

2-1-1973

Foreign Investments: Politics and International Law

T.E. J.P. Davinovic

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

T.E. J.P. Davinovic, *Foreign Investments: Politics and International Law*, 5 U. Miami Inter-Am. L. Rev. 10 (1973)
Available at: <http://repository.law.miami.edu/umialr/vol5/iss1/4>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

FOREIGN INVESTMENTS: POLITICS AND INTERNATIONAL LAW*

TOMISLAVO E.J.P. DABINOVIC**

*E ancora stimato uno principe quando elli é vero amico
o vero inimico. . . .* Niccoló Machiavelli *IL PRINCIPE*,
Chapter XXI.

The unfriendly attitude toward North American companies assumed by various Latin American Governments has manifested itself in various ways, politically and legally. The modern version started with the "expropriation" of the International Petroleum Company in Peru, but it has expanded gradually to some countries of the Andean bloc, and even to countries outside the bloc, principally Venezuela and Argentina. In our country, even though the instances of harassment have not been as marked, there has developed a negative political attitude towards foreign capital. This attitude has been reflected in different legal enactments dating from June 1970; in court decisions evidencing strong nationalistic tendencies; and, in political acts intended to let public opinion know the feelings of the government.

In fact, there has been truly a race between officials, men in public life and newspapermen to demonstrate and prove a deep resentment to all that is foreign, and particularly towards foreign companies. Argentine citizens who, for whatever reason are associated with foreign companies have been publicly ridiculed and reviled. Their honor, integrity and patriotism have been publicly questioned and even the coalition of official parties has included in its platform the ineligibility of these citizens to

*Translation of article "Las Inversiones Extranjeras Como Tema de Política y de Derecho Internacional," published in *Política y Economía*, No. 18, September 1972.

**Distinguished Argentine jurist and member of the firm of Mayer, Lobos & Clusellas. Mr. Dabinovic has written extensively on legal matters and has been a frequent lecturer in the United States on subjects pertaining to inter-American affairs.

public office by entering their names in special "registers." This automatically makes them second-class citizens.

Thus it is obvious that there exists a *vindicta pública* against foreign-owned companies, their representatives and officials. This has become a *cause célèbre* which a certain sector of Argentinian public opinion maintains in constant effervescence so that it may, with typical national-socialistic tactics, divert the public's attention from the true causes of the decadence and ruin of Argentina's economy.

Lately, the debate has once again reached a highly controversial sector—petroleum—paralyzing the normal flow of private investments. Because of the obvious inadequacy of public investments, this paralysis will undoubtedly bring about—even if the tendency were to be curbed, which is unlikely at this time—an unavoidable reduction in the rate of production.

There are well founded reasons for believing that the extraction and industrialization of many natural resources, especially energy producing resources, will follow the same fate of the public utilities, and that the same familiar results will ensue with the attendant grave effect on the overall deterioration of the quantitative and qualitative level of economic standards. In the case of petroleum, there are still two additional factors which are a source of great concern:

- a) An unaccountable identification with the exporting countries—Venezuela and Ecuador—which will probably be our suppliers and will profit from our import needs.
- b) The international impact of this political identification has its repercussion not only on the normal flow of investments typical of the sector, but it even extends to the political and legal posture of Argentina.

In order to clearly understand this second factor, it is necessary to analyze the political impact on the United States Government and public opinion of the expropriations without "prompt and adequate indemnification" recently carried out by some Latin American governments.

The report of the Department of State on "Nationalization, Expropriation and Other Takings of Properties of the United States and Other Countries Since 1960,"¹ analyzes the unfriendly actions towards foreign capital carried out in thirty-four non-communist countries. Some of the tangible results of those actions follow:

- a) *The economic substitutionary effect:* When governments succeed in raising the price of natural resources inordinately, investments decidedly lean towards the production of substitutes (synthetic or those obtained through the utilization of other resources.) Such is the case of petroleum which, as a result of shortages and rises in price due to OPEC's actions, presently justify substantial investments to develop substitutive sources of energy.
- b) *The political substitutionary effect:* The decided canalization of investments towards countries offering greater juridical and political guarantees—Canada, Australia—with which investing countries, particularly the United States, also have military pacts.

The State Department's report and the reaction of the North American public, whose fiscal interests are adversely affected (it should be borne in mind that the Treasury of the United States bears the brunt of the losses resulting from expropriations) motivated President Nixon's official statement published January 19, 1972, incorporated in his message to Congress.² In that statement, which deals with "economic aid and safety of investments in developing countries," President Nixon points out that one of the three basic aspects of the economic aid program is the "clarification of the role of private investments abroad, in development, in relation to the problems created by expropriations." Mr. Nixon went on to say the Government of the United States will adhere to the principles of international law whenever expropriations are carried out without proper indemnification. According to the principles of international law, the Government of the United States expects that in cases where governments expropriate U.S. companies or properties of private U.S. citizens, the following conditions will be met:

- a) That the expropriation is not a discriminatory act against North American property;
- b) that the expropriation is carried out for a public purpose; and
- c) that U.S. companies or citizens receive prompt, adequate and effective compensation.

The principles set forth constitute an official political pronouncement of the United States in the matter of expropriations as well as a general guideline regarding future relations with the countries receiving North American investments. Thus, it is of the utmost importance that countries which in the future hope to receive foreign investments respect the universally accepted principles of international law; also, that they establish their

positions regarding those principles. In other words, investing countries have divided the countries which receive capital investments into two major groups: those which wish to remain within the international juridical community and those which openly or surreptitiously support discriminatory and anti-juridical acts against foreign capital.

Diplomatic protection has undergone many phases, but only the less informed continue to believe that because the so-called gunboat diplomacy is no longer resorted to for the compulsory payment of foreign debts, diplomatic protection of foreign property has ceased to exist. This is not the case, and the International Court of Justice (an organ of the United Nations in which all political and ethnic groups are represented, including the socialist bloc) decided in the famous *Barcelona Traction* case³ that investment in a foreign country is part of the national patrimony forged by the citizens through their own efforts, and, as such, is entitled to juridical and political protection. Thus, it is to be construed that the national, fiscal or collective patrimony of States whose citizens suffer expropriations or acts of discrimination, is impaired.

The reader may ask whether or not the foregoing has a decided influence on the future economic policy of Argentina. I am aware that a clear and categorical definition of the treatment that will be accorded to foreign-owned enterprises is a subject of the utmost importance and a necessary pronouncement for any government which seriously considers the economic development of the country. It has been justly said that a domestic legal order which respects private property, whether national or foreign, is the only valid and effective guarantee for foreign investment.

In view of the events of recent years, it should be pointed out that some of the measures taken by the Government of Argentina have violated basic principles of international law, distorting the spirit of that law and reducing appreciably the security guarantees which have been traditionally offered by the juridical institutions of the country. These actions have affected, retroactively, private rights acquired through valid contracts and related legal procedures.

Political decisions affecting private rights—such as the cases of *Astra*, *Propulsora*, *Shell* and *Esso*—constitute examples of the differences between the principles applicable to property rights and contracts and constitutional precepts, as well as the traditional decisions of our superior courts based on the interpretation of those principles. “Neither the legislator nor the judge may, by virtue of a new law or its interpretation, take away a patrimonial right acquired under a previous law. In such a case,

the principle of non-retroactivity ceases to be a simple legal norm and merges with the constitutional principle of the inviolability of property.”⁴ At one time this was the position of our Supreme Court, and it offered the best guarantee to all national and foreign investors, ignoring development plans, promotional laws or capricious ministerial preferences.

Today, that guarantee no longer exists and it serves no purpose to continue under the delusion that juridical stability and security exist in Argentina. In contractual matters, the relativity between property rights and the will of the parties has been dealt with, first, politically, and secondly, juridically. Constitutional provisions protecting property rights (in all legal ramifications) have been down-graded to supplementary rules.

Superior courts have gradually recognized and accepted a substantial reduction in the constitutional guarantees concerning property rights, and, in the economic sector, have allowed the Executive to act almost without restriction of any kind. In this manner, the Executive has invaded the private sector, and has harmed and impaired legitimate economic interests through what may be considered indirect expropriations.

On the other hand, the intense political campaign sponsored and encouraged by the Government’s aulic circles, has diminished the independence of the Judiciary inasmuch as this branch of government now functions in a climate of intellectual violence emanating from the highest official circles. The freedom of judges to render decisions in accordance with the dictates of conscience has been curtailed by implicit pressures to interpret what is “good and just” in accordance with the official criteria of the moment.

The soundness of the juridical principles which guarantee stability in the international order depends on the effectiveness of domestic laws. If Argentina wishes to join the international economic and juridical community, it must return to its traditional legal order by respecting all of the provisions of its fundamental law.

New followers are joining the international juridical and economic community, as evidenced by the new policies adopted by the Soviet Union. Its State Insurance Company (INGOSSTRAKH) has recently taken over part of the expropriation risks covered by the Overseas Private Investment Corporation (OPIC) of the United States Government. According to Bradford Mills, President of OPIC, “this is the first time that a branch of the USSR Government has given its support to the Government of the United States to guarantee private U.S. investments overseas.”⁵

It is to be hoped that these facts will serve to enlighten some advocates of relativism on the meaning of juridical security, particularly when that security relates to the protection of foreign interests.

Since basic juridical principles of civilized society have been challenged for political reasons domestically and in the Hemisphere—with the express or tacit ideological support of Argentina—a return to the sources of our laws and legal tradition seems to be the only sensible course to follow. If not, in the words of St. Augustine, one must ask: “If the King has no respect for justice, who is the King but a powerful highway-robber?” and “who is the highway-robber but a little King?”

NOTES

¹U. S. Department of State, Bureau of Intelligence and Research Study RECS-14, November 30, 1971.

²The Department of State Bulletin, Vol. LXVI, No. 1702, February 7, 1972, p. 152.

³International Legal Materials, Vol. IX, No. 2, March 1970, p. 171, No. 87, et al.

⁴Fallos C.S., Vol. 137, p. 61.

⁵Comentarios en el Desarrollo Internacional, Sociedad para el Desarrollo Internacional, Vol. IX, No. 5, May, 1972, p. 3.