U.S. PROPERTY IN JEOPARDY: LATIN AMERICAN EXPROPRIATIONS OF U.S. CORPORATIONS' PROPERTY ABROAD

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Those who cannot remember the past are condemned to repeat it.[1]

I. INTRODUCTION

An expropriation or nationalization is the forced, non-negotiated purchase or uncompensated seizure of property by a public authority from a private owner[2] during times of peace to "place [such property] at the disposal of its public services, or of the public generally."[3] Such seizures swiftly eliminate any profit expectations held by the investment owner, even if adequately compensated.[4]

During the 1940s to 70s, multinational corporations saw a surge of nationalizations and expropriations in the Latin American region.[5] With the quick evolution of technology and

1. GEORGE SANTAYANA, THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS 284 (2d ed. 1924).

2. *See* BLACK'S LAW DICTIONARY 602, 1046 (7th ed. 1999).

3. ERIC N. BAKLANOFF, EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE 2 (1975).

4. Also called "wealth deprivation." Catherine Yannaca-Small, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 3, 10–11 (OECD, Working Paper No. 2004/4, 2004).

5. *See generally* Quan Li, *Democracy, Autocracy, and Expropriation of Foreign Direct Investment*, 2 (2005), http://www.princeton.edu/~pcglobal/conferences/IPES/papers/li_S1100_2.pdf (discussing various scholars' views on government expropriations in Latin America from 1945 to 1970).

increased expectations on the standard of living, third world countries embarked in a mass expropriation of property within the oil industry.[6] Mexico, for example, is now the infamous first mass expropriator in the energy industry.[7] After the 1970s, Latin American countries largely ceased expropriations and nationalizations.[8] However, with the new surge of socialistic regimes and anti-"Imperialistic Yankee"[9] feelings in Venezuela, Ecuador, and Bolivia, the trend of expropriations in South America is back in full swing.[10]

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6. *See generally id.* (discussing the view that increased expectations regarding the level of welfare increased the instances of expropriations in Latin America).

7. *See* Noel Maurer, *The Empire Struck Back: The Mexican Oil Expropriation of 1938 Reconsidered*, 1 (Harv. Bus. Sch., Working Paper No. 10–108, 2010), http://www.hbs.edu/research/ pdf/10-108.pdf.

8. *See* Glen Biglaiser & Karl DeRouen, Jr., *Economic Reforms and Inflows of Foreign Direct Investment in Latin America*, 41 LATIN AM. RES. REV. 51, 54–55 (2006).

9. GEORGE M. INGRAM, EXPROPRIATION OF U.S. PROPERTY IN SOUTH AMERICA: NATIONALIZATION OF OIL AND COPPER COMPANIES IN PERU, BOLIVIA, AND CHILE 107 (1974). Ingram uses this phrase to refer to expropriations that took place at the beginning of the 20th century. *See id.* The sentiment was carried over to this century as evidenced by Morales' and Chavez's views. *See* Nikolas Kozloff, *Hugo Chavez's Anti-Imperialistic Army*, VENEZUELANALYSIS.COM (Feb. 19, 2008), http:// venezuelanalysis.com/print/3177; *see also Evo Morales: Iran, Bolivia Share "Anti-Imperial" View*, WW4 REPORT (Oct. 26, 2010), http://www.ww4report.com/node/9201. These sentiments were partly the result of Latin America's perception of Transnational Corporations' attitude toward the Latin American markets. *See generally* Rory M. Miller, *British Firms and Populist Nationalism in Post-War Latin America*, 2 (2006), *available at* http://www.liv.ac.uk/~rory/ British%20Business%20and% 20Economic%20Nationalism.pdf (stating that "Sir Henri Deterding, the chairman of Shell, was described as 'incapable of conceiving Mexico as anything but a Colonial Government to which you simply dictated orders.'"); *but see Bolivia: Petrobras Plans to Explore Three New Fields in Bolivia*, ENERGY-PEDIA NEWS (Jan. 19, 2011), http://www.energy-pedia.com/article.aspx?articleid= 143796 (noting that Bolivia's Evo Morales may be turning a new leaf by entering into a new contract with Petrobras to explore for oil and gas in three areas of Bolivia).

10. *See* Diego Moya Ocampos, *Venezuelan President Nationalises Steel Company and Private Housing Projects*, GLOBAL INSIGHT (Nov. 1, 2010) (stating that "[w]ith regards to the nationalisation of the housing sector, it constitutes a new manifestation of Chavez's strategy to win back the middle classes that turned against him in the recent September parliamentary elections in which Chavez's ruling United Socialist Party of Venezuela lost its two-thirds majority in parliament. It is expected that Chavez is to continue with nationalisations in the basic and mining industry sectors, and will strategically begin to target housing projects to cover the housing deficit."); *see* Graham Bell, *Peru's President Gave Up on Land Expropriation*, BUSINESSDAY (June 27, 2011), http://www.businessday. co.za/Articles/Content.aspx?id=146879 (stating that Venezuelan

This article explores the history of expropriations in Latin America in times of peace during the early to mid-twentieth century and their effects on international investment. It analyzes the applicable treaties and other international agreements, the procedures multinationals must follow when seeking redress, and the problems a corporation may encounter when going through international judicial systems. It also explores the new trend of expropriations, including the new methods and policy reasons applied by the expropriating countries. Most importantly, this article gives greater emphasis to the legal reasoning and policies behind Latin American expropriations and their legitimacy, rather than merely focusing on whether there was proper compensation awarded to the injured parties.

II. THE FIRST WAVE OF EXPROPRIATIONS

Expropriations have been around since Roman times.[11] However, in the past, the act of expropriation constituted willingly and voluntarily surrendering one's property for religious purposes.[12] Now this word implies having property taken away, and in the international arena it may well actually mean "stolen."[13] This section explains the most basic form of expropriation and the new, much more sophisticated, methods used by governments to take property belonging to a foreign investor, none of which were the modalities of expropriation employed by the Romans.[14]

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president Hugo Chavez, Bolivian president Evo Morales, and Ecuadorian president Rafael Correa are usually grouped together as supporters of land expropriation and nationalization).

11. *See* J. Walter Jones, *Expropriation in Roman Law*, 45 L. Q. REV. 512, 513–14 (1929).

12. *See id.* at 512.

13. *See* ELLIS BRIGGS, PROUD SERVANT: THE MEMOIRS OF A CAREER AMBASSADOR 137 (1998).

14. *See generally* Jones, *supra* note 11, at 525–26 (explaining the methods of Roman expropriation).

A. Direct Expropriations

A direct expropriation is the taking of property by a host state from a private investor,[15] which could arise by presidential or legislative mandate. Although the Mexican expropriations of the 70's were "direct," the circumstances that allowed the Mexican government to seize these oil concessions were in the making for many years.[16] This was most strongly evidenced in the development of new law in Mexico in 1925 that divided oil fields into "free land and non-free land."[17] Only land designated as "free" was available for concessions.[18] Not surprisingly, by 1935, ninety percent of oil fields were on non-free land.[19]

The next step came in 1936 when Mexico's law of expropriation on the basis of public utility was enacted and approved by then Mexican President Cardenas.[20] Public utility was defined under the law as "the defense, conservation, development or utilization of natural resources, susceptible to exploitation."[21] Furthermore, payment for expropriation was to be "based on the tax value of the property" and effectuated within ten years after the expropriation.[22] Without this political chain of events the Mexican mass expropriations of 1938[23] might have never happened, and perhaps the history of foreign investments in South America could have been a very different

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15. *See* Foreign Trade Information System, Dictionary of Trade Terms, http://www.sice.oas.org/dictionary/IN_e.asp (last visited Apr. 11, 2012).

16. *See* WENDELL C. GORDON, THE EXPROPRIATION OF FOREIGN-OWNED PROPERTY IN MEXICO 104–05 (1975). Mexico's "Six-Year Plan" was the government's response to sentiments of nationalism and the need to take back control of the nation's economy from foreign investors. *Id.* at 105. The plan asserted that Mexican citizens have the duty to contribute to the country's economy, and as a result they also deserved the right to have a part in it; the government would intervene to ensure this right, if necessary. *Id.*

17. *Id.* at 103.

18. *See id.*

19. *See id.*

20. *Id.* at 104.

21. *Id.*

22. *Id.* There is no mention if the law would account for possible inflation over the ten year period.

23. *See* Maurer, *supra* note 7.

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Similar to Mexico's re-nationalization, Venezuela enacted the Reserving Law in 1975, which allowed the country to "assume full control of its valuable hydrocarbon resources."[24] The effects of the 1975 Reserving Law were that (1) "all outstanding concession contracts were terminated," (2) "the state was granted a monopoly of oil and gas operations," (3) "the formation of the National Oil Company was required," now called Petroleos de Venezuela or PDVSA for short, (4) "the National Oil Company would own and manage all assets reverted to the state upon the termination of the existing concessions," and (5) "the state obtained exclusive control of all oil and gas exports," among others.[25]

The 1975 law also required compensation based on the asset's book value; however, this law contradicted a pre-existing rule that required only fair compensation.[26] A contradiction is in Article 113 of the Venezuelan constitution, or Venezuela's equivalent to the United State's antitrust law, which "includes a provision allowing concessions to exploit state-owned resources."[27] Ironically, this provision was included for the very purpose of avoiding the expropriating and nationalizing frenzy that has been implemented in the last few years.[28]

As previously mentioned, the historic approach to expropriation has been focused on whether there was just compensation, regardless of the legitimacy of the expropriation itself.[29] In the Mexican expropriations of 1938 and the Venezuelan expropriations of 1975, the outcomes of the settlements are still not entirely clear to the public.[30]

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24. Luis E. Cuervo, *The Uncertain Fate of Venezuela's Black Pearl: The Petrostate and Its Ambiguous Oil and Gas Legislation*, 32 HOUS. J. INT'L L. 637, 642–43 (2010).

25. *Id.* at 644–45.

26. *Id.* at 645.

27. *Id.* at 656.

28. *Id.* (noting that "contradictory provisions are abundant in the constitution").

29. *See* ANDREAS F. LOWENFELD, EXPROPRIATION IN THE AMERICAS: A COMPARATIVE LAW STUDY 6 (1971).

30. *See id.* at 153, 235–36.

B. Indirect Expropriations (or "Creeping Expropriations")[31]

As the name indicates, indirect expropriation means that the investor has no option but to leave the property behind and abandon the project due to the country's policies and actions, such as increased taxation and other unfair policies.[32] During the 1970's there were also occasional "indirect" expropriations executed in Mexico.[33] The events that led to these indirect expropriations began in 1938, when Mexico's oil production had significantly declined, causing investment to drop as output decreased even further.[34] The decrease in revenues along with pressure from Mexican labor union's demands for higher wages hit the oil companies' interests hard.[35] To make matters even more difficult for investors, the Mexican Supreme Court granted the unions a wage increase, and when the companies responded that they could not abide by the order, the government cancelled all oil contracts and nationalized the oil business.[36]

Comparably, Argentina undertook a policy change in the mid-twentieth century to reclaim its control over its energy resources, mainly gas. Argentina's method of expropriation

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31. Oscar M. Garibaldi & Luisa F. Torres, *Expropriation of Energy Investments*, INT'L ENERGY REV. (May 2007), *available at* http://www.cov.com/files/Publication/b4146383-8f28-4c55-a48c-83248bf2b772/Presentation/PublicationAttachment/85f47e24-9b59-4a25-93e5-003b7e364a15/813. pdf.

32. *See* George Joffé, et al., *Expropriation of Oil and Gas Investments: Historical, Legal and Economic Perspectives in a New Age of Resource Nationalism*, 2 J. WORLD ENERGY L. & BUS. 3, 12–13 (2009). There is also another term for this method of expropriation called "Forced Abandonment." *Id*.

33. *See* Gordon, *supra* note 16 at 104 (noting that Article 123 of the constitution of 1917 gave Mexican workers rights and legal benefits that were not available in even more advanced countries). This relief for Mexico's workers may have backfired, serving as the reason foreign investment began to pull away at an even greater speed, injuring Mexico's economy and employment opportunities even further. *See* Dennis Rios, *Corporate Restrictions in Mexico and the United States,* University of Georgia School of Law 7–9 (2007).

34. See Maurer, *supra* note 7 at 29.

35. *Id.* at 19.

36. *Id.* at 8–10 (arguing that the union demands were reasonable and excusing Mexico's nationalization based on the need to protect Mexico's economy and oil workers from the oil companies that sought to keep leverage and a reputation of not giving way to union demands).

diverges from conventional nationalization procedures.[37] Instead of merely cancelling energy contracts, Argentina sought to reclaim its power over its natural resources by steadily increasing tariffs against the gas companies and transporters.[38] The increase in taxes progressively sliced the companies' profits, squeezing them out of the international market as they became noncompetitive.[39]

Taxations can also prove to be a challenge when the host country provides no guarantee that applicable taxes will remain somewhat stable or within a range.[40] Commonly, foreign investors cannot use legal provisions to minimize the risk that taxes will change to their disadvantage.[41] Often, they have no expectations of a stable tax system, other than a subjective trust in that country's government.[42] The problem then becomes how much of a tax increase is too much of a tax increase so that the international community may consider it an expropriation? The court in *EnCana Corporation v. Republic of Ecuador* held that "only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised."[43] Furthermore, if the company is producing profitably, the possibility of succeeding in a claim of deceitful

37. Garibaldi & Torres, *supra* note 35, at 2.

38. *See id.*; *see also* Yannaca-Small, *supra* note 4, at 2 (noting that many disputes that used to be classified as direct expropriations in the 1970s and 1980s are now being brought under the category of indirect expropriations as a result of the appearance of a few NAFTA cases dealing with this matter). The organization asks the very important question, "to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a 'taking' and having to compensate for this act." *Id.* As suggestive as this question may seem, this is a legitimate concern of many foreign investors, as the following section explains, demonstrating to an international court or arbiter that an indirect expropriation has taken place is a very difficult task.

39. *See* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/01, Decision on Liability, ¶¶ 33–75 (Oct. 3, 2006).

40. *Id.*

41. *See* Garibaldi & Torres, *supra* note 35, at 2.

42. *See id.*

43. *EnCana Corp. v. Republic of Ecuador,* LCIA UN3481 (Award) (Feb. 3, 2006), a*vailable at* http://www.investmentclaims.com/decisions/EnCana_Equador_Award.pdf; *see* Julian Cardenas Garcia, *Rebalancing Oil Contracts in Venezuela*, 33 HOUS. J. INT'L L. 235, 264–65 (2011) (discussing the *EnCana* decision).

expropriation is even lower.[44]

Some examples of Argentina's creeping expropriations can be seen in the cases *LG&E v. Argentine Republic*, in which the claims of expropriation were a result of "regulatory changes in the tariffs for gas distribution and transport" within the Argentine territory.[45] As commonly seen during the times of crisis, in the 1980s Argentina's government policies reflected a desperate attempt to restore the country's economy by opening the doors to foreign investors by offering opportunities of privatization and government concessions.[46] One of the government's big projects was the privatization of the state's national gas company, Gas del Estado S.E., which was the sole provider of gas in Argentina.[47] Furthermore, in 1991 the Argentine government enacted the Convertibility Law, which established a fixed exchange rate that would peg the Argentine currency to the value of the dollar.[48] Part of the plan to restore international confidence in the Argentine market also included the ratification of several international agreements such as the International Centre for Settlement of Investment Disputes (ICSID) and bilateral treaties, including a U.S.-Argentina bilateral treaty.[49] Encouraged by these changes in policy, "LG&E purchased a 45.9% interest in Centro Gas, a 14.4% interest in Cuyana Gas, and a 19.6% interest in GasBan," all of which were previously nationalized gas companies.[50] These

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44. *See* Garibaldi & Torres, *supra* note 35, at 2; Julian Cardenas Garcia, *Rebalancing Oil Contracts in Venezuela*, 33 HOUS. J. INT'L L. 235, 264–65 (2011) (correlating companies' matters of taxation with the probability of expropriation).

45. *Id.*; s*ee* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006).

46. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 35–37 (Oct. 3, 2006).

47. *Id.* ¶ 37.

48. *Id.* ¶ 36.

49. *Id.* ¶ 51. The U.S.-Argentina Bilateral Treaty provided that "the two countries agreed that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and a maximum effective use of economic resources." *Id.* ¶ 124. Furthermore, the main economic goals included efforts to "promote greater economic cooperation and stimulate the flow of private capital and the economic development of the parties." *Id.*

50. *Id.* ¶ 52.

licensed companies proceeded to invest heavily in Argentina's natural gas infrastructure and in return, Argentina continued to honor its legal obligations.[51] Then by the end of the 1990s, Argentina fell back into an even deeper recession[52] after the value of the Argentine Peso plummeted as a result of dramatic levels of deflation. The country began to revert back to its protectionist policies by forcing the recently privatized gas companies to take a reduction in the contractually agreed payments to keep prices of domestically used gas stabilized and under control.[53] Then in 2002 the government issued the Public Emergency Law, which unlocked the one-to-one value between the Argentine peso and the dollar and allowed the local currency to fluctuate freely. The new Law also demanded "the Executive Branch to renegotiate all public-services contracts," including the LG&E contract, forcing LG&E to renegotiate in an unfair environment and under the threat of rescission of contract.[54]

The crisis led the Argentine president to force the foreign investors to accept one massively devalued peso per every dollar owed and to be owed to them.[55] Furthermore, under the contract between the parties, the Argentine government was to charge the maximum tariffs against LG&E for five years, and to lower them thereafter according to the terms of the contract.[56] However, as a result of the Public Emergency Law, the tariffs were never revised; on the contrary, the Argentine government eventually attempted to raise them even higher.[57]

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51. *See id.* ¶ 53 (noting "GasBan invested about US$372 million in a new plant and equipment, even though originally required to invest US$90.9 million; Centro invested US$92 million even though originally required to invest US$10 million; and Cuyana invested more than US$120 million, although original required to invest US$10 million").

52. *Id.* ¶ 54.

53. *Id.* ¶¶ 59–60.

54. *Id.* ¶¶ 64–65.

55. *See id.* ¶¶ 66–67 (noting that "pesification", or the switch into Argentine pesos, was characterized as "a necessary process to return the country to the path of economic stability" by the Argentine government).

56. *Id.* ¶ 40.

57. *Id.* ¶ 69. LG&E had five major claims against Argentina including: (1)repudiation of the guarantees offered to foreign investors to lure them into the country's market, (2)singling out "the gas industry and other public utility industries" to

The tribunal concluded that "Argentina . . . acted unfairly and inequitably in the manner in which it abrogated the guarantees of the Gas Law and its implementing regulations, adversely affecting the gas-distribution sector but not affecting other sectors of the economy."[58] Furthermore, "Argentina also acted unfairly and inequitably in forcing the licensees to renegotiate public service contracts, and waive the right to pursue claims against the Government, or risk rescission of the contracts."[59] As the tribunal's opinion shows, the unfair treatment of U.S. gas companies like LG&E places so much pressure on investors to the point that they may actually be driven out of the market.[60] The investor's expected return on their investments may be substantially affected by the imposition of excessive tariffs and other financial impositions such as payment at a different than contractual exchange rate or paying with a devalued currency.[61] These are some classic methods of indirect or creeping expropriation.[62]

As seen in the *LG&E* case, proving that the investor has suffered an indirect expropriation can be more challenging than proving a direct expropriation, because merely proving there has been a taking will not suffice. Usually, the state action does not involve an "overt taking" per se, but rather, the "taking occurs when governmental measures have 'effectively neutralize[d] the benefit of property of the foreign owner.'"[63] To prove unfairness and to seek compensation, the government's action must have a

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suffer less favorable treatment than [that] "granted to all other sectors of the economy," (3)publicizing "unfounded charges against the foreign investors and coerced the gas-distribution companies to waive their rights under the licenses and renegotiate [them]," (4)demanding that LG&E comply with the contract while the government refused to comply with the tariff terms, (5)denying LG&E the right to pursue judicial or arbitral remedies, directly violating the US-Argentina treaty. *Id.* ¶ 105.

58. *Id.* ¶ 135. The court decision was influenced by the discrimination against foreign investors in the gas industry. *See id.*

59. *Id.* ¶ 137.

60. *See generally id.* ¶ 179 (explaining that the "value of LG&E's investment was based on a tariff system and depended on the [government] respecting the system," and that therefore, the unfair treatment of LG&E decreased the value of their investment).

61. *See generally id.* ¶¶ 134–39 (concluding "Argentina went too far by completely dismantling the very legal framework constructed to attract investors").

62. *Id.* ¶ 188.

63. *Id.*

"*substantial* adverse impact on the use and enjoyment of the investment."[64] To make this determination the courts will usually observe the "degree of possession taking, or control over the enterprise,"[65] and whether the company can "continue to function profitably" in spite of the tariffs and taxes.[66] While proving a government have been unfair during the implementation of a direct expropriation is still challenging, the associated legal routes differ significantly from the blatant taking without proper compensation needed in an indirect expropriation—as it falls into a much more objective standard.

If LG&E would have been sufficiently pressured to accept the renegotiation of the contracts with the Argentine government, there might have also existed a claim similar to duress, called "arm twisting" expropriation.[67] Through this method, officials in the expropriating country use threats of expropriation to have foreign company owners fear a total loss, and as a result sell their property for a fraction of its value.[68] In the *LG&E* case, Argentina could have achieved this by threatening to rescind the contract unless LG&E give up some of its contractual rights, assets or profits under a new, renegotiated contract. These expropriations are also very challenging to prove because, technically, they are considered bona-fide sales, because the company owners "willingly" sell their property to the government, regardless of whether the compensation was adequate or not.[69]

This section offered some historical background, as well as an analysis, of creeping expropriations. However, the main purpose of this article is to highlight the intricacies and weaknesses of the international law covering foreign

64. Garibaldi & Torres, *supra* note 35, at 3.

65. *Id.*

66. *Id.*

67. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 237–38 (Oct. 3, 2006); Compañìa De Agua Del Aconquija S.A. et al., v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 7.4.37 (Aug. 20, 2007).

68. *See* Andrew Newcombe, Regulatory Expropriation, Investment Protection and International Law: When is Government Regulation Expropriatory and When Should Compensation be Paid? 55 (1999) (unpublished Master of Laws thesis, University of Toronto), http://www.italaw.com/ documents/RegulatoryExpropriation.pdf.

69. *Id.*

expropriations, namely the policy reasons claimed by expropriating countries to legally effectuate these takings. For example, in the *LG&E* case the tribunal itself "recognize[d] the economic hardships that occurred during this period, and certain political and social realities that at the time may have influenced the Government's response to the growing economic difficulties."[70] In this case, it appears Argentina had an adequate policy reason behind its actions, such as having an entire country headed straight for bankruptcy and soaring unemployment rates that pushed the country into a state of national emergency.[71] It was the method employed by the government that violated international law, principally the discrimination imposed against LG&E.[72]

III. ELEMENTS OF EXPROPRIATIONS

Expropriation arbitration can be a very complex process. The burden of proof to show abuse of right to expropriate falls upon the party making the accusation.[73] An injured party must then demonstrate that (1) the expropriation was not adequately justified and (2) if there was adequate justification, he did not receive fair compensation for its business.[74]

A. Justification

Although there is no single international court that determines the fairness and just compensation elements of a foreign expropriation, there is somewhat of a consensus of what may actually constitute a taking of this kind. The trying tribunal must determine whether the expropriation was well justified.[75] If the expropriation is based on social reasons, the

70. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 139 (Oct. 3, 2006).

71. *See id.* ¶¶ 63, 198–200.

72. *See id.* ¶ 267.

73. *See* Newcombe, *supra* note 72, at 108.

74. *Id.*; Norwegian Shipowners' Claims (Nor. V. U.S.), 1 R.I.A.A. 307, 309, 332 (1922).

75. *See* Newcombe, *supra* note 72, at 108–09 (1999) (stating that the customary international standard of treatment requires that states not act arbitrarily).

state must act in good faith.[76]

As noble as this element might seem, most of the issues with expropriation arise out of the difficulties in determining whether the state action was justified or not. Due to fear of stepping on another country's sovereign power, the international community has refrained from setting forth a standard by which foreign government actions could be measured.[77] The Foreign Sovereign Immunities Act, for example, sets forth a series of procedures that must be followed when suing a foreign state, and places limits on whether such states may even be sued in the first place.[78] Limitations of this kind have caused courts to place the focus away from the policy reasons claimed by the foreign expropriating state.[79]

The reality of foreign expropriations is that foreign countries can express any number of reasons to excuse their need to expropriate or nationalize a foreign company.[80] The need for a straight forward standard is reflected in the uncertainty and decline of investments found in countries that are keen on nationalizing foreign property.[81] One way to approach this issue would be to require the expropriating country to justify the taking of property through a preexisting and express legal mandate or policy in that country's bylaws.[82] This would limit

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76. B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 111 (1977).

77. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 119–20 (7th ed. 1997) (1970); Newcombe, *supra* note 72, at 110–12.

78. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1330.

79. *See* Peter Charles Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract*, 80 S. CAL. L. REV. 1, 47 (2006).

80. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 194–97 (Oct. 3, 2006).

81. *See generally* ANDREW BREITBAR, VENEZUELA SEIZES A LANDMARK HILTON HOTEL (2008), http://www.breitbart.com/article.php?id=cng.641f6a1ace6620056b73f6b56e7b6cd8.b31 (noting that over the past four years "Venezuela has implemented the nationalization of industries it sees as strategic, including electrical utilities, cement, steel, oil services and banking"); *see also* Helen Murphy, *Chavez's Venezuela Land Seizure Sparks Friction, Lawsuits, Fear*, BLOOMBERG (Nov. 8, 2005), http://www.bloomberg.com/apps/news?pid=newsarchive&sid= aLJI6oIrRB8s.

82. *See generally* Newcombe, *supra* note 72, at 76 (discussing an opinion that states "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to

the use of arbitrary justifications that might mask the real political reason behind the taking of foreign property.[83]

In *Norway v. United States*, the court found that the United States was "responsible for having … made a discriminating use of the power of eminent domain", holding it was unlawful to expropriate the property of foreigners through the enactment of legislation, which is openly, or by implication, directed exclusively against a group of foreigners.[84] Although there has not been much litigation on this matter, the new wave of expropriations in Latin America has had a great impact on property belonging to U.S. corporations.[85] The President of Venezuela, Hugo Chavez, has persistently voiced his negative views against the United States and against basic capitalist principles, causing increasing concern for foreign investors.[86]

Furthermore, Venezuela's currency control limits investor's business even further as the government regulates the purchasing and selling of foreign currencies, thus restraining foreign companies' ability to perform their everyday exchange functions.[87] Multinationals struggle to bring their earnings back to their home states and to make use of the bolivares[88] earned through their businesses.[89] As a result, many corporations will most likely be forced to resort to the black market to seek

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begin with").

83. *See generally id.* at 53 (stating "the principle that an intention to expropriate is not necessary for a finding of expropriation and that states are responsible for expropriations that occur indirectly").

84. Norwegian Shipowners' Claims, 1 R.I.A.A. 309.

85. *See Another American Company Expropriated in Venezuela: Ohio-based Owens-Illinois is Latest Victim of Chavez's Attacks on Private Property*, What's Next Venezuela (Oct. 26, 2010), http:// whatsnextvenezuela.com/e-alert/another-american-company-expropriated-in-venezuela-ohio-based-owens-illinois-is-latest-victim-of-chavez%E2%80%99s-attacks-on-private-property/ (listing some of the companies whose property has been affected by expropriations in Venezuela).

86. *See* Murphy, *supra* note 87.

87. *See* Carlos A. Plaza & Rossana D'Onza, *Venezuela: Exchange Controls*, NATLAW.COM (1996), http://www.natlaw.com/pubs/spvebk1.htm; *see also* Jeremy Morgan, *Venezuela Currency Control Tightened as Economic Clouds Gather*, LATIN AMERICAN HERALD TRIBUNE, http://www.laht. com/article.asp?ArticleId=332348&CategoryId=10717.

88. The bolivar is the Venezuelan currency.

89. *See* Plaza & D'Onza, *supra* note 93.

overpriced dollars, paying the premium demanded by sellers to make up for the risk of possible criminal prosecution.[90] Just as an increase in tariffs in Argentina drove out so many foreign gas providers,[91] currency controls create an environment full of hostility toward the foreign investor, making the option of abandoning once profitable oil and gas contracts a more desirable alternative.[92]

B. Compensation

After a government has expropriated a foreign investor's assets, a court or international arbiter has to determine the correct and appropriate amount of compensation.[93] Ideally, the element of compensation should only come into play if the first element of proper justification has been met.[94] Otherwise a country should not be allowed to legally proceed with the expropriation.[95] Some foreign states identify with the theory of "prompt, adequate, and effective compensation" to the injured party.[96] However, there is no treaty establishing this concept as a legal standard.[97] In fact, the American Law Institute's *Restatement* affirms that "[a] state is responsible under

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90. *See Special Report: Venezuela's Unsustainable Economic Paradigm*, STRATFOR GLOBAL INTELLIGENCE 3 (Aug. 4, 2010), http://www.porvenezuela.org/KeyIssues/VENEZUELA_ ECONOMIC_PARADIGM.pdf.

91. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, ¶¶ 85–88, 198, 257–62, 266–67 (July 25, 2007).

92. *See* Paul Shang, *East Meets West: Future Challenges in Asia*, FUTURES INDUS., Dec. 1996–Jan. 1997, *available at* http://www.futuresindustry.org/fi-magazine-home.asp?a=1113 ("[F]oreign ownership restriction, foreign exchange risk and foreign currency control often drive foreign investors to alternative investment vehicles.").

93. *See* LOWENFELD, *supra* note 33, at 30–31 (discussing procedure in Argentina).

94. *See generally id.* at 25–29 (discussing how Argentina requires a public utility as a justification for an expropriation).

95. *See id.* at 26 (noting that Supreme Court of Argentina wrote "[i]t is appropriate to dear in mind that no expropriation may be carried out, according to a clear statement in the Constitution, but for reasons of public utility as stated in law").

96. *See* Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 121 (1984).

97. *See generally id.* at 121–22 (explaining that the Hull formula was created by Secretary of State Hull, who wrote the phrase in his notes to the Mexican government after the mass expropriation of 1938 but that it cannot be considered as international law).

international law for injury resulting from (1) a taking by the state of the property of a national of another state . . . when provision is not made for just compensation."[98] The issue then becomes, what is just compensation? Furthermore, is the compensation supposed to be adequate for the investor or for the expropriator? Governments may take into account the "circumstances that the state considers pertinent."[99] This discretion leads to a slippery slope in which a government may take its own financial situation into account when deciding what to pay a foreign investor for their expropriated assets, because the government may determine that a mere fraction of the property's actual value is adequate, given the country's circumstances.[100]

There have been several standards set forth on what the right amount of compensation should be in expropriation cases, some of which are just, fair, adequate, effective, appropriate, and full compensation.[101] Full compensation is the ideal for an investor who cannot avoid expropriation altogether. An investor's expectation is to get back the fair market value, which is the cost that an investor would pay under market conditions that are favorable to both the investor and seller.[102] Yet this form of payment is less than common because expropriating countries usually repay a lower value to affected investors—a value closer to what they deem "adequate" compensation.[103]

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98. *Id.* at 121.

99. Joffé et al., *supra* note 36, at 13 (referring to the U.N. Charter of Economic Rights and Duties of States).

100. *See generally* Schachter, *supra* note 102, at 122 (noting Article 2(2)(c) of the Charter of Economic Rights and Duties of States, a U.N. declaration, established that expropriating states are to decide compensation based on their national laws and tribunals).

101. *See* Joffé et al., *supra* note 36, at 13.

102. *Id.* at 15 (citing World Bank Guidelines IV(3), defining "fair market value" as "[t]he price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat").

103. *Id.* at 13 (arguing that adequate compensation is less restrictive for expropriating countries because it takes into account the expropriator's relevant laws, regulations, and circumstances).

Another form of valuation is "net book value."[104] This constitutes subtracting the value of the enterprise's liabilities from the value of its assets.[105] The difference between the two is the net value of the enterprise.[106] Yet because this method does not consider future business opportunities and revalorization of assets, it is much more accurate to determine the fair market value by determining what a buyer would be willing to pay for the property.[107] Ultimately, this method is considered a rather controversial valuation scheme due to the added difficulty in assessing the liability and appreciation values of the expropriated assets.[108]

In the famous *Norwegian Shipowners' Claims* case, the United States expropriated certain contracts from Norwegian citizens who sought to enter into the business of building ships in the United States to be sold both in Norway and the U.S.[109] In 1916, the United States sought to reinforce its naval power, and on April 6, 1917, the U.S. government declared war against Germany setting in motion the Great War, now called World War I.[110] The public purpose behind an act that played a part in the expropriation was "encouraging, developing and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries."[111] Whether the taking was in the form of a direct or indirect expropriation is not entirely clear. The act provided that while the United States was at war "no vessel . . . shall, without approval of the board, be sold, leased, or chartered to any person

104. *Id.* at 16.

105. *Id.*

106. *Id.* (noting that under this method of valuation, one party may benefit over the other due to lack of accounting for depreciation, which unfairly benefits the victim of expropriation, and the issue most likely to arise is that appreciation of the assets value will not be properly taken into consideration, benefiting the expropriating government and hurting the investor).

107. *See generally id.* at 13–14 (noting that this method does not take into account public interest factors of the appropriating country).

108. *See* i*d.* at 18.

109. Norwegian Shipowners' Claims, 1 R.I.A.A. 307, 309, 314–15.

110. *Id.* at 314–15.

111. *Id.* at 315 (referring to the United States Shipping Act of September 1916).

not a citizen of the United States, . . . [and] no vessel . . . owned by any person a citizen of the United States . . . shall be sold to any person not a citizen of the United States."[112] At first glance, this appears to be an indirect expropriation due to the implication that, with the board's approval, the ships may still be sold abroad.[113] Yet the ship building contracts provided that the ships would be produced in the U.S. for the benefit of citizens of Norway,[114] which would seem to automatically violate the act if war were declared. The U.S. government took away the ship owners' entire claim to their contracts by issuing a written statement informing the ship owners that they were not to send any additional payments to the ship builders and that the agreement was now terminated.[115]

Although the policy considerations of an imminent world war lurking upon the United States could be argued to be as legitimate of a reason as they come for asset and investment expropriation, the core of this landmark arbitration was determining the just compensation owed to the Norwegian investors.[116] Ultimately, the tribunal held that just compensation meant the "fair actual value of the property taken" at the time and place of its expropriation, or the value of the assets held by the corporation at the moment of the taking, including the ships being built at that time.[117] The overall value of the expropriated assets according to the investors was just over thirteen million dollars. Although not officially submitted to the tribunal, Norway also calculated interest at a rate of seven percent for five years, which according to the tribunal amounted to over eighteen million dollars.[118] In the end, the tribunal held that the U.S. was liable for the fair market value

112. *Id.*

113. *See generally id.* (proposing that Section 9 of the Act provided the possibility to sell ships to noncitizens through the Shipping Board's approval).

114. *See id.* at 314.

115. *See id.* at 318–19.

116. *Id.* at 314.

117. *Id.* at 334; s*ee also* Schachter, *supra* note 102, at 123 (noting that the Norwegian Shipowners' Claims arbitration makes no mention whatsoever of the "prompt and effective" standard).

118. Norwegian Shipowners' Claims, 1 R.I.A.A. 307, 313, 338–39.

as compensation for the assets taken, which included an evaluation of the net value as well interest for a five year period.[119]

The reality of expropriation disputes is that just compensation is a rather debatable issue on its own. Another important example can be found in the Mexican expropriations of 1938 when many of the issues related to compensation involved the difference of estimated fair market value claimed by the Mexican government and the sum demanded by the expropriated foreign investor.[120] As seen in negotiations of any kind, it will almost always be the case that the expropriated party will overestimate the value of the assets taken, while the expropriating government will do exactly the opposite.[121] It is the court's and arbitrator's obligation to find the value of the assets, which can prove to be extremely difficult, and usually involves determining the particular circumstance of the parties involved including their financial circumstances, public interest, rights, obligations and risks.[122]

By observing all of these different methods of valuation it becomes apparent that it does not much matter whether it is called appropriate compensation or just compensation, because either way there are major valuation considerations that follow these concepts.[123] Furthermore, valuation has almost become a

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119. *Id.* at 340–42.

120. Karla Urdaneta, *Transboundary Petroleum Reservoirs: A Recommended Approach for the United States and Mexico in the Deepwaters of the Gulf of Mexico*, 32 HOUS. J. INT'L L. 333, 355 (2010); *see also* Maurer, *supra* note 7, at 18–20 (arguing that in the expropriation of the El Aguila oil company in Mexico, the U.K. demanded compensation over $43 million, but the "book value" of the corporation was only slightly over $16 million). Note that Maurer questions the unfairness of the Mexican expropriations and undermines the injury caused to the oil producers, but even if this were the case, the current reality of expropriations is markedly different.

121. *See generally id.* at 18 (comparing the U.K.'s $257 million settlement claim for its loss of Mexican oil deposits to Mexico's counteroffer of only $42.9 million as compensation to the U.K.).

122. *See generally* Schachter, *supra* note 102, at 128 (stating that "[t]he determination of the amount of an award . . . is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case [and] there must necessarily be economic calculations, and the weighing-up of rights and obligations, of chances and risks, constituting the contractual equilibrium").

123. *See id.* at 128–29 (discussing the advantages and shortfalls of each term).

subjective matter, evidenced by the fact that at least one U.S. court has decided not to apply the "prompt, adequate and effective" formula perhaps due to the belief that in some circumstances, "full compensation" may not be appropriate.[124] Even if a court decides that a victim of expropriation is entitled to full, instead of adequate, compensation, the investor may still suffer a loss if the value of the property was not adequately, or fairly, calculated. Still the issue remains whether an investor who has committed money, time and effort is also entitled to receive compensation for its expected future returns if the company had proven to be a profitable enterprise with promises of profitable growth. It is also possible that because large multinational corporations are more likely to be the victims of foreign expropriation of assets than the small enterprises,[125] the international community is not highly concerned with equity in the global spectrum. Instead, it has focused on avoiding intruding on the Foreign Sovereign Immunities Act, preferring the practicability of cutting investment losses and moving on to newer markets.[126]

Ultimately, there are two major issues to address when deciding what constitutes just compensation. First, the court must determine whether the amount to be paid should be the initial investment set forth by the injured party, the market value of the assets, or some other book value.[127] Unfortunately, because the creation of a thorough expropriation treaty is unlikely in the near future,[128] and because international attorneys cannot sit by and hope for their clients not to get expropriated, contracting parties should address this issue in

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124. *See id.* at 128.

125. Thomas A. Pynter, *Government Intervention in Less Developed Countries: The Experience of Multinational Companies*, 13 J. INT'L BUS. STUD. 9, 18, 21, 22 n.9 (1982).

126. *See generally* Mark B. Baker, *Whiter Weltover: Has the U.S. Supreme Court Clarified or Confused the Exceptions Enumerated in the Foreign Sovereign Immunities Act?*, 9 TEMP. INT'L & COMP. L.J. 1, 1–2 (1995).

127. *See* ERNEST E. SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTION 292–93 (3d ed. 2010).

128. *See generally* Goi Chien Yen, *The Sharp Edge of International Investment Agreements: Expropriation and Dispute Settlement,* THIRD WORLD NETWORK (last visited Nov. 18, 2011), http://www.twnside.org/sg/title2/FTAs/Investment.htm (discussing how issues of exporpriation are addressed in investment traeties).

their contracts and determine which standard should be used in the event of a taking.[129] Second, international courts and arbitrators should come up with the real estimate of what this just compensation may be, regardless of the standard to be followed[130]—perhaps through the use of unbiased third party experts and other methods.[131] This is essential in most cases, as the victims of expropriations are likely to overestimate the value of their assets and expropriating governments are likely to underestimate them.

Although there are local and international rules in place that are meant to protect foreign investors from expropriation, enforcing those laws is a rather difficult task.[132] Due to the complex nature of expropriation, many investors and property owners decide to give way to the expropriating country and settle with whatever compensation they receive.[133] This is especially true when considering the difficulty an investor may encounter in enforcing international awards, even if they manage to get an international tribunal to rule in their favor.[134]

Furthermore, the method of compensation has become yet another issue, with countries offering to pay in debt notes and government bonds that are supported by very unreliable and financially unstable governments.[135]

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129. *See* Joffé et al., *supra* note 36, at 7, 14–15.

130. *Id.* at 14–15.

131. *See generally* James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1305 (1985) (discussing the different methods of determining just compensation with the use of experts).

132. *See generally* Schachter, *supra* note 102, at 121–22 (stating the Restatement is supposed to add provisions for taking property of another state in a dispute, but this formula is not applicable in all scenarios making it difficult to create a standard view; SMITH ET. AL., *supra* note 126, at 329–32 (The FSIA is another piece of legislation seeking to protect against expropriation, however due to issues of minimum contracts an political questions, it is hard to succeed in litigation under this Act).

133. *See* George Chifor, *Caveat Emptor: Developing International Disciplines for Deterring Third Party Investment in Unlawfully Expropriated Property*, 33 L. & POL'Y INT'L BUS. 179, 184–85, 189–90, 194 (2002) (explaining the various reasons why investors subject to expropriation often prefer monetary settlement to other remedies).

134. Joffé et al., *supra* note 36, at 11.

135. *See* Audrey Racine, *Chavez Orders Seizure of U.S.-Owned Cargill Plant* (May 3, 2009), http://www.france24.com/en/20090305-venezuela+chavez-seizure-us-rice-processing-plant-nationalization; *see also* Schachter, *supra* note 102, at 78, 125 (arguing

IV. THEORIES BEHIND NATIONALIZATION

Expropriations and nationalizations are usually based on the belief that a country will be better off if government officials handle the financial and economic sector of the country.[136] The need for expropriations usually arises as a socialist solution to periods of economic and political distress.[137] Other reasons for nationalization include the belief that the expropriation will help (1) prevent the "unfair exploitation and large-scale labor layoffs," (2) promote the "fair distribution of income from national resources," (3) "keep means of generating wealth in public control."[138] As previously mentioned, however, recent nationalizations have often been a result of targeted antagonism towards a specific country, market, or even a specific producer.

V. THE NEW WAVE

The first wave of expropriations arose out of Latin America's desire to reclaim its resources in an attempt to improve the quality of life of its own citizens.[139] By the end of the 1970s the expropriations had subsided, but lack of trust among investors had an impact on the number of foreign owned industry in Latin American countries.[140] Then in 1999 President Hugo Chavez

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that in some instances, courts should look at the circumstances surrounding the expropriation to determine if deferred payments are reasonable due to the financial burden of the expropriating state).

136. *See generally* Ian James, *Venezuela Faces Growing Load of Arbitration Cases*, CHRON.COM (Oct. 15, 2011), http://www.chron.com/business/article/Venezuela-faces-growing-load-of-arbitration-cases-2219946.php (noting that to some "expropriations are seen as patriotic moves to protect the country's resources from exploitation").

137. *See generally id.* (stating "Chavez maintains that government-run companies . . . are the linchpins to the new socialist system he's building"); *see also* Martha M. Hopkins, *Olympic Ideal Demolished: How Forced Evictions in China Related to the 2008 Olympic Games Are Violating International Law*, 29 HOUS. J. INT'L L. 155, 162–64 (2006) (explaining socialist China's constitutional amendments and change in expropriation procedures).

138. BUSINESS DICTIONARY, http://www.businessdictionary.com/definition/nationalization.html (last visited Oct. 19, 2011) (defining "nationalization").

139. FACUNDO ALBORNOZ, ET AL., INVESTMENT AND EXPROPRIATION UNDER OLIGARCHY AND DEMOCRACY IN A HECKSCHER-OHLIN WORLD, DISCUSSION PAPERS FROM DEP'T. OF ECON., UNIV. OF BIRMINGHAM, 2–3 (Jan. 22, 2008), http://econpapers.repec.org/paper/birbirmec/08-02.htm; *see also* Gordon, *supra* note 16, at 104.

140. *See generally* Quan Li, *Democracy, Autocracy, and Expropriation of Foreign*

took power in Venezuela with promises of leftist social and economic reforms.[141] Leading the anti-U.S. revolution,[142] President Chavez found an ally in Bolivian President Evo Morales, who has followed in some of the steps in the nationalization of the Bolivian energy industry.[143]

One of the latest expropriations in Venezuela consisted of a takeover of ExxonMobil assets and oil contracts.[144] The Venezuelan government's attempt to force foreign oil producers into joint ventures as minority partners was rejected by ExxonMobil.[145] Instead, the company initiated international arbitration proceedings which will guide Venezuela's decision as to how to proceed.[146] Furthermore, President Chavez has threatened to begin paying victims of expropriation with

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Direct Investment, 42 COMP. POL. STUD. 1098, 1100, 1111 (2009) (noting the declining trend of expropriations after 1976 and positing that a reason for such activity is the 'spoiled reputation' of the host country and lack of interest from 'forward-looking investors').

141. *See* Clifford Krauss, *Question Mark to Become Venezuela's President Today*, N.Y. TIMES, Feb. 2, 1999, *available at* http://www.nytimes.com/1999/02/02/world/question-mark-to-become-venezuela-s-president-today.html.

142. *See* Sarah Miller Llana, *Hugo Chavez Embraces Iran and Syria, wins Russian Support for Nuclear Program*, CHRISTIAN SCI. MONITOR (Oct. 22, 2010), http://www.csmonitor.com/World/ Americas/2010/1022/Hugo-Chavez-embraces-Iran-and-Syria-wins-Russian-support-for-nuclear-program.

143. Federico Fuentes, BOLIVIA RISING (Sept. 7, 2011), http://boliviarising.blogspot.com/2011/09/bolivia-plans-to-hike-mining-royalties.html. Note that although a significant amount of Venezuelan expropriations have been targeted towards U.S. owned corporations, namely oil corporations, these do not comprise the whole extent of injured parties, which include many local producers and manufacturers as well. *See* Enrique Andres Pretel, *Venezuela's Chavez Nationalizes Local Steel Company*, REUTERS (Oct. 31, 2010), http://www.reuters.com/article/2010/10/31/us-venezuela-sidetur-idUSTRE69U2D120101031.

144. *See* Corina Rodriguez Pons & Nathan Crooks, *Venezuela's PDVSA in Talks on $6 Billion Settlement with ExxonMobil*, BLOOMBERG, (Sept. 21, 2011).

145. *See* Nathan Crooks & Corina Rodriguez Pons, *Venezuela to Wait for ExxonMobil Arbitration Decision*, BLOOMBERG, (Sept. 27, 2011).

146. *See id.* This move by the Venezuelan government is similar to what Argentina attempted to force upon LG&E by demanding that LG&E either renegotiate the gas contracts or the government would rescind the concession contracts. *See* Andre von Walter, *LG&E Energy Corp. and ors v. Argentina, Decision on Liability*, INVESTMENT CLAIMS (July 31, 2008), http://www.sadarbitrazowy. org.pl/upload/LGEv.Argentina2006.pdf.

government debt bonds.[147] This would cause an even greater injury due to the fact that, with its regulated currency exchange, Venezuela currently has one of the highest inflation rates in the world.[148] Between the instability of the government and the increasing inflation rates, those bonds could be nearly worthless in a matter of years, or even months.[149] Regardless of this partial win by ExxonMobil, the hostile environment continues to damage foreign relations and to create further uncertainty for investors in South America.[150]

In Bolivia, Evo Morales recently sent armed army troops into the natural gas facilities to be expropriated and nationalized.[151] Morales, whose election campaign succeeded Chavez's, used the promise of nationalization of the energy industry as his political platform.[152] Luckily, gas corporations and other providers at least had some warning of what was to come, giving some of them the time necessary to take preemptive measures.[153]

A. Constitutional Protections

The need for further international agreements and treaties is demonstrated by the fact that most of these countries have provisions in their constitutions meant to encourage foreign investment and place certain limitations on the powers of

147. *See generally* Audrey Racine & Kate Williams, *Chavez Orders Seizure of U.S.-Owned Cargill Plant* (May 3, 2009) http://www.france24.com/en/20090305-venezuela+chavez-seizure-us-rice-processing-plant-nationalization (quoting Chavez stating that "if [a U.S. corporation] gets funny with us . . . we will go for expropriation and pay them with debt bonds").

148. *See* STRATFOR, *Venezuela's Unsustainable Economic Paradigm*, 2 (Aug. 4, 2010), http:// www.stratfor.com/memberships/168524/analysis/20100803_special_report_venezuelas_unsustainable_economic_paradigm.

149. *See generally* Thierry Ogler, *Venezuela Bond Default Looms, Says Analysts*, EMERGING MARKETS (Aug. 10, 2010), http://www.emergingmarkets.org/Article/2689865/Venezuela-bond-default-looms-say-analysts.html (noting concern over the ability of Venezuela to repay foreign debt).

150. *See* Geoffrey Durham, *supra* note 137.

151. Jardine Lloyd Thompson, *Bolivia's Gas Nationalization Indicative of Larger Trend*, JLT (May 11, 2006), http://www.jltgroup.com/default.asp?docId=14603.

152. *Id.*; Alvaro Vargas Llosa, *No Left Turn*, N.Y. TIMES (Dec. 27, 2005), http://www.nytimes. com/2005/12/27/opinion/27llosa.html?ref=evomorales.

153. Thompson, *supra* note 157.

expropriations. For example, the Venezuelan constitution, just like the United State's constitution, guarantees the right to property and just compensation in the event of expropriation.[154] Legislation on this matter goes even further with the Expropriation Law of 1947.[155] This law requires "(1) a formal declaration of public utility; (2) a declaration stating that the project to be carried out requires all or part of the property to be transferred; (3) appraisal of the property to be transferred; and (4) payment of the price representing compensation."[156] Yet there is a major loophole in this statute. Even though it requires a formal declaration of public policy, there is no mention of what types of policy will be considered adequate for expropriations and allowed by the international and even national communities.[157] A mere requirement for some sort of declaration has allowed President Chavez to come up with all sorts of policy reasons for expropriating private property.[158] This opened the doors for him to not only expropriate assets in the energy industry, claiming the need to regain control of Venezuelan natural resources, but also to find a policy reason to expropriate anything from two Hilton hotels to the land of a leading beer producer in Venezuela.[159]

B. Issues with Jurisdiction

A factor that investors must take into account when deciding where to go into business is where they could seek

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154. *Compare* CONSTITUCION DE LA REPUBLICA DE VENEZUELA ASAMBLEA NACIONAL CONSTITUYENTE [CONSTITUTION] 1999, art. 115 (Venez.), *with* U.S. CONST. amend. V.

155. LOWENFELD, *supra* note 33, at 213.

156. *Id.*

157. *See* Harvey Yates, *Condemnation in the United States and Expropriation in Venezuela: A Comparative Legal Study*, 6 LAW. AMS. 259, 267 (1974).

158. *See id.* at 267, 271; *see also Full Speed Ahead*, ECONOMIST (Oct. 29, 2010), http://www. economist.com/blogs/americasview/2010/10/expropriations_venezuela.

159. Andrew Breitbart, *Venezuela Seizes a Landmark Hilton Hotel*, BRIETBART.COM (Oct. 13, 2008) http://www.breitbart.com/article.php?id=cng.641f6a1ace6620056b73f6b56e7b6cd8.b31; *Chavez Orders Expropriation of Brewer Polar's Prime Land*, FRANCE24.COM (Apr. 28, 2010), http:// www.france24.com/en/20100428-chavez-orders-expropriation-brewer-polars-prime-land.

recourse in the event that the deal goes wrong.[160] In cases of expropriation, the corporation and its investors will battle against a foreign government,[161] making the concerns even greater.

Until recently, in most of the world, a victim of expropriation would most likely have to count on his own government to apply diplomatic measures of protection.[162] But in Latin America jurisdiction over foreign investment disputes were mostly handled under the Calvo doctrine.[163] Carlos Calvo, from Argentina, created the Calvo doctrine as a response to the diplomatic reactions to international investment disputes.[164] Diplomacy even included the threat of military actions in many instances.[165] The doctrine stipulated that "jurisdiction in international investment disputes lies with the country in which the investment is located, with no right of recourse by the investor to benefit from diplomatic intervention."[166] These "Calvo clauses" were placed in contracts and were even addressed in international treaties to protect the host country against foreign diplomatic attack.[167]

The obvious issue with the Calvo clause was the level of fairness that was awarded to a victim of expropriation.[168] The doctrine essentially states that the very same government that expropriated the foreign owned assets will be the one to determine (1) whether there was adequate justification for the taking and (2) if there was adequate justification, how much is just compensation,[169] as well as how it should be paid and how

160. *See* BAKLANOFF, *supra* note 3, at 5, 8.

161. *See* Arif Hyder Ali & Alexandre de Gramont, *ICSID Arbitration in the Americas*, GLOBAL ARB. REV., at 6 (2008) http://www.globalarbitrationreview.com/reviews/4/sections/7/chapters/50/ icsid-arbitration-americas/.

162. *See id.* (noting that in 1970 a court in Barcelona held that an injured foreign investor had "absolutely no remedy in international law").

163. *Id.*; *see* Cardenas Garcia, *supra* note 47, at 256, 272–73 (commenting on the Calvo doctrine and its implementation in settling disputes).

164. *See* Ali & Gramont, *supra* note 167, at 6.

165. *See id.*

166. *Id.*

167. *See id.*

168. *See id.*

169. *See* Yannaca-Small, *supra* note 4, n.1.

quickly.[170]

However, the United States government "contends that a U.S. national abroad may not sign away the right to protection by his government without its consent," and will support its citizens abroad through diplomatic efforts.[171] The U.S. recognizes the right to protect its citizens from international expropriations if they are the result of targeted discrimination against U.S. investors and when they are not properly compensated for such takings.[172] Nevertheless, a mere focus on discrimination and property compensation will not ensure that a just nationalization takes place.[173] For example, such a narrow look into the proceedings could leave a loophole for the expropriating country to assert public reasons to deny the U.S. investor of its property on a premise other than discrimination.[174]

Another method of handling jurisdiction is that available with the International Center for Settlement of Investment Disputes (ICSID).[175] The ICSID Convention, further analyzed in the sections below, provides that "a signatory state may 'consent' to arbitration claims being filed against it by an investor from another signatory state . . . [through] investment treaties,

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170. *See* Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After The NAFTA*, 25 ST. MARY'S L.J. 1147, 1166 (1994) ("Latin American and other developing nations take the position that compensation has to be determined by the laws and regulations of the nationalizing or expropriating state. The United States does not maintain this view."); Stanley D. Metzger, *Property in International Law*, 50 VA. L. REV. 594, 598–607 (1964) (outlining the Calvo doctrine theory).

171. BAKLANOFF, *supra* note 3, at 5. The U.S. fully recognizes a sovereign nation's right to expropriate property owned by foreign investors as long as such nation abides by international law. *Id.*

172. *Id.*

173. *See generally* Yannaca-Small, *supra* note 4, at 2–5. (explaining that besides direct expropriation, where compensation is considered, there is also the issue of indirect expropriation, which requires investigating other factors).

174. *See* F.V. Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AMS. 1, 28 (1980).

175. *See* Ali & de Gramont, *supra* note 167, at 6; *see also* Richard Deutsch, 33 HOUS. J. INT'L L. 589, 594 (2011) (explaining dispute settlement through ICSID Arbitration).

investment agreements, and the local investment laws of the host states."[176] More than 140 countries have ratified the ICSID, and roughly 250 cases have been filed with the ICSID.[177]

Similar to the argument that the Calvo doctrine is unfair to the foreign investors, there is validity to the argument that arbitration with the ICSID is just as unfair to the host country.[178] For the most part, corporations and investors from capitalist nations are the ones filing suit against socialist countries,[179] and holding arbitrations in the U.S., a capitalist country, may present a bias towards anti-socialist ideas.

One solution to this issue would be the creation of preemptive contracts that designate a third party country as the forum for arbitration of any disagreements and other issues that may arise between the host country and the investors.[180] Of course, the challenge would then be persuading the host country to agree to a contractual ICSID clause when it is already so nationalistic as to expropriate private property.

VI. POSSIBLE SOLUTIONS FOR THE CURRENT TIMES

Based on the explanation of expropriations thus far, readers should be feeling disheartened and disappointed at the lack of possibilities and fairness now present in the international community. The question then becomes, should investors give up and abandon all risky international markets?

Regardless of the high risk present in some Latin American countries, there are real benefits to entering massive, new

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176. *Id.*

177. *Id.* (noting that the most common forum for ICSID disputes is in Washington, D.C.).

178. *See generally id.* at 8 (noting tribunals have a history of not supporting their findings and the high number of cases decided against the host state).

179. *See* Jean E. Kalicki, *ICSID Arbitration in the Americas*, ARB. REV. AMS., at 3 (2007), http://www.arbitralwomen.org/files/publication/4911201000239.pdf (noting most of the claimants are investors from Europe or the U.S); *see generally* Jorge G. Castaneda, *Latin America's Left Turn*, FOREIGN AFFAIRS (2006), http://www.foreignaffairs.org/20060501faessay85302/jorge-g-castaneda/ latin-america-s-left-turn.html (noting the leftist-socialist turn of many Latin American countries, including Venezuela, Argentina, and Bolivia).

180. *See Contemporary Problems in International Arbitration*, *in* CENTRE FOR COMMERCIAL LAW STUDIES, QUEEN MARY COLLEGE, UNIV. OF LONDON 102 (1987).

markets in such close proximity to the United States.[181] Some of the upsides include shorter transportation distances for goods, as well as the commonalities between western cultures.[182] Furthermore, the fact that two languages cover the great majority of the Latin American region makes distribution and sales a much easier task compared to other continents, such as India and Asia, where dozens of dialects may be prevalent in a small area.[183]

Due to the benefits of entering these potentially risky markets, investors and their attorneys must try to determine what options to pursue in order to lessen the risk of nationalization and expropriation with or without compensation. Until the international community decides upon a single rule of law that applies to all countries that decide to expropriate property belonging to a foreign investor, some of the options available include insurance policies, contract clauses and reliance on international treaties and trade agreements.[184]

A. Insurance Policies

Possibly the best preemptive measure that a transnational company can take against the risk of expropriation is to have an insurance policy issued against the property at risk, whether tangible, such as a factory or plant, or intangible, such as oil and gas concessions.[185]

Some world investment insurers include the World Bank with its Multilateral Investment Guarantee Agency (MIGA), the United States' Overseas Private Investment Corporation

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181. *See* Cuervo, *supra* note 28, at 638–41 (noting that Venezuela sits atop the "largest hydrocarbon reserves in the Western Hemisphere. . . . When Venezuela's extra heavy oil reserves are included, the country has the largest oil reserves in the world at an amount that would exceed 310 billion barrels. . . . [Moreover] for oil export purposes, Venezuela is located only five days away from the United States").

182. *See id.* (declaring that for oil export purposes, Venezuela is located only five days away from the United States); *see generally* Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 329, 331–32 (1996) (describing common characteristics in Western cultures).

183. *See* Languages Spoken in Each Country of the World, INFOPLEASE (2007), http://www. infoplease.com/ipa/A0855611.html.

184. Joffé et al., *supra* note 36, at 7–13.

185. *Id.* at 12.

(OPIC), and other private insurance companies.[186] Depending on the type or location of the investment, certain insurance policies may not cover the political risks of expropriation.[187] For example, to qualify for the World Bank's MIGA insurance, the investor must be in a MIGA member country, and the investment must be targeted toward a developing member country.[188] Furthermore, investments involving illegal activities and those that are not environmentally conscious are not eligible for coverage.[189] Ultimately, the World Bank and MIGA's bottom line is to "promot[e] economic growth and development" by insuring "investment projects [that] must be financially and economically viable, environmentally sound, and consistent with the labor standards and other development objective of the country hosting the investment."[190]

One clear benefit of insuring through MIGA is the fact that many of these developing countries are dependent on financial aid provided by the World Bank.[191] As a result of this relationship of dependence and necessity, high risk Latin American countries are likely to respect agreements that are insured by MIGA.[192] Otherwise, they risk crossing the World Bank, jeopardizing millions of dollars of aid, often needed by

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186. *Id.*

187. RALPH H. FOLSOM ET AT., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK 1273–74 (10th ed. 2009).

188. WORLD BANK GROUP, MULTILATERAL INVESTMENT GUARANTEE AGENCY, http://www.miga.org/investmentguarantees/index.cfm?stid=1798 (noting that some of the member countries that may be eligible for insurance issued in favor of their investors include the United States, United Kingdom, Germany, Australia, etc., and some of the eligible developing member countries with high expropriation risks in Latin America include Argentina, Bolivia, Mexico, Peru, and Venezuela, among others).

189. *Id.* Other investments not covered under MIGA are those involving the production or trade of weapons and munitions, alcoholic beverages other than beer and wine, tobacco products, unbounded asbestos products, gambling services, and drift net fishing. *Id.*

190. *Eligibility*, WORLD BANK, MULTILATERAL INVESTMENT GUARANTEE AGENCY, http:// www.miga.org/investmentguarantees/index.cfm?stid=1548 (last visited Oct. 19, 2011).

191. *Id.*

192. *Projects*, WORLD BANK, MULTILATERAL INVESTMENT GUARANTEE AGENCY, http://www. miga.org/projects/index.cfm?stid=1531 (last visited Nov. 3, 2011).

third world countries for their mere survival.[193]

Another popular form of insurance is that offered by United States' Overseas Private Investment Corporation (OPIC). Although the name implies that it is a private corporation, it is in fact a U.S. government agency.[194] OPIC was established in 1971 with the purpose of protecting and managing the risks of U.S. investments abroad, as well as "foster[ing] economic development in new and emerging markets"[195] by requiring that U.S. transnational investors abide by US policy, including international standards on the environment and worker as well as human rights.[196] OPIC's South American 2010 portfolio of insured investments includes a project for the creation of affordable housing facilities[197] and a financing project in Mexico;[198] however, there have not been many projects in recent years involving oil and gas concessions and other production plans.[199] Unlike the World Bank's MIGA program, the United

193. Since the beginning of the MIGA program, MIGA has insured more than 700 investment projects, and has only had to pay out claims to six of its insurance policy holders—none of which were due to expropriations. *Projects*, WORLD BANK, MULTILATERAL INVESTMENT GUARANTEE AGENCY, http://www.miga.org/projects/advsearchresults.cfm?srch=s (last visited Nov. 18, 2011); *Who We Are*, WORLD BANK, MULTILATERAL INVESTMENT GUARANTEE AGENCY, http://www.miga.org/whoweare/index.cmf?stid=1792#con9 (last visited Nov. 18, 2011).

194. Joffé et al., *supra* note 36, at 12 (noting that even though OPIC is a U.S. government agency, it is self-sustaining, thus it does not operate at the expense of U.S. taxpayers). OPIC's profits and self-sustainability come from its ability to lend money for investment purposes at fixed interest rates and risk assessment measures, as those performed by any other private insurance company. *See* OVERSEAS PRIVATE INVESTMENT CORPORATION (OPIC) *OVERVIEW*, http://www.opic.gov/about-us (last visited Jan. 12, 2011).

195 *Overview*, OVERSEAS PRIVATE INVESTMENT CORPORATION (OPIC), http://www.opic.gov/about-us (last visited Jan. 12, 2011).

196. *Id.*

197. *Latin American Affordable Housing Facility*, OVERSEAS PRIVATE INVESTMENT CORPORATION (2010), http://www.opic.gov/sites/default/files/docs/latin_america_affordable_housing_facility.pdf.

198. Genworth Seguros Mexico, *Project Profiles and Descriptions*, OVERSEAS PRIVATE INVESTMENT CORPORATION (2010), http://www.opic.gov/sites/default/files/docs/genworth_mexico_ smef.pdf.

199. Scot W. Anderson, *Expropriation, Nationalisation and Risk Management*, TOUCH BRIEFINGS (2008), http://www.touchbriefings.com/pdf/3046/anderson.pdf. In addition to investment insurance, OPIC provides loans to U.S. investors abroad. *Small Business Assistance*, OVERSEAS PRIVATE INVESTMENT CORPORATION, http://www.opic.

States' OPIC does not have nearly as much influence on poorer, developing countries.[200] As a result, OPIC tends to be more selective on the types of projects it insures and has a higher risk of having to actually pay out claims to insurance policy holders.[201]

B. Treaties and the Use of Treaties Against the Calvo Doctrine

Ideally, the international legal community would come together to write a treaty—one that would specify exactly when a country may or may not expropriate and under what expressed circumstances an expropriation or nationalization would be acceptable. However, dealings between countries are more complicated than that,[202] and the current legal views on expropriations around the world are composed of and ruled by more than 2,000 free trade agreements.[203]

As previously mentioned, one method of standardizing such disputes that has been prominently used among nations and contracting parties has been the ratification of the International Centre for Settlement of Investment Disputes (ICSID).[204] ICSID was "established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,"[205] written by the Executive Directors of the World Bank, and has been in effect for ratifying countries since 1966.[206] ICSID clauses in international investment contracts clarify that in the event of a dispute the parties will go through a dispute resolution process that complies with ICSID rules and regulations.[207] This forum provides a much fairer forum for

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gov/small-business.

200. FOLSOM ET AL., *supra* note 193, at 1274.

201. *Id.* at 1273–74.

202. Goh Chien Yen, *Expropriation and Investor-State Disputes: The Dangers of International Investment Agreements*, THIRD WORLD NETWORK 1–2, http://www.twnside .org.sg/title2/resurgence/ 182-183/Cover04.doc.

203. *Id.*

204. Joffé et al., *supra* note 36, at 7–8.

205. *About ICSID*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&action Val=ShowHome&pageName=AboutICSID_Home.

206. *Id.*

207. *Id.*

expropriation disputes as opposed to the Calvo Clauses most commonly seen in South American investment and concession contracts.[208] However, ICSID does not provide an actual facility where the dispute resolution process will take place.[209] Rather it sets forth rules and regulations to be followed, some of which include the type of facility and location in the globe that may be used for dispute resolution between specific contracting parties.[210]

Treaties, such as those ratifying ICSID, are essential when facing foreign laws and regulations such as those set forth by the Calvo doctrine.[211] The Calvo doctrine aimed to protect national sovereignty.[212] The Clause requires that any dispute regarding expropriation or any other matter involving an international investor be handled in that country's own courts of

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208. *Antecedentes—What is the Calvo Clause?*, INTERNATIONAL COMMUNITY FOUNDATION (May 2010), http://www.icfdn.org/publications/housing/007.php. Note that this trend is changing as the negotiating power of international energy companies appears to be increasing, forcing some Calvo Clause countries to agree to ICSID. *See generally List of Pending Cases*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last visited Jan. 2011) (showing dozens of energy, prominently gas, related ICSID cases against Argentina, which is the originating country, and firm believer, of the Calvo Clause); *see also* Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 LAW & POL'Y INT'L BUS. 1169, 1185–93 (1995); *and* Cemex v. Bolivarian Republic of Venezuela, [2010] ARB/08/15 (ICSID) (noting that Venezuela, just like most other South American countries, has been reluctant to accept the provisions set forth in ICSID, and signed the convention in 1993, just under thirty years after the convention's adoption). Article 151 of the Venezuelan constitution incorporates a local jurisdiction provision in foreign investment contracts, a modality of the Calvo Clause; however, this is only a default law that does not require strict application and can be contracted around. Cuervo, *supra* note 28, at 657–58.

209. *ICSID Dispute Settlement Facilities*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities.

210. *Id.* Parties may choose to hold an arbitration procedure in a third country, in the hopes of finding an unbiased and fair forum. *See, e.g.*, QUEEN MARY COLLEGE, UNIV. OF LONDON, *supra* note 186, at 102.

211. Cardenas Garcia, *supra* note 47, at 271–72.

212. Francisco Orrego Vicuña, Keynote Remarks Made at the Conference on Regulatory Expropriations in International Law: Carlos Calvo, Honorary NAFTA Citizen (Apr. 26, 2002).

law and under that country's laws and regulations.[213] It binds an international investor to the following conditions: "(1) Submission to local legal jurisdiction; (2) application of local law, (3) assimilation of foreigners to local contracting arrangements, (4) waiver of diplomatic protection in a foreigner's home state, and (5) surrender of rights under international law exclusion."[214] In Mexico, for example, foreign investors may only acquire property if they would first agree to a Calvo Clause set forth in the contract, which would force the foreigner to consider itself a national of the state.[215] Presumably, the main purpose of enforcing this "national" treatment is to keep the foreigner's home country from taking retaliatory measures against the host country in the event of a foreign investment dispute.[216]

A second doctrine that may affect a claim for expropriation is the Drago doctrine. This was created by Argentinian international law writer Luis Maria Drago as a response to political and military pressure from Great Britain, Germany, and Italy against Venezuela.[217] Drago's doctrine stated that a country should never attempt to collect a public debt from a sovereign American state by the use of armed force.[218] This goes hand in hand with the Calvo doctrine, as both theories dictate that a foreign investor should not rely on protection from his

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213. *Antecedentes*, *supra* note 214.

214. *Id.* (*citing* Roger Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Factfinding*, 7 LAW & POL'Y INT'L BUS. 813, 818 (1975)).

215. *Id.*

216. *See id.* One example of a Calvo Clause states "[t]he parties hereby waive any right they may have under any applicable law to a trial by jury with respect to any suit or legal action which may be commenced by or against the other concerning the interpretation, construction, validity, enforcement, or performance of this agreement or any other agreement or instrument executed in connection with this agreement. If any such suit or legal action is commenced by either party, the other party hereby agrees, consents, and submits to the personal jurisdiction of . . . Mexico with respect to such suit or legal action." *Id.* (*citing* Desarrollos Punta La Paz, S de RKI. De C.V. contrato de promesa de fideicomiso, http://www.icfdn.org/publica tions/housing/007.php#39).

217. *See* Kathryn Sikkink, *Reconceptualizing Sovereignty in the Historical Precursors and Current Practices*, 19 HOUS. J. INT'L L. 705, 716–17 (1997).

218. *Id.* (noting that Drago's doctrine sought to use law to limit European intervention in Latin American); G. POPE ATKINS, LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM 214 (2d. ed. 1989).

own country to solve a claim of expropriation, and instead, should proceed through the judicial and administrative system in the host country.[219]

These doctrines have great potential for abuse. Evidenced by the mere existence of the Calvo and Drago doctrines, Latin American countries can be adverse to foreign investors, whether North American or from other nations.[220] This places great distrust in the potential investor who may be fully aware of the fact that he will likely not get a fair trial in a court comprised of judges who believe in the Calvo doctrine and who believe in, and are adverse to, the "American Imperialism."[221] Given the nature of the world's trend toward global and interrelated economies, it is in the best interest of Latin American countries to begin restoring trust with foreign investors and demonstrating good will and fair dealing by ratifying, signing, and honoring treaties like ICSID.[222] Nevertheless, ICSID does not solve the most subjective and intrinsic problem presented by expropriations.[223] Latin American governments still have broad discretion to fabricate policy reasons to expropriate or nationalize property owned by foreign investors.[224]

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219. *See id.*

220. Omar E. García-Bolívar & Jon Schmid, *The Rise of International Investment Arbitration in Latin America*, BG CONSULTING, http://www.bg-consulting.com/docs/rise_international_arbitration. pdf.

221. Anibal Sabater, *The Weaknesses of the "Rosatti Doctrine": Ten Reasons Why ICSID's Standing Provisions Do Not Discriminate Against Local Investors*, 15 AM. REV. INT'L ARB. 465, 468–69 (2004); Guy Raz, *World Sees "Imperialisim" in American Reach, Strength*, NPR (Nov. 2, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=6423000.

222. *See* Clark, Martire & Bartolomeo, Inc., *International Centre for Settlement of Investment Disputes: Stakeholder Survey* 5 (Oct. 2004), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=18_1.pdf.

223. *See generally United Nations Conference on Trade and Development: Dispute Settlement*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 1 (2003), http://www.unctad. org/en/docs/edmmisc2 32add5_en.pdf (highlighting the fact that the ICSID Convention does not settle the question of which country's law to apply).

224. *"Not So Private Negotiations": Mexico Expropriates the Oil Companies*, HISTORY MATTERS, http://historymatters.gmu.edu/d/5170/ (last visited Feb. 18, 2012).

C. Contract Clauses

Another way to avoid expropriation or at least expropriation without compensation is by establishing a set of rules and procedures to be followed by the contracting parties in the event that the circumstances surrounding the deal were to change.[225]

For example, hypothetically a foreign investor could enter into a concession contract with a government that provides that in the event that taxes were to increase for the general population they would remain the same for the owner of the investment or otherwise the government would incur penalties under the contract. Even though a government may still have as its goal to expropriate the assets, it would be easier to win arbitration under breach of contract and get an appropriate amount of damages, instead of bearing the burden of having to prove there has been an indirect expropriation.[226] The leverage the investor may enjoy in order to include these types of protection clauses into the contract would depend on how pressing the country's needs are for foreign investments.

D. NAFTA's Expropriation Clause

Although the North American Free Trade Agreement (NAFTA) was meant to expand and encourage investment, Chapter 11 of NAFTA contains an expropriation clause that may hinder this very purpose.[227] Unlike the other issues analyzed so far, the problem on this agreement may just be that the expropriation clause is too broad in regards to what constitutes a creeping expropriation.[228] This has led to suits by investors against NAFTA governments "for actions such as banning a

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225. *See* Anderson, *supra* note 205 (recommending that foreign investors be very specific in their contracts, obtain insurance, and add an ICSID clause to their agreements, as well as any other procedure they choose to follow in the event of an expropriation).

226. *See* Michael Pryles, *Lost Profit and Capital Investment*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION 1, 4–5 (Feb. 21, 2009), http://www.arbitration-icca.org/media/0/ 12223892171920/damages_in_the_international_arbitration_paper.pdf.

227. *See* Emma Aisbett et al., *Regulatory Takings and Environmental Regulation in NAFTA's Chapter 11* abstract, 1 (Working Paper, Feb. 20, 2006), http://are.berkeley. edu/~karp/iiasubmitfeb06. pdf.

228. *See id.* at 2.

polluting petrol additive . . . and refusing to permit a hazardous waste facility," all challenged under a broad reading of NAFTA's expropriation clause.[229]

As detrimental as Chapter 11 can be to NAFTA countries,[230] it can also be beneficial to investors seeking to obtain assets and ensure they will be well protected in that state.[231] Unlike in the rest of Latin American countries where the Calvo doctrine is king,[232] and an investor cannot always negotiate an ICSID clause into a contract,[233] under NAFTA a foreign investor may enjoy the "Most Favored Nation" treatment.[234] This would see to present the perfect opportunity for an investor seeking to invest in Latin America. However, of all Latin American countries, only those seeking to invest in Mexico will benefit from these protections.[235]

VII. IN A PERFECT WORLD

Looking at the new wave of expropriation in Latin America, the need for third world countries to direct foreign investments into their countries, and the negotiation power held by most developed nations,[236] the world may see itself inclined to demand that less developed countries, with a higher risk of expropriating assets, enter into standardized international

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229. *Id.* at 4 (also noting that "[e]xpropriation clauses which force governments to compensate investors for costs arising from regulation can induce hosts to internalize costs, thereby eliminating excess regulation and promoting investment").

230. *See id.* at 5 (explaining that "under a narrow police powers carve-out, agreements with strong rights to invest [such as NAFTA] may cause a host to receive more foreign investment, but benefit less").

231. *See generally id.* at 3–4 (describing some potential benefits to investors).

232. *Supra* section VI.(B) (discussing the Calvo doctrine).

233. *See* Alexia Brunet & Juan Agustin Lentini, *Arbitration of International Oil. Gas, and Energy Disputes in Latin America*, 27 NW J. INT'L L. & BUS. 591, 592–94, 610–11 (2007)

234. *See* Aisbett, *supra* note 233, at 1.

235. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (of all the Latin American countries, only Mexico is a party to NAFTA, along with Canada and the United States).

236. *See* Dirk Willem te Velde, *The Global Financial Crisis and Developing Countries*, Overseas Development Institute 3–4 (Oct. 2008), *available at* http://www.odi.org.uk/resources/ download/2462.pdf.

agreements.[237] This multinational, and hopefully worldwide, agreement must cover every single aspect of expropriations.[238] The two aforementioned elements of expropriations are a good starting point: adequate justification and just compensation.

Adequate justification is the hardest to define and place limitations on, without making it overly broad or overly constricted.[239] A common view seems to be that as long as a country does not discriminate against citizens of a specific nation[240] and there is a public purpose to the expropriation, then it may expropriate with just compensation.[241] The problem that follows is that even if there is just compensation, which almost never equals full compensation, the risk that corporations may be expropriated greatly increases the costs of future investments.[242] All of this occurs while the expropriating government reaps the benefits of all the effort and financing put forth by the foreign investor, making this not only a matter of compensation, but a matter of equity and fairness.[243]

The requirement that a state shall not discriminate against citizens of other states is a good starting point for the analysis. But whatever strength this requirement gives to the law is subsequently taken away by the overly broad loophole of a public purpose. Although these two requirements are not mutually exclusive, in that no public purpose makes it acceptable to discriminate through expropriation,[244] claiming a

237. *See generally* William J. Clinton, Investment Treaty with the Republic of Ecuador, Message from the President of the United States, S. Doc. No. 103–15 (1993).

238. *Id*.

239. *Supra* section VI(C) (discussing ambiguities concerning adequate justification).

240. *See* GORDON, *supra* note 16, at 154 (noting the international standard of the "absence of discrimination against foreigners").

241. *See id.* at 173 (noting Mexico's right to expropriate "provided she pays just compensation"); *see also* BAKLANOFF, *supra* note 3, at 5 (noting that the U.S. recognizes a sovereign nation's right to expropriate property owned by foreign investors when there is "a public purpose" and when "accompanied by just compensation," but not when it is "discriminatory against a U.S. citizen").

242. *See* Michael Pryles, *Lost Profit and Capital Investment*, 8 (2007), http://www.arbitration-icca.org/media/0/12223892171920/damages_in_the_international_arbitration_paper.pdf.

243. *See* Joffe, *supra* note 36, at 22.

244. *See* Clinton, *supra* note 243.

public purpose can easily conceal discrimination. Thereby giving the international community no other choice than to merely demand just compensation and allow the expropriation to continue.[245] The problem arises due to the fact that public purpose can be expanded to mean anything. If a country can find a public purpose to expropriate the land of a beer producer,[246] then it will not be so difficult to justify the expropriation a company with a more sensitive public interest; such as oil production or gas distribution.

A way to overcome this issue could be to delineate what constitutes a "public use" with more detail. For example, as seen above in the *Norwegian Shipowner's Claims* the United States needed a steady supply of ships for its naval army during a time when the country was in the brink of a world war.[247] Furthermore, Argentina's "creeping expropriation" against LG&E was a result of the country's financial crisis that quickly devaluated its currency and caused the unemployment rates to soar, calling for the president to declare a state of emergency.[248] Aside from the methods and compensation for these expropriations, which may have been incorrect,[249] there can be

245. *See* Asian-Australia-New Zealand Free Trade Area (AANZFTA), ch. 11, Annex on Expropriation and Compensation, http://aanzfta.asean.org/index.php?page=annex-on-expropriation-and-compensation (last visited Jan. 10, 2011). The Asia, Australia, New Zealand Free Trade Area agreement demonstrates the same vague language seen in the Western Hemisphere when it comes to defining public purpose: "Non-discriminatory regulatory actions by a Party that are designed and applied to achieve a legitimate public welfare objective, such as the protection of public health, safety and the environment do not constitute expropriation." *Id.* However, it does slightly develop the concept further by stating that "[t]he determination of whether an action or series of related actions by a party in a specific fact situation, constitutes an expropriation . . . requires a case-by-case . . . inquiry that considers . . . the economic impact of the government action [,] whether the government action breaches the government's prior binding written commitment to the investor [, and] the character of the government action, including, its objective and whether the action is disproportionate to the public purpose." *Id.* It does not require that specific criteria be met regarding the nature of the public utility. *See id.*

246. *See Chavez Orders Expropriation of Brewer Polar's Prime Land*, *supra* note 165.

247. Norwegian Shipowner's Claim, *supra* note 80, at 314–16.

248. *See* J.F. HORNBECK, CONG. RESEARCH SERV., RS21130, THE ARGENTINE FINANCIAL CRISIS: A CHRONOLOGY OF EVENTS 28–32 (2002).

249. *See* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/01,

no doubt that events such as these can and may well constitute a crisis of sufficient enough proportions to justify taking extreme measures.[250] Yet, as demonstrated in the previous sections, Mexico and Venezuela have demonstrated that there can be a plethora of reasons that benefit the public yet do not sufficiently excuse the taking.[251] Mexico's mass expropriation was a result of political pressure to attempt to bring the country up to the new standards of living enjoyed by more developed countries.[252] And Venezuela's expropriations of the last two decades have been a part of the new government's anti-imperialistic approach to its foreign relations, yet both countries claimed public purposes to justify their actions.[253]

A workable solution would be the enactment and ratification of an international treaty requiring a pre-existing express policy or mandate in the host country's laws or regulations that clearly state the public policy declared by the expropriating government. The same treaty would create exemptions for host countries that are in a state of emergency due to war, an extreme financial crisis, or natural disaster.[254]

Just compensation should also be specified under this international law; however, it should only come into play once the court or tribunal has determined that the country is either (1) in a state of emergency, (2) extreme financial crisis, (3) has

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Award, ¶¶ 99-106 (July 25, 2007).

250. *See generally Norwegian Shipowners' Claim*, at 80 (explaining that is consistent with what the U.S. used as justification).

251. *See* Maurer, *supra* note 7, at 1; *Chavez Orders Expropriation of Brewer Polar's Prime Land*, *supra* note 165.

252. *See* GORDON, *supra* note 16, at 104–07. (stating that a primary factor behind expropriation was the consolidation of labor unions and the ensuing dispute over labor conditions).

253. *See* Cuervo, *supra* note 28, at 660, 683 (stating that the law nationalizing Venezuela's oil industry cites public policy concerns, while Hugo Chavez maintains a foreign policy based on hostile relations with the United States).

254. *See generally* Cesar Ayala Casas & Jose Bolivar Fresneda, *The Cold War and the Second Expropriations of the Navy in Vieques*, CENTRO JOURNAL, Spring 2006, at 11–13 (noting the use of the Cold War as a reason for expropriations by the U.S.); Robert Abtahi, *Indirect Expropriations in the Jurisprudence of the Iran-United States Claims Tribunal*, 3 J.L. CONFLICT RESOL. 80, 81 (2011) (noting the use of a financial crisis as justification); *Haffejee v. Wthek Wini Municipality* 2011 (1) SA (CC) at 17, ¶ 39 (S. Afr.) (noting the use of a natural disaster as justification).

experienced a natural disaster, or (4) demonstrates another public policy expressed in their laws and regulations. Once established that the policy reason is not an issue, the court or tribunal should then have to choose how the investor should receive just, or appropriate, compensation: market price or net book value, as well as the time frame for payment and interest rate applicable if paid in installments.[255]

The value of the asset should be determined by obtaining several appraisals from non-interested parties, or perhaps by accepting bids from investors to find the correct market value of the asset.[256] However, the appropriate level of compensation should always be full compensation.[257] Otherwise governments may be tempted to lure investors into their markets just to push them out thru expropriation at the first opportunity they get.[258] Net book value may only be appropriate if the company's liabilities are in the form of debt to local banks and the expropriating country is willing to exonerate the investor of such debt.[259] The only thing that may vary should be the timeframe in which the government may compensate the investor.[260] If a country experienced a natural disaster, they should be able to obtain some leeway to pay in installments to allow their country to recover from the disaster, similar to leniencies allowed in a force majeure clause.[261] Nevertheless, the government should pay in full if it decides to take the company's assets for the

255. *See* ASIAN DEVELOPMENT BANK, COMPENSATION AND VALUATION IN RESETTLEMENT: CAMBODIA, PEOPLE'S REPUBLIC OF CHINA, AND INDIA 64 (Nov. 2007), http://www.adb.org/ Documents/Reports/Capacity-Building-Compensation-Valuation/ Compensation-Valuation.pdf.

256. *Id*. at 260.

257. See Joffe, *supra* note 36, at 22 (stating "[i]n international law, the principle for compensation in such circumstances is that it should be fair, just, full, adequate, adequate, appropriate and effective").

258. *See id.* at 21 (noting "[e]xpropriation is one of the more extreme noncommercial risks faced by investors").

259. World Bank, *Guidelines on the Treatment of Foreign Direct Investment*, art. IV §§ 2–3 (2992), *available at* http://italaw.com/documents/WorldBank.pdf.

260. *See World Bank Guidelines on the Treatment of Foreign Direct Investment*, INVESTMENT TREATY ARBITRATION, ¶ 10, http://italaw.com/documents/WorldBank.pdf.

261. *See id.* (stating "[i]n cases where the State faces exceptional circumstances . . . compensation . . . may be paid in installments).

benefit of its own people through a time of crisis.[262]

VIII. CONCLUSION

When a country exercises its power of expropriation, the "public good" purpose upon which that country relied on to conduct such expropriation must be one recognized by the international community. If it is an arbitrary motive, the foreign states should have the power to protest and seek remedy. In a perfect world, the ideal solution would be to create an international agreement on expropriations that would specify the particular policy reasons and instances in which a country may expropriate property from a foreign investor. Furthermore, the agreement would have to set forth the method of payment that must be implemented, the time frame by which such payments must be made, and guidelines to determine the fair property value that must be repaid to the injured party. All of these goals could be met without stepping on the boundaries set forth by the Foreign Sovereign Immunities Act, yet the biggest challenge would most likely be to get the nations with socialist tendencies, the most risky nations, to agree to this matter. In the meantime, treaties like ICSID and bilateral trade agreements provide some sort of framework to be followed by high-risk countries. These provide some sort of protection to investors that, only a few years ago, would have been subject to Calvo and Drago doctrines, and of course, to the risk of never being paid or being paid inadequately, even if they managed to get a foreign court to rule in their favor.

Ultimately, this article is not only about the value of the assets expropriated, nor whether there has been just or fair compensation. Of course these are very important aspects of a judgment in an expropriation case. But very few times does it happen that the international community asks whether the expropriation was acceptable in the first place. The end of the road in this discussion seems to take place at Foreign Sovereign Immunities Act, yet nobody has defined the limits of Act. Rather it has simply become easier to get paid and get out, regardless of the losses that are normally incurred. Perhaps this issue will

262. *See* ASIAN DEVELOPMENT BANK, *supra* note 263, at 64.

continue to remain unresolved as long as there is just compensation, but the principle still remains, where should the line be drawn between a compensated expropriation based on a legitimate policy reason and stealing for a country's own advantage?