POLITICAL RISK IN ENERGY-RELATED INVESTMENT DISPUTES

Hakan Sahin∗

ABSTRACT

The energy industry is a key source of growth stimulation for developing states. This is true not only in terms of economic growth, but also in terms of the transfer of knowledge and skills as well as the provision of employment opportunities. Understandably, developing states are well-disposed towards international investors, and are eager to enter into petroleum investment contracts with the expectation that this will bring the aforementioned benefits to their countries particularly where the host state is less able to act as a provider of such resources autonomously. On a global scale, regardless of their type, all investments face risks. These risks are volatile in nature and reach as the world economy globalises. It is, of course, true that political risk phenomena *per se* are potentially destructive to all industries. However, it is fair to say that due to its high stakes, the energy industry is more acutely exposed and subject to political risk than most sectors. The purpose of this article is to examine political risk, particularly direct expropriation risk, in long-term energy investment projects. This paper will refer to arbitral decisions with regard to expropriation cases, as well as the valuation techniques applied by the investment arbitration tribunals in unlawful expropriation cases.

∗ Assistant Professor in Private International Law at Maltepe University, Istanbul. Dr. Sahin was awarded an LL.B degree in law from Yeditepe University, Istanbul in Turkey. He also holds LL.M and Ph.D. degrees in law from Anglia Ruskin University, Cambridge,UK. He teaches courses in English on a broad range of subject areas such as Private International Law, International Investment Law, International Arbitration, International Business Law, International Commercial Contracts, Energy Law and International Organisations. E-mail: hakansahin@ maltepe.edu.tr or sahinhakan79@hotmail. com.

I. INTRODUCTION

The main purpose of international investment law, at least from the perspective of alien investors, is to provide a safeguard against political risks that many international investors face in other countries.[1] Energy projects, such as oil and gas exploration and their transportation through pipelines, can be subject to unpredictable economic and political risks. If a dispute arises from energy-related investment projects between a host government and an alien investor, presumably the alien investor would wish to resolve the dispute in an unbiased environment. In that sense, the International Centre for Settlement of Investment Dispute (ICSID) is a good example as it offers an autonomous and self-contained system for the resolution of conflict between host states and foreign investors.[2] Host states that instigate these risks may take either entire or specific parts of the property from alien investors.

In general, business analysts divide the risks that alien investors face into two different categories.[3] These categories are broadly defined: commercial risks and political risks.[4] The commercial risks are directly related to normal economic activities such as fluctuations in the commodity prices;[5] however, political risks arise out governmental activities and political developments[6] in the country where the investment is made. In the field of social sciences, attempts have been made to provide an accurate definition of political risk phenomena by international organisations such as the Organisation for Economic Cooperation and Development (OECD) and the Multinational Investment Guarantee Agency (MIGA). The OECD describes "political risk" as:

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[1] DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 308 (2017).

[2] SERHAT ESKIYORUK, TOWARDS TRANSNATIONAL DISPUTE RESOLUTION, SERHAT ESKIYORUK & AHMET CEMIL, INTERNATIONAL COMMERCIAL ARBITRATION AND THE NEW LEXMERCATORIA 175 (1st ed. 2014).

[3] JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CULTURAL AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 245 (2013).

[4] *Id.*

[5] *Id.*

[6] *Id.*

> The risk of non-payment is on an export contract or project due to action taken by the importer's host government. Such action may include intervention to prevent transfer of payments, cancellation of a license, or events such as war, civil strife, revolution, and other disturbances that prevent the exporter from performing under the supply contract or the buyer from making payment. Sometimes physical disasters such as cyclones, floods, and earthquakes come under this heading.[7]

According to The World Bank Group's Multilateral Investment Guarantee Agency (MIGA), political risk can be defined as:

> Political risk is the probability of disruption of the operations of multinational enterprises by political forces or events, whether they occur in host countries or result from changes in the international environment. In host countries, political risk is largely determined by uncertainty over the actions not only of governments and political institutions, but also of minority groups such as separatist movements.[8]

The purpose of this article is to analyse political risks particularly direct expropriation in energy related investment disputes. This article will attempt to answer two central questions: what is the most harmful political risk for investors in the energy sector, and why do host states interfere in international energy investment related projects? The article starts by examining a sectorial assessment of political risk from a historical perspective. The analysis of the historical background of risk aims to shed light on how political risk arose and evolved in the sector. Afterwards, attention shifts to expropriation. While analysing expropriation phenomena, this article will discuss arbitral decisions with regard to expropriation cases as well as the valuation techniques applied by the investment tribunals.

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[7] *Glossary of Statistical Terms*, OECD.COM, http://stats.oecd.org/glossary/detail.asp?ID=5990 (last visited July 2018).

[8] Daniel Villar & Stephan Dreyhaupt et al, *World Investment and Political Risk Report*, Multilateral Investment Guarantee Agency, World Bank Group (2010), https://www.miga.org/documents/WIPR10ebook.pdf (last visited July 2018).

II. HISTORICAL BACKGROUND OF POLITICAL RISK IN ENERGY INVESTMENT

The historical background of political risk in the energy sector and its stakeholders should be viewed as belonging to two distinct timelines: pre- and post-World War II.[9] The global growth of the petroleum industry brought international oil companies into contact with more and more non-Western countries and their representative governments.[10] These companies are referred to as the "Seven Sisters," namely: BP, Shell, Exxon, Mobil, Chevron, Texaco, and Gulf.[11] These companies secured concessions all over the world particularly in developing countries, in the Middle East, and Asia.[12] Pre-World War II, there were a number of non-Western states that were under the control of European Colonial rule.[13] At that time, if an oil company acquired and operated its business activities in a non-Western country, it would be granted diplomatic protection by the home country of the investor.[14]

In the twentieth century, the nationalisation of international energy companies was one of the major political risks present in the energy sector.[15] After World War II, the main concern of petroleum companies was to avoid being exposed to nationalisation by the host government.[16] Numerous nationalisation cases emerged following World War II such as in Argentina, Algeria, Ecuador, Nigeria, Iran, Iraq, Syria, Libya, Venezuela, Kuwait,[17] and some other developing states. In relation to this

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[9] ALFRED J. BOULOS, ASSESSING POLITICAL RISK 4 (Jan. 28, 2003).

[10] BERNARD TAVERNE, PETROLEUM, INDUSTRY, AND GOVERNMENTS: A STUDY OF THE INVOLVEMENT OF INDUSTRY AND GOVERNMENTS IN THE PRODUCTION, AND USE OF PETROLEUM 39 (2d ed. 2008).

[11] King & Spalding LLP, *An Introduction Upstream Government Petroleum Contracts: Their Evolution and Current Use*, 1 OIL, GAS & ENERGY L. 1, 3 (2005).

[12] BOULOS, *supra* note 9 at 5.

[13] *Id.*

[14] TAVERNE, *supra* note 10.

[15] MUSTAFA ERKAN, INTERNATIONAL ENERGY INVESTMENT LAW: STABILITY THROUGH CONTRACTUAL CLAUSES 35 (2010).

[16] *Id.*

[17] BOULOS, *supra* note 9.

phenomenon, an important question needs to be asked: which driving forces and which environmental conditions enabled developing states to nationalise the foreign assets of investors in the 20th century? Throughout the twentieth century, mankind witnessed a divergent stream of ideologies in operation: on the one hand was the well-established system of capitalism, but on the other hand, collectivisms, such as Socialist and Marxist ideas, were gaining ground.[18] As it transpired, after the Bolshevik revolution, many developing states adopted these collectivist ideals as policy.[19]

As the colonial period drew to a close, the newly established independent states sought to assert permanent sovereignty over their natural resources.[20] The main reason why this principle took root quickly in these countries was because the principle provided these states with the moral right to regain control over their natural resources within their territory and use them for the benefit of their own citizens.[21] In 1962, the General Assembly of the United Nations approved Resolution 1803, which announced "the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and the well-being of the people of the state concerned."[22]

With this resolution, the United Nations sought to link the principle of permanent sovereignty with the state of economic independence and self-determination.[23] For example, the preamble attaches "particular importance to the question of promoting the economic development of developing countries and securing their economic independence, [and notes that] the creation and strengthening of the inalienable sovereignty of States over their natural resources wealth and resources

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[18] PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK 1 (1st ed. 1997).

[19] ERKAN, *supra* note 15 at 39.

[20] *Id.*

[21] MUTHUCUMMARASWARMY SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT 22 (3rd ed. 2010)

[22] G.A. Res. 1803 (XVII), at 223 (Dec. 14, 1962), reprinted in 1963.

[23] *Id.*

reinforces their economic independence."[24] The resolution also permitted countries to implement nationalisation measures if deemed necessary, but only for the good of the general public, and security or national interest, which are recognised as overriding individual or private interests both at a domestic and international level.[25] In such cases "appropriate compensation" should be paid to the owner in accordance with domestic and international law.[26] Under the protection of such policies, many petroleum-producing states grew more confident of their own ability to assert control over natural wealth and resources within their territory.[27]

The establishment of the Organisation of Petroleum Exporting Countries (OPEC) was one of the most significant and ground-breaking events in the petroleum industry.[28] The creation of this organisation bolstered the confidence of Member States in their negotiations with international energy investors.[29] Following the establishment of OPEC, Member Countries of this organisation increased the weight of investor obligation by adopting OPEC Resolution XVI in 1968 and XXIV in 1970.[30] Moreover, as a result of these declarations, Member States had an opportunity to renegotiate the existing traditional concession contracts from a new bargaining position strengthened by their improved economic circumstances.[31] Another reason why host states seek to nationalise foreign assets may be found in the resource-producing state's move to maximize revenue from oil and gas production by unilaterally changing the terms of the original contract.[32]

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[24] *Id*. at 223-224.

[25] *Id.*

[26] *Id.*

[27] ERKAN, *supra* note 15 at 42.

[28] *Id.*

[29] *Id.*

[30] In 1968 and 1970, Organisation of the Petroleum Exporting Countries made resolutions XVI. 90 of 1968 and XXIV 135 of 1970.

[31] ERKAN, *supra* note 15 at 42.

[32] Munir Manirruzzaman*, The Issues of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry*, 5 TEX. J. OIL, GAS & ENERGY L. 80, 82 (2009).

A. Obsolescing Bargain and Political Risk

In the literature, the phenomenon is called "obsolescing bargain"; this theory was outlined by Raymond Vernon.[33] According to Vernon, under the obsolescing bargaining theory, the degree of political risk is measured by the relative market power of the multinational companies and host governments and their bargaining relationships in terms of the natural product cycle.[34] Since the oil companies have the most leverage at the initial stage of the bargain, they are in a position to use this advantage to the detriment of the host states.[35] Oil companies have the technology, know-how, and capital to extract the natural resources rendering host states dependent on them to gain access to their own resources.[36] This advantage provides international energy investors with the option to invest and extract natural resources in any developing country free of obligation from an unchallenged position of control where the nationalisation risk does not exist.[37] Under the obsolescing bargaining theory, fluctuations in oil prices have always played a defining role in the bargaining relationship between host governments and energy investors.[38] When prices increase, petroleum companies are more disposed to expose themselves to risk, which gives the host governments a considerable advantage in shaping the terms of the investment relationship.[39] Conversely, when oil prices decrease, negatively impacting the potential profitability of energy projects, the bargaining position of a host state in investment terms negotiations is diminished.[40]

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[33] Reymon Vernon, *International Investment and International Trade in the Product Cycle*, 80 Q. J. ECON. 190 (1966).

[34] *Id.*

[35] OKSAN BAYULGEN, FOREIGN INVESTMENT AND POLITICAL REGIMES: THE OIL SECTOR IN AZERBAIJAN, RUSSIA AND NORWAY 17-18 (1st ed. 2010).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

B. Political Risks in the Twenty-First Century

In the years that spanned the close of the twentieth century and the dawn of the new millennium, the energy industry found itself exposed to a range of new risk scenarios. The past century and the beginning of the new era "have brought the issues of political risk into focus in a different global economic and political context than the earlier days of the international oil and gas industry."[41] In the twenty-first century, some political risks, such as expropriation and confiscation, are no longer considered a major threat[42] to the energy investment sphere. In academic literature, Boulos describes why the political risk of nationalisation is no longer a major problem in the energy industry.[43]

According to the author, there are several factors that have lessened the risk of nationalisation in recent years.[44] First, the World Bank, the International Monetary Fund (IMF), the International Finance Corporation (IFC), and other multinational organisations tend to considerably reduce a host state's free rein to nationalise.[45] The second reason is privatisation. In a general sense, when considering the nationalisation cases, national oil companies nationalise the foreign oil companies' assets.[46] "Privatisation changes the basis for nationalisation; the state transforms National Oil Companies into private enterprises to compete in the market for international oil and gas ventures and obviates the need to nationalise foreign companies."[47] A final reason for the lessening of political risk of nationalisation in today's world is that the objectives of nationalization have for the most part been achieved.[48] The author goes on to state that in the OPEC's takeover of production in the early 1970s, for example,

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[41] *Id.*

[42] ERKAN, *supra* note 15, at 49 (citing Sam Wilkin, *Managing Today's Political Risk*, The Risk Management Letter 22, No.6. 1-2 (2001)).

[43] BOULOS, *supra* note 9, at 5.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] BOULOS, *supra* note 9, at 6.

host governments through nationalization, buy-in participation, or government checks and controls, achieved their goal of gaining control over oil and gas resources.[49] Even with State control, the emergence of privatization and market-oriented economies further neutralized the political risk of nationalization.[50]

In order to provide a twenty-first century context to the risk of expropriation or nationalisation, the interviewed participant's views in this article and recent survey on political risks should be drawn upon. According to one of the interviewees,[51] "there are a number of political risks such as civil war, direct or indirect expropriation and nationalisation that should rightly be regarded as the major political risks that foreign investors might face over the course of their energy projects. However, it is difficult to state categorically that expropriation-nationalisation risk is very common in the 21st Century."[52] He further states that "it is true that it is not very common to see civil wars, direct or indirect expropriation or nationalisation in the modern developed world. Such risks usually only appear in natural resource rich developing states, such as Bolivia, Venezuela, Ecuador, Kazakhstan or other similar countries which are ruled by dictatorships."[53]

Another interviewee disagrees with the previous participant and states that the phenomena of expropriation and nationalisation continue to pose a danger for investors.[54] The legitimacy of the latter respondent's view is validated by the recent expropriation case in Argentina.[55] In April 2012, the president of Argentina, Cristina Fernandez, announced that

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[49] *Id.*

[50] *Id.*

[51] The interviews of this work applied the qualitative semi-structured interview technique. Interviewees represent a variety of professional backgrounds relevant to the study. This includes legal backgrounds (lawyers and a judge), and experts with scientific qualifications (academics in the field of energy and international investment laws).

[52] Interviewee no.1.

[53] *Id.*

[54] Interviewee no. 5.

[55] Hugh Brostein, *Argentina Nationalize Oil Company YPF*, REUTERS.COM (May 3, 2012, 8:39 PM), https://www.reuters.com/article/us-argentina-ypf/argentina-nationalizes-oil-company-ypf-idUSBRE8421GV20120504.

the government had expropriated the Spanish Oil Company, Repsol's subsidiary, YPF.[56] Fernandez claimed that YPF's expropriation was aimed at "recovering sovereignty" over natural resources.[57] Having furnished this recent example, the same interviewee went on to explore whether these actions are taken by governments and used as a weapon against energy investors with the real purpose of protecting sovereignty over natural sources or not.[58] According to the interviewee:

> The YPF Company had uncovered precious natural gas sources in Argentina. Until this exploration, the company had always been regarded as an inconsequential company by the Argentinean government. Following the discovery of invaluable natural resources, the company's value soared and, as a result, it was expropriated by the government. Expropriation of a foreign company by the state meant that any profit would be absorbed by the state.[59]

In light of the interviewees' views, it can be asserted that, compared to the previous century, the risk of expropriation and nationalisation in the new era has relatively declined. However, this should not be understood as if expropriation and nationalisation risks do not pose a threat to international energy investors. It is evident that since the beginning of the new century the sector has been subject to a "silent disruption."[60] For instance, in April 2012, the Argentinean Congress nationalised the country's biggest oil company, YPF.[61] To identify the most hazardous risk in the energy industry and gauge the level of importance of each political risk, Erkan conducted a survey.[62]

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[56] *Id.*

[57] *Id.*

[58] *Id*

[59] *Id.*

[60] Lucian Pugliaresi & Ben Montalbano, *Silent Disruption Limiting Oil Supply*, OIL & GAS J. 24 (2008).

[61] Brostein, *supra* note 55.

[62] ERKAN, *supra* note 15, at 50. In the author's research, each participant was required to rate the level of risk of divergent destabilising events from one to five; one representing the most significant and five representing the least significant political risk.

Table 1. *Main Political Risks to International Petroleum Projects*[63]

Types of Political Risks	***Categories (% Share)***				
	1	**2**	**3**	**4**	**5**
War	18.56	11.34	16.49	24.74	28.87
Nationalisation	25.96	28.85	28.85	11.54	4.81
Direct Expropriation	15.69	30.39	30.39	21.57	1.96
Indirect Expropriation	50.91	23.64	16.36	7.27	1.82
Unilateral Change of Contractual Terms	30.56	36.11	19.44	7.41	6.48
Currency Transfer	4.95	16.83	33.66	26.73	17.82
Sabotage	7.37	8.42	20.00	34.74	29.47
Kidnapping	5.10	9.18	20.41	24.49	40.42

It is immediately apparent that indirect expropriation was considered by participants to be the most significant destabilising contemporary political risk with over 50% share.[64] Indirect expropriation is followed by unilateral change of contractual terms with 30.56%, nationalisation with 25.96%, and war, perhaps surprisingly, constituting only 18.56%.[65] When considered outside of a specific geographic context, or, at least within the framework of their own experience, the participants considered indirect expropriation to be the most menacing of all risks.[66] Nevertheless, according to the author, "if we focus on specific countries such as Nigeria or Iraq, kidnapping or sabotage or war could be described as the dominant political risks."[67]

III. THE CONCEPT OF DIRECT TAKING

It may be appropriate to focus on the term of "taking" as a key to unlock the topic itself. Providing this definition is a hurdle that needs to be overcome before embarking on a broader analysis of the concept and cases of expropriation. To this end, the question

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[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id*

[67] *Id.*

of what constitutes "taking" must be answered.[68] The terms: expropriation, nationalisation, and confiscation are used interchangeably and often with reference to quite different forms of government intervention of a private property.[69] It will be instrumental to establish clear distinctions between these terminologies. According to Sornarajah, "[c]onfiscation is a capricious term for taking the property by the ruler or ruling the coterie of the state for personal gain."[70] The author extends the definition to assert that such taking can be seen primarily in countries ruled by dictatorships and oligarchies.[71] The term "confiscation" is also used to define "the state taking of private property where such a measure is penal as a part of the sanction to be visited on the owner because they violate required regulatory or criminal standards."[72] Notably, confiscatory taking is motivated by caprice; therefore, it should be recognised as an unlawful taking[73] and, as a consequence, the taking does not trigger the payment of compensation.[74]

Generally speaking, the term "expropriation" entails the taking of the private property, assets, and control of an investment of an investor by the host country.[75] Expropriation and nationalisation are used to define the unconcealed host governments' direct taking of private wealth.[76] In this regard, *The Iran-U.S. Claims Tribunal* defined the expropriation phenomenon in the renowned petroleum case of *AMOCO International Finance Corporation vs. The Government of the Islamic Republic of Iran,* as the "compulsory

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[68] SORNARAJAH, *supra* note 21, at 365.

[69] *Id.* at 364.

[70] *Id.*

[71] *Id.*

[72] UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2003: FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 112 (2003).

[73] SORNARAJAH, *supra* note 21, at 365.

[74] ERKAN, *supra* note 15, at 63.

[75] IIIAS BANTEKAS, AN INTRODUCTION TO INTERNATIONAL ARBITRATION 314 (2015).

[76] CYNTHIA WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE IN ERA OF ECONOMIC GLOBALISATION 980 (2002).

transfer of property rights."[77] In practical terms, this "taking" occurs when a host government seizes a company's development rights or facilities and its produce for the host country's own use particularly for the purpose of the host country's national interest.[78] In this context, nationalisation can also be identified as a risk. Nationalisation is regarded as the "evil twin" of expropriation and manifests itself when the host state expropriates and hands the property or development rights over to a national company.[79]

Admittedly, the definition of nationalisation and expropriation is complex and can be easily confused. Therefore, *The Iran-U.S. Claims Tribunal* in the *AMOCO* case defined nationalisation as: "the transfer of an economic activity from private ownership to the public sector."[80] Nationalisation happens when a host state "makes expropriation and hands the property or development rights over to a national company."[81] Furthermore, with regard to the definition, several authors in the field have also attempted to isolate the two notions. According to Domke, "the term 'expropriation,' though usually applied to measures taken in individual cases, is sometimes used in instances where 'nationalisation' as a measure of general change in the state's economic and social life would be more appropriate."[82] According to Ingram's definition, "the most meaningful distinction is that expropriation refers to the taking of one or several properties within a single area of economic activity, whereas nationalisation refers to the government's taking of all properties within the area."[83] Hobber agrees with Ingram's distinction and goes on to affirm that the difference between nationalisation and expropriation is defined by scope and extension as Hobber argues

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[77] Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 222-23 (1987).

[78] SCOT W. ANDERSON, EXPROPRIATION, NATIONALISATION, RISK MANAGEMENT (2013).

[79] *Id.*

[80] *See* ANDERSON, *supra* note 78, at 222.

[81] *Id.*

[82] Martin Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 AM. J. INT'L. L. 585, 588 (1961).

[83] ERKAN, *supra* note 15 at 62.

that the nature of the two is essentially the same.[84] Direct expropriation and nationalisation are both actions that were taken frequently by host governments in the twentieth century, but more recently have given way to indirect expropriation.[85]

A. The Right to Expropriate versus Property Ownership

In the case of expropriation, one of the interviewees of this study asserted that "expropriation is a legal instrument in law systems; this right derives from state sovereignty."[86] If this right is to be seen as a direct expression of sovereignty, it can be assumed that the owner's consent is not required and that a sovereign power has the right to expropriate the private owner's property.[87] Nevertheless, if the property and its ownership rights belong to a foreign investor and the relationship between the investor and the host state were based on an investment contract, would a state still be able to expropriate the foreign investor's property? In order to answer this question and add breadth to this discussion, two important principles should be mentioned. The first principle is the *pacta sunt servanda* (sanctity of contracts) principle. The concept *of pacta sunt servanda* is accepted as a positive norm in general international law.[88]

It is worth mentioning that the absolute application of *pacta sunt servanda* in international investment contracts between states and aliens has given rise to a serious legal debate among both scholars and practitioners.[89] Before moving on, it would be appropriate to highlight the issue of whether or not a state can limit its sovereign rights via a contract. If a state is free to bind itself by a treaty with another sovereign state, can it then fetter

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[84] Kaj Hober, *Investment Arbitration in Eastern Europe: Recent Cases on Expropriation*, 14 AM. REV. INT'L. ARB. 377 (2003).

[85] SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 64 (2008).

[86] Interviewee no.7.

[87] ERKAN, *supra* note 15 at 65.

[88] Munir Manirruzzaman, *State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law*, 9 J. INT'L ARB. 141, 142 (1992) (citing Josef. L. Kunz, *The Meaning and the Range of the Norm of the Pacta Sunt Servanda*, 39 AM. J. INT'L. L. 180 (1945)).

[89] *Id.* at 141.

itself with similar restrictions via a contract with an investor?[90] The insertion of specific contractual clauses in an investment contract, such as stabilisation clauses and arbitration clauses, has an effect similar to that of internationalising the contract.[91] According to this theory, if the contract between a state and an alien company is internationalised, the commitment resides within an external system, which has been regarded as the transnational law of business, a general principle of law and *lex mercatoria*.[92]

In this respect, it can be said that inserting such contractual devices in an investment contract with clauses to limit the state's ability to take the property, by extension, means that the state is no longer able to expropriate the property.[93] Other scholars disagree with the notion that a state can bind itself in this way and focus instead on the principle of *state sovereignty and the succession of law norm*.[94] According to this principle, "the legislative capacity of lawmakers cannot be bound, nor can be executed, nor can public powers of the government be fettered by a contract with a private individual or corporation, i.e., no parliament can bind its successor through a contract mechanism."[95] Nevertheless, it has been provided that expropriation is a natural right that derives from sovereignty and a sovereign power can exercise this right in accordance with their law and as long as they meet certain requirements of international customary law.[96]

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[90] Esa Paasivirta, *Internationalization and Stabilization of Contracts versus State Sovereignty*, 1990 BRIT. Y.B. INT'L L. 315.

[91] Thomas Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract*, 31 TEXAS INT'L L. J. 215, 241 (1996).

[92] *Id.*

[93] ERKAN, *supra* note 15, at 65.

[94] Wealde & Ndi, *supra* note 91.

[95] JAMES OTTO & JOHN CORDES, THE REGULATION OF MINERAL ENTERPRISES: A GLOBAL PERSPECTIVE ECONOMICS, LAWS AND POLICY 22 (Rocky Mountain Mineral Law Found., 2002) (citing Kyla Tienhara, *Unilateral Commitments to Investment Protection: Does The Promise of Stability Restrict Environmental Policy Development?* Ole Kristian Fauchald & David Hunter, *Yearbook of International Environmental Law* 17, 155 (2006)).

[96] Art. 4 of the G.A. Res. 1803 (XVII), *supra* note 22.

While a state is striving to reach its targets and sustain its development, it should not disregard the property ownership of alien individuals and their vested possession.[97] Consequently, sovereign rights are not everlasting or unlimited; when contracts are entered into in the international sphere, specific constraints are necessary to maintain the mutual trust between states and foreign individuals for the sake of protecting property rights. [98]

B. Legal Requirements for Rightful Taking under International Law

Sovereign power includes the right to take the property of a foreign individual as an expression of its permanent sovereignty over its natural resources.[99] However, the right to take does not mean that the state has unlimited rights to take property.[100] States are, nevertheless, subject to certain restrictions under international law.[101] In order to regard an expropriation as lawful, the state must meet certain criteria. These requirements are public purpose, non-discrimination, due process of law and prompt, and adequate and full compensation.[102] In addition, these requirements were also articulated in the Work Bank Guidelines on the Treatment of Foreign Direct Investment[103] and the United Nations General Assembly Resolutions (UNGAR).[104]

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[97] ERKAN, *supra* note 15, at 67.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] These legal requirements may be found in various bilateral and multilateral treaties practice. For instance, Article 13(1) (a) of the Energy Charter Treaty clearly states that "Investments of investors of a Contracting Party in the area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such expropriation is: a) for a purpose which is in the public interest; b) not discriminatory; c) carried out under due process of law and d) accompanied by the payment of prompt, adequate and effective compensation.

[103] World Bank (ed.), *Legal Framework for the Treatment of Foreign Investment: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, 31 I.L.M. 1363 vol. II (Washington, D.C., 1992) IV Guideline.

[104] G.A. Res. 1803 (XVII), *supra* note 22.

The following sub-sections outline the basic requirements for expropriation.

1. Public Interest/Purpose

The necessity of public purpose in order to legitimise a taking has long been considered part of customary international law.[105] This requirement was first formulated by Grotius[106] "as a limit on the sovereign right of eminent domain."[107] According to Salacuse, the concept of public interest is very broad and cannot be subject to a precise definition.[108] Although there is no specific definition of public interest under international law, one may claim that any "taking" by a host government is done in the public interest such as the development of the national economy, the execution of development plans, or the protection of foreign currency reserves.[109] In other words, the public purpose justification is broadly understood to mean that an expropriation measure should be made in the interests of public utility, security, national interest, or the general welfare of society rather than individual or private gain.[110]

Expropriation must truly target social and/or economic improvements and, more importantly, national interest must prevail over individual or private interest.[111] It seems reasonable at this point to pose the question: can a state genuinely determine what is in the public interest? It can be said that verifying a breach of public purpose requirement is not an easy task.[112]

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105 PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 235 (7th ed. 1997).

106 MUTHUCUMARASWARY SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 174 (1986).

107 *Id.*

108 JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 57 (2d ed. 2009).

109 *Id.*

110 ADEOYE A. AKINSANYA, EXPROPRIATION OF MULTINATIONAL PROPERTY IN THE THIRD WORLD 20 (1980).

111 WALLACE, *supra* note 76, at 983.

112 NOAH D. RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 177 (2005); *see also* ERKAN, *supra* note 10, at 72.

Baade points out this issue.[113] According to the author, "it seems perfectly logical to require that nationalisation be in the public interest. The question is, of course, whose public interest, as determined by whom. Since international law quite patently leaves all sovereign states free to choose their own economic and social systems, the answer can be only that the test has to be the public interest of the taking state, as conclusively determined by it."[114] In this regard, it should be noted that "at the very least, there must be some demonstrable public interest and the determination must be made in good faith."[115]

The scope of the public purpose requirement and its measure has been endorsed and identified by international tribunals such as in the *Amoco* case.[116] The tribunal also addressed the scope and measure of public purpose in the *Amoco* Case.[117] The tribunal in the *Amoco* case stated "a precise definition of the 'public purpose' for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested."[118] The tribunal also highlighted that states have complete discretion in determining their public interest.[119] The tribunal went on to point out that "an expropriation, the only purpose of which would have been to avoid the contractual obligation of the state or of an entity controlled by it, could not, nevertheless be considered as lawful under international law."[120] It is apparent that through this statement the tribunal wished to emphasise that the taking should not be based on avoiding contractual commitments. The lessons that can be learned from the aforementioned cases is that states are free to decide whether public interest justifies an expropriation. However, it has also been emphasized that an

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[113] ERKAN, *supra* note 15, at 71 (citing Hans W. Baade, *Permanent Sovereignty Over Natural Wealth and Resources*, *in* Essays on Expropriation 23 (Richard S. Miller & Roland J. Stranger eds. 1967)).

[114] *Id.*

[115] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF Treatment 372 (2009).

[116] Amoco Int'l Fin. Corp. v. Iran,15 Iran-U.S. Cl. Trib. Rep. 189, 233 (1987).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id*. at ¶ 145

expropriation should not be executed as a means of avoiding contractual obligations.

2. Non-Discrimination

The non-discrimination requirement is the second condition of lawful expropriation in the context of international law. What is the concept of non-discrimination? It includes several components among which are nationality, race, ethnicity, and religion. For example, if the measure of the host state is based on race discrimination, the measure violates the *jus congens* norm under international law automatically rendering the taking illegal.[121] If a state's measures are motivated by discrimination against one of these classes, then the taking is regarded as an unlawful expropriation and, therefore, contrary to the rule of international law. The non-discrimination requirement is recognised as reflecting customary international law and has found its way into numerous multilateral[122] and bilateral[123] treaties and arbitral decisions.[124] Notably, as far as BITs and MITs are concerned, many of them state that expropriation measures must not be discriminatory.[125] However, while in principle these treaties have a non-discrimination provision, they do not define or exemplify what might constitute discriminatory actions of host states.[126] In this respect, treaties would benefit from being more explicit and consistent to facilitate interpretation and render their terms more easily comparable.

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121 SORNARAJAH, *supra* note 21, at 409.

122 See, e.g., North American Free Trade Agreement, art. 1110(1)(b), Dec. 8, 1993, 107 Stat. 2057 ("NAFTA"); Energy Charter Treaty, art. 13(1)(b), Dec. 17, 1994, 2080 U.N.T.S. 95 ("ECT") [hereinafter ECT].

123 Most BITs included that provision to the effect that expropriations shall be on a "non-discriminatory manner*." See, e.g.*, U.K.-Turk. BIT, art. 5(1), Mar. 15, 1991; U.K.-Czech BIT, art. 5(1), Jul. 10, 1990.

124 *See, e.g.*, British Petroleum vs. Libya, 53 I.L.R. 297, 329 (1979) (where one reason for finding the holding of BP's assets illegal was that it was "discriminatory in character"); Libya vs. Libyan Am. Oil Co., 20 I.L.M. 1 (1981) (holding that "purely discriminatory nationalization is illegal and wrongful").

125 *See*, *e.g.,* Article 13 (1) (b) of the ECT and Article 110 (1) (b) of the NAFTA.

126 ERKAN, *supra* note 15, at 73.

3. Due Process of Law

The requirement of due process of law means that expropriation must be in accordance with appropriate legal procedures.[127] Due process of law embodies both substantive and procedural elements.[128] For instance, if a foreign investor's property is taken by a host state, the taking must be free from arbitrariness, and safeguards and remedies at an administrative level and through the judiciary system must be viewed holistically.[129] Furthermore, nearly all BITs[130] and MITs[131] require due process of law.

4. Compensation

As far as the business world is concerned, there is no doubt that the prospect of having property expropriated by a host state and the profit loss entailed is a bleak one. It is probable that if a survey were conducted of energy investors of all nationalities regarding the perceived necessity of compensation the vast majority would declare themselves in favour of the compensation principle, which obliges states to pay adequate compensation for the injury caused.[132] However, in reality, compensation for expropriation is one of the most controversial subjects in international law.[133] As mentioned above, the traditional view is that compensation should be paid for the expropriated property of a foreign investor. However, a sovereign state might venture to take property unlawfully. In such scenario, damage in fact includes not only *damnum emergens* (positive damage) and *lucrum cessans* (loss of profit) as a result of the taking.[134]

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[127] *Id.* at 74.

[128] IBRAHIM SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDANCE 299 (1993).

[129] *Id.*

[130] RUDOLF DOLZER & MARGRETE STEVENS, THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: BILATERAL INVESTMENT TREATIES 106 (1995).

[131] *See, e.g.*, NAFTA, art. 1110(1) (c) and ECT, art. 13(1)(c).

[132] SALACUSE, *supra* note 108, at 58.

[133] SORNARAJAH, *supra* note 21, at 413.

[134] H. VAN HOTTE, THE LAW OF INTERNATIONAL TRADE, 252 (2d ed. 2002).

There is a disagreement on the appropriate standard of compensation for expropriation.[135] There are two competing theories with regard to this standard. One is the formulation of "prompt, adequate and effective" compensation theory, which is also called the "Hull Formula."[136] The Hull Formula has been referred to in numerous bilateral and multilateral investment agreements and couched in a variety of terms.[137] Reference has been made variously to "fair market value," "genuine value," and "market value" of the expropriated investment.[138] The second theory is the "appropriate compensation" or "equivalent compensation," which means that a state ought to pay the full value, or the appropriate market value of the expropriated property to the alien investor.[139]

The theory of "appropriate compensation" or "equivalent compensation" has been approved in the declaration of the United Nations General Assembly Resolution 1803.[140] According to Article 4 of the Resolution, expropriation, nationalisation, or requisition ought to be based on the grounds of public utility, security or national interest.[141] It also requires that the host state provides "appropriate compensation" in accordance with both municipal and international law.[142] Similarly, Article 2 of the Charter Economic Rights and Duties of States (CERDS)[143] includes

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[135] SALACUSE, *supra* note 108 at 58.

[136] 'Hull Formula' which was used by Secretary of State Cordell Hull, over the course of Mexican Expropriation. *See* Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553, 558-59 (1981).

[137] Kaj Hober, *Remedies in International Investment Law*, in INVESTMENT TREATY LAW: CURRENT ISSUES III 3, 10 (Andrea K. Bjorklund et al. eds., 2009).

[138] *Id.*

[139] ERKAN, *supra* note 15, at 75.

[140] G.A. Res. 1803 (XVII), ¶ 4, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/521, at 15 (Dec. 14, 1962), *supra* note 22.

[141] *Id.*

[142] BOLESLA W. A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 148 (2005).

[143] Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 2, U.N. GOAR, 29th Sess., Supp. No. 31, U.N. Doc. A/Res/29/3281 (Dec. 12, 1974) (stating that every state has the right to "nationalize, expropriate or transfer ownership private property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its

the term "appropriate compensation."[144] Furthermore, the representatives of several European countries and U.S. representatives equated "appropriate compensation" to the serving of "prompt, adequate and effective" compensation.[145] However, the perception of this concept held by their counterparts from developing states differed vastly.[146] Developing states consider that compensation should be in accordance with the national treatment principle satisfied by the standards of "appropriate compensation."[147]

IV. VALUATION METHODS OF INVESTOR COMPENSATION

There is no doubt that every tribunal has the responsibility to determine and calculate "the quantum of damages, whether it is applying the fair market value, full restitution, or any other standard to assess loss."[148] Perhaps one of the reasons for this is that "many diverse, seemingly scientific valuation methods can be applied in different ways to arrive at different results."[149] It should be noted that the valuation of investment and valuation of compensation are both separate issues as the former occurs after the measures of compensation is determined by the tribunals.[150] In this analysis, the main responsibility of the tribunals is to consider "how much the investment was actually worth to the

relevant laws regulations and all circumstances that the State considers pertinent").

[144] Article 2(c) of CERD provides that '…nationalise, expropriate or transfer of ownership of private property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent'.

[145] The United States Representative at the UN supported the 1803 resolution asserted that "the requirements of Article 4 of 'appropriate compensation' …in accordance with international law 'would be interpreted as meaning… Prompt, adequate and effective compensation.'" Iran-U.S. Claims Tribunal Reports: Volume 33 243 (Edward Helgeson ed., 1997).

[146] BOCZEK, *supra* note 142.

[147] *Id.*

[148] KATIA YANNACA-SMALL, ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 562 (2010).

[149] *Id.*

[150] COLLINS, *supra* note 1, at 198.

investor so that a correct level of compensation can be awarded."[151] Today, international agreements provide for the reassessment of decisions taken by the tribunals with regard to valuations.[152] For instance, according to Article 13(2) of the Energy Charter Treaty:

> The investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other component and independent authority of that Contracting Party, of its case, of the valuation of its investment, and of the payment of compensation, in accordance with the principals [of prompt, adequate and effective compensation].[153]

There are many different valuation techniques that can be applied to determine the actual value of an investment.[154] However, among them, there are four main types of valuation methods that are frequently applied by tribunals in determining valuation of investment.[155]

A. Book Value Method

Book value refers to "the difference between a company's assets and liabilities as recorded on its financial statements, or the amount at which the expropriated tangible assets appears on the balance sheet in accordance with the generally accepted accounting principles."[156] In the 1970s, this valuation investment technique was popular and investment tribunals frequently applied it in petroleum nationalisations cases.[157] For instance, in

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[151] *Id.*

[152] *Id*.

[153] ECT, *supra* note 122, at 34.

[154] COLLINS, *supra* note 1, at 199.

[155] *Id*.

[156] Paul D. Friedland & Eleanor Wong, *Measuring Damages for the Deprivation of Income- Producing Assets: ICSID Case Studies*, 6 ICSID REV. FOREIGN INV. L. J. 400, 408 (1991).

[157] SORNARAJAH, *supra* note 21, at 451.

Liamco v. Libya,[158] the investment arbitration tribunal applied this method to measure the level of compensation.[159] However, the book value method also has disadvantages. According to Rovine, "[t]he disadvantages of the book value method are its reliance on historical figures that may not have any relevance in the valuation context."[160]

B. Replacement Value Method

Another technique for measuring the value of tangible assets is the replacement value method. This method is "the amount it would have cost to replace the specific assets seized based upon the market conditions."[161] In theory, the replacement value method is "the simplest of all forms of compensation at it is perhaps the one, which is the most closely aligned with the criterion of 'adequacy' seen in the Hull Formula."[162] According to Collins, using this valuation technique requires the alien investor to demonstrate "what similar assets or equipment would have cost at the time of the host state's interference, for instance through expropriation."[163] Although this type of valuation technique has not often been applied in investment arbitration cases, it has been effectively used by a wide range of courts and tribunals such as the International Court of Justice (ICJ), *Iran-US Claims Tribunal*.[164]

C. Liquidation Value Method

This method refers to "the amounts at which individual assets comprising the enterprise or the entire assets of the enterprise

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[158] Libyan American Oil Co. ("LIAMCO") v. Libya, 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB. 177 (1979).

[159] COLLINS, *supra* note 1, at 199.

[160] CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2007 77 (Arthur W. Rovine ed., 2008).

[161] Homayoun Mafi, *Controversial Issues of Compensation in Cases of Expropriation and Nationalisation*: *Awards of the Iran-United States Claims Tribunal*, 18(1) INT'L J. HUMAN. 83, 99 (2011) (citing Award No. 258-43-1 of the Iran-U.S. Claims Tribunal).

[162] COLLINS, *supra* note 1, at 201.

[163] *Id*. at 200.

[164] *Id*. at 201.

could be sold under conditions of liquidation to a willing buyer less any liabilities which the enterprise has to meet."[165] Like the replacement value method, this valuation technique has been rarely used by investment arbitration.[166] However, some tribunals were keen on applying this valuation method in some cases. For instance, some of those cases were *Vivendi v. Argentina*[167] and *CME v. Czech Republic*.[168] It should be noted that the liquidation value technique is perhaps more suitable to be applied by investment tribunals in disputes that are based on indirect or partial expropriation claims.[169] According to Collins, "the liquidation method, which focuses on the value of individual assets rather than an enterprise, allows tribunals to assess the value of the expropriated part."[170] In *CME v, Czech Republic*, the tribunal applied this valuation technique in this way as well as using other methodologies.[171]

D. Discounted Cash Flow Method

Another commonly used method is the discounted cash flow method. "This type of valuation method requires the projection of the future receipts expected by the enterprise after deducting the cost associated with the making of the receipts."[172] The World Bank Guidelines express that this is the valuation technique that ought to be applied where the company that is expropriated is an "ongoing concern."[173] It should be emphasised that when the tribunals are applying this valuation technique they ought to consider the following issues: investment's track record, any

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[165] World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline IV: 6 (iii).

[166] COLLINS, *supra* note 1, at 201.

[167] Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (Aug. 20, 2007).

[168] CME Czech Republic B.V. (The Netherlands) v. Czech Republic, UNCITRAL, Final Award (Mar. 14, 2003).

[169] COLLINS, *supra* note 1, at 203-204.

[170] *Id.* at 203.

[171] *Id*. at 204.

[172] SORNARAJAH, *supra* note 21, at 451; *see also* COLLINS, *supra* note 1, at 202.

[173] *Id.*

contractual agreements saved by investors, business plans of investors, and the economic environment of the host state.[174] While this valuation method has been used willingly by a number of tribunals for a long time, some tribunals have rejected using this technique if projections are considered too speculative.[175]

V. RISE OF RESOURCE NATIONALISM

In the historical background section, attempts were made to identify the driving forces that constitute direct taking in the context of the twentieth century and in the new millennium respectively.[176] This section aims to examine the link between resource nationalism and indirect expropriation with regard to the more recent trend of governments interfering indirectly in investments made by foreign parties. In order to discover this link, the following questions need to be addressed: what is the definition of "resource nationalism"? What form does the antagonistic behaviour of host states take?

Resource nationalism can be defined as a national government's claim of ownership rights over their natural resources within their own land usually in ways that contradict liberal paradigms for safeguarding alien investments, and that work against the interest of international energy investors.[177] Resource nationalism is a notion that deems natural resources to be the property of a sovereign state rather than of a petroleum company or an individual who has property rights over an area.[178] This view holds that the asset of natural resources equates with national patrimony and they, therefore, should be

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[174] IRMGRAD MALBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 242-243 (2d ed., 2017) (cited in COLLINS, *supra* note 1, at 202).

[175] *See, e.g.*, Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13, Award, ¶ 514 (Mar. 2, 2015); *see also* Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, ¶ 344 (Sept. 16, 2015).

[176] *See*, section 2 of this article.

[177] DANIEL MORAN & JAMES A. RUSSELL, ENERGY SECURITY AND GLOBAL POLITICS: THE MILITARIZATION OF RESOURCE MANAGEMENT 235 (2009).

[178] David R. Mares, *Resource Nationalism and Energy Security in Latin America, Baker Institute, Scholar For Latin American Energy Studies* (James A. Baker III Institute for Public Policy, Rice University, Working Paper No. 6, 2010), http://pages.ucsd.edu/~dmares/MaresResourcesNationalismWorkPaper.pdf.

used for the benefit of the nation rather than for the benefit of the private sector.

According to Stevens, there are two components that drive resource nationalism to take into consideration.[179] The first component is that of limiting the control of international investors' business activities over natural resources as they take too large a share of the cake.[180] The second driver is the perception among ordinary nationals that they have a significant claim to the natural resources of their territory and that the benefit of those resources should go towards the improvement of their economy.[181]

It should be underlined that the rise of oil prices in the energy sector is an equally powerful catalyst. What happens when oil prices rise? In such scenarios, the sovereign state seeks to impose new terms and conditions to the current contract, or the state implements new regulations of energy investment projects, or else they seek to maximise their profit.[182] It is clear that instead of taking the property the government attempts to interfere in the project by implementing new rules, regulating new tax codes, or changing the contractual terms of the contract. This, in practice, constitutes indirect expropriation. Resource nationalism has become a more popular measure and, consequently, a more frequent occurrence in a significant number of countries.[183] As mentioned in the previous section, the main factors behind host government expropriation in the twentieth century were rooted in socio-political conditions. Perhaps, the same elements are still the cause of the resurgence of resource nationalism in the twenty-first century.

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179 Paul Stevens, *National Oil Companies and International Oil Companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle*, 12(1) J. WORLD ENERGY L. & BUS. 1, 5 (2008).

180 *Id.*

181 *Id.*

182 Warburton, *Resource Nationalism in Post-Boom Indonesia: The New Normal*, Apr. 2017 Lowy Inst., https://www.lowyinstitute.org/publications/re source-nationalism-post-boom-indonesia-new-normal.

183 *Id.*

VI. CONCLUSION

Political risk has always been a major hindrance to foreign investors in the energy sector and is likely to continue to be so for the foreseeable future. It may be part of the inherent nature of energy projects—expropriation, nationalisation, and confiscation are all risks that foreign investors faced during the life span of their projects in the twentieth century. The direct expropriation notion is not an unlawful action *per se* as long as sovereign state meets legal requirements under the international law.[184] There is no major obstacle to prevent states from expropriating local or foreign investors' property as long as the state's actions meet certain conditions. These requirements are commonly referred to as: public purpose, non-discrimination, respecting due process of law, and prompt and adequate compensation. It should be borne in mind, that although expropriation is a legal right, such sovereign power should be used only as a last resort against alien investors' property ownership. As mentioned above, if the property is expropriated by a sovereign power and the taking does not meet the exact criteria as defined by international law, then the taking will be deemed wrongful.

In addition, the driving forces behind the rise of resource nationalism are the ideological, political, and economic factors that have driven the rise in resource nationalism in recent years. In the twentieth century, common political risks were mass expropriation and nationalisation and confiscation for foreign investors in oil and gas related projects.[185] The phenomena of the last century have lingered on into the present; although the frequency of their occurrence has lessened somewhat, it is always possible to witness such sovereign activities as a result of their national policies. Evidently, the nationalisation case in Argentina in 2012 is a reminder to the investment community that such takings cannot be relegated to history.[186]

It is currently the case that the most hazardous political risk is indirect expropriation. The simple answer to why a government interferes in investment projects is to maximise their profit and

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[184] *See* the Article 4 of the G.A. Res. 1803 (XVII), *supra* note 22.

[185] ERKAN, *supra* note 15, at 35.

[186] *Id.* at 41.

improve sustainable developments for their country. While the methods of governments may sometimes be questionable, the exploitative mind-set of profit-driven energy companies is also unsustainable. Perhaps, the solution is to promote fairer contract terms and a more even-handed system for the sharing of profit between the parties.