International Expropriation: Curse or Blessing?
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The very issue of international expropriation comes to the fore in the context of foreign direct investment from developed countries in developing countries.[1] Consisting of the taking of the private property of the investor by the host state for a public purpose or a national interest, expropriation is also considered a type of "political risk" and may come about suddenly or gradually.[2] Such a course of action carries with it disadvantages as well as certain benefits, yet given the current international political system on the whole, expropriation has the promise of benefit.

Disadvantages or "Cons"

Perhaps the most obvious disadvantage of expropriation is to drive foreign investors from and lessen foreign investment in a country that expropriates property. Investors, despite insurance as that offered by the Overseas Private Investment Corporation (OPIC), are not willing to take risks that could potentially result in losses of capital equipment, technology or intellectual property, resources needed for other operations, and a stream of profits for the private entity.

A deadly climate of uncertainty results when expropriations occur because a foreign investor who is considering "investing in another country…is influenced in making his decision mainly by its stability of political and social structure" so as not to "jeopardize his investment, opportunity for earning high profits, transferability of earnings, and safeguards against

[1] Swadesh S. Kalsi, "Encouragement of Private Foreign Investment in the Developing Country: Provisions in the Laws of Kenya," 6:3 *International Lawyer* 576, 577.
[2] Kalsi, 589; John W. Head, *Global Business Law: Principles and Practice of International Commerce and Investment* 3d. Ed. (Carolina Academic Press; Durham, North Carolina, 2012), 543.

expropriation of property."[3] With the foreign investors' losses, the possibility for strained relations between governments increases posing a further possibility of limited investment. Expropriation also costs the expropriating State in transactional costs and compensation to the foreign investor.

Related to this reality, expropriation, which functions the same way as eminent domain, results in a violation of the principles of the Enlightenment which principles require the protection of rights.[4] It is upon those principles that are based the dominant political entities of today, and it is believed that those principles are necessary for the proper structure of societies to insure stability and a good environment for investment.

Expropriation has an impact on domestic markets which is not necessarily good, according to the work of Hamid Mohtadi. In monopolistic situations, expropriation of the foreign investment results in the increase of production costs, and increase of the price to consumers.[5] This in turn results in the reduction of output and consumer surpluses.[6] In duopolistic situations, expropriation of the foreign investment results in the benefiting of national firms,[7] however, additional costs to the country arise if the State runs any of the expropriated enterprises.[8]

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[3] Kalsi, 580.
[4] Nadia E. Nedzel, Walter Block, "Eminent Domain: A Legal and Economic Critique," *University of Maryland Law Journal of Race, Religion, Gender & Class.* 7 (2007), 171.
[5] Hamid Mohtadi, "Expropriation of Multinational Firms: The Role of Domestic Market Conditions and Domestic Rivalries," *Economic Inquiry.* XXVIII (October, 1990), 815.
[6] Ibid.
[7] Ibid., 818.
[8] Ibid., 826.

Benefits or "Pros"

Expropriation enhances the sovereignty of the State and therefore strengthens the international system as the current international system is based on sovereign and equal states.[9] Without an international system based on these principles, the possibility of chaos and disorder on a broad scale – certainly regionally – is greatly increased.

Closely related to this first point is the point that expropriation of foreign investments enhances the power of the Government in the appropriating States. This keeps the Government in control of the society, and does not therefore lead to the disproportionate control of the society by private, foreign investors. Expropriation by Governments is part of the power that Governments have to use and dispose of territory and property under its control.[10] It is justified on the grounds of "national safety" as United States Secretary of State Robert Lansing said in 1921 and also to "perform all activities deemed necessary or beneficial to the populace living there".[11] Acting out of motives to benefit the populace over whom it exercises control, the legitimacy, power, and effectiveness (especially in maintaining order), of Governments is enhanced and society becomes more orderly. This is especially important at the current stage of social and political development found in so many developing or "Third World" countries.

Also closely related to the second point, Governments that expropriate place the management of investments in the hands of their country's own people. The development of the country is more likely to be for the benefit of that country than for the profit margins of foreign investors. Indeed, States seek national interests before those of the foreign investors as William

[9] Antonio Cassese, *International Law.* 2nd Edition (Oxford University Press: 2005), 48.
[10] Ibid., 51.
[11] Ibid.

B. McElhiney, III has written.[12] States expropriating foreign investments is a powerful check on the developed countries who seek to exploit the developing countries in promotion of "their political and economic aims."[13]

Conclusion

While there exists an international system that is based on sovereign and equal states, this is theory if not also aspiration as the reality is a lot different. There are developed countries and those termed developing, the rich and the poor, the powerful and the weak. Essential to establishing the preconditions for the Enlightenment principles that grace the powerful and wealthy countries in the system, there must first be established political entities, or Governments, that are able to exercise their jurisdiction for the benefit of the people in their countries. This allows the creation of conditions that allow the people of these countries to manage their own industries and affairs and this provides the needed stability for foreign investment. Expropriation, which adds to transactional costs by both the investor and the State conducting the expropriating, is an important power and reality for long term stability.

[12] William B. McElhiney, III, "Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention," *Texas International Law Journal.* 49 (2014), 604.

[13] Kalsi, 579.