Research Article-Law Studies

Petroleum Business Review, Vol. 5, No. 2, pp. 75–86, Spring 2021

The Taking Over of a Foreign Investor's Property by the Host State in International Petroleum Agreements: How International Arbitration Practice Responds

Hamid Reza Younesi[a*]

[a] *Ph.D. Candidate, LL.M in International Oil and Gas Law and Policy (CEPMLP, University of Dundee, UK); DPhil in Law, University of York, York, United Kingdom. Email: hamid.r.younesi@alumni.york.ac.uk*

ARTICLE INFO

Keywords:
Expropriation
Foreign Investor
Host State
International Petroleum Contracts

Received: 16 March 2021
Revised: 20 April 2021
Accepted: 03 May 2021

DOI:10.22050/PBR.2021.277665.1175

ABSTRACT

The present article aims to examine the risk of host governments' interference with the property of foreign investors (expropriation) in the petroleum industry. Host states have the police power to make regulatory changes. The "police power" is defined as the inherent and plenary power of a sovereign to make all laws necessary and proper to preserve public security, order, health, morality, and justice. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government. The government can interfere with the contract, change the terms, or directly take the investment. This is why international petroleum disputes and arbitration practices have addressed such risk. For this purpose, the concept of property and compensable property rights under international law are significant. Indeed, expropriation conveys a deprivation of a property owner of this property. This paper assesses the concept of expropriation, the international legal requirements for a lawful expropriation, and then analyzes the relevant international arbitral awards in petroleum jurisprudence.

1. Introduction

The main reason for international petroleum disputes is the host government's interference with the property rights of the international investor. This interference may involve direct and indirect expropriation of the foreign investor's property that will adversely affect the profitability of the petroleum project for the international oil company (Wallace, 2002, p. 977). Expropriation has been the main problem facing foreign investors. It took place in the 20th century, is taking place nowadays, and will occur in the future. The sort of risk that is the subject of this article is direct expropriation.

2. The host government's mechanisms to control international oil companies

Expropriation arises from the fact that the host government has a right to control the foreign investor once an investment has been made. Host governments may control foreign investment in their territory at the time of entry, and also once the investment has been made, they can regulate and control the operations of the international oil company in their jurisdiction (Brownlie, 2003, p. 508).

Host states have the police power to make regulatory changes. The "police power" is defined as the inherent

and plenary power of a sovereign to make all laws necessary and proper to preserve public security, order, health, morality, and justice. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from the government (Mewett, 1959, p. 222). The government can interfere with the contract, change the terms, or directly take the investment.

Indeed, host governments exercise maximum control over foreign investors that operate in their territory, and it is settled that they are authorized to control foreign investors at the time of entry and over the life of the investment project. The host government has unlimited rights to place conditions on the entry of the foreign company into its territory. It is stated that no international legal authority today would dispute the virtually unlimited right of a sovereign state, if it so chooses, to prescribe in what cases and under what conditions that alien would be admitted (Wallace, 2002, p. 329).

Thus, the host government exercised two main control mechanisms over the foreign company: the right to control potential investment at the time of entry and the host state's right to regulate and control the future operations in its territory. In addition, the host state has sovereign powers, including legislative and administrative measures, and can prioritize its interests when they conflict with the foreign investor's interest in the energy industry.

While the host government can force the foreign company to meet the legal requirements, it is subject to the accepted standards of international law. Under international law, host governments in the presence of certain conditions can expropriate foreign investors' property. This right is concerned with the sovereignty of the host government and has been widely accepted (Wallace, 2002, p. 977). Furthermore, this right was recognized by the United Nations General Assembly Resolution, 1803 (XVII) 1962[1] and confirmed by some international arbitrations and bilateral investment treaties.[2] Similarly, chapter two of the Charter on Economic Rights and Duties of States has recognized the right of nationalization and expropriation for host states.[3] While there is a controversy concerning some conditions for expropriation, mainly assessment of compensation under international law[4] between developed and developing countries, the right of sovereign states as to expropriation and nationalization is recognized (Sedle-Hohenveldern, 1999, p. 35).

International arbitral practice demonstrates that the right of sovereign states concerning expropriation and nationalization of private property is endorsed, but it is subject to conditions. In the *LIAMCO*, the sole arbitrator noted that the host state might expropriate or nationalize natural resources, and it would be legal if it were accompanied by compensation for that termination (*LIAMCO*, 1981, p. 85). The tribunal followed this pattern in the *AMINOIL* case. The tribunal held that nationalization was a valid exercise of the right of nationalization by Decree No.124 (*AMINOIL arbitration*, 1982, 976), and it is not discriminatory or confiscatory (AMINOIL arbitration, 1981, p. 1019). The AMOCO tribunal found that the rights of expropriation for host states are unanimously accepted (*AMOCO International Finance Corp. versus Iran).* In the case of *British Petroleum versus Libya*, the Libyan government had nationalized all properties, assets, shares, and rights of BP under the BP nationalization law (*British Petroleum versus Libya*, p. 297).

Further, the tribunal recognized the right of the Libyan government to nationalize natural resources but found that the action of the Libyan government was against international law because the basis for taking was purely a political reason. In addition, this taking was discriminatory (*British Petroleum versus Libya*, p. 354). Therefore, it is clear that although the state's right to nationalization is recognized, the taking was unlawful and breached the investment contract.

As the above suggests, the trend that emerges from the practice of arbitral tribunals is to circumscribe the right of host states with specific conditions. Taking will be lawful, but only if specific requirements are met. A result is an approach in which whenever the foreign company runs against the public interest of the host country, the sovereign state may use its power to compel the foreign investor to comply with the government's

[1] The United Nations General Assembly Resolution (UNGAR) 1803 (XVII) of 14 December 1962, Permanent Sovereignty Over Natural Resources.
[2] AMINOIL (1982) 21 ILM 976; *AMOCO* 15 Iran-US CTR 89, 222-4.
[3] Charter on Economic Rights and Duties of States (CERDS) UNGAR 3281 of 1974.
[4] *Texaco Overseas Petroleum Co. And California Asiatic Oil Co. versus The Government of the Libyan Arab Republic (TOPCO)*, (1977) 53 ILR. 389, para 86, 491; *Government of the State of Kuwait versus American Independent Oil Co. (AMINOIL)*, (1982), 21 ILM, 976; *Libyan American Oil Company (LIAMCO) versus Government of the Libyan Arab Republic*, (1981) 20 ILM 1.

stipulations and legal requirement, subject to safeguards that seek to prevent the abuse of this power.

3. Nature of expropriation

The terms “expropriation” and “nationalization” are used in international investment law concerning host government interference with foreign private property. However, international petroleum agreements and Bilateral Investment Treaties (BITs) do not usually define the essential concepts and terms such as expropriation, so the terminology has remained blurred.[5] Although the definitions remain controversial, their impact on investment value will be significant. International investment treaties only point out the risk, but interpretation must not be inconsistent with international law.[6] Some scholars define expropriation and distinguish between expropriation and nationalization. In Hoffman’s view, expropriation is the outright and overt taking of property, often achieved using transfer of title (Hoffmann, 2008, p. 224). Professor Brownlie elaborates on the expropriation definition that the essence of the matter is the deprivation by state organs of a right of property either as such or by permanent transfer of the management power in control (Brownlie, 2003, p. 509). In addition, it has been stated that the most meaningful distinction is that expropriation refers to the taking of one or several properties within a single area of economic activity. In contrast, nationalization refers to the government’s taking of all properties within the area (Ingram, 1974). Thus, nationalization and expropriation have the exact legal nature, but they differ in the scope and compensation usually accompanied by it.

Expropriation is defined as taking private property by the state with compensation. It is also described as the taking or using the property by a public authority with adequate compensation. In the *AMOCO* case, the tribunal presented a definition for expropriation, the compulsory transfer of property rights (15 Iran–US CTR 189, p.220). However, there are some cases where the host government’s taking of property rights is regarded lawful without compensation.[7] The host government, as the sovereign state, does have sovereignty and, due to this right, can take the foreign investor’s property. It is undisputed that international law allows that property of nationals and foreign investors may be expropriated, provided that specific requirements are met. There is general agreement on this point (Shaw, 2003, p.728). However, international investment agreements are subject to the principle of Pacta Sunt Servanda (sanctity of contract), under which the host government may not expropriate the foreign investor’s property without mutual contractual consent (*Texaco* arbitration, 1979, para 68). Some scholars have criticized this principle and asserted that it might not be absolute in long-term investment contracts.

Brownlie has defined nationalization as the process of taking one or more major national resources as part of a general program of social and economic reform (Brownlie, 2003, p. 509). In the *AMOCO* case, the tribunal held the following view on nationalization: transferring economic activity from private ownership to public. It is realized through the expropriation of the assets of an enterprise or its capital stock to maintain such enterprise as a going concern under the state control (15 Iran–US CTR, 1987, p. 222–3). Nationalization has also been defined as the transfer of property from the private to the public sector, in the public interest, as a general program of economic development. Expropriation is about taking property rights in individual cases, but nationalization is used as part of the economic program of the host governments (Rubins and Kinsella, 2005, p. 10).

However, in the reality of international investments, a distinction between “nationalization” and “expropriation” does not significantly impact. As a result of host states’ interference, whether nationalization or expropriation, the original equilibrium of the contract will be disrupted. In this study, the terms “taking” and “expropriation” will be employed to take over international investors’ property. It is worth noting that taking of the foreign investor’s property should be the last resort because it will reduce the economic value of the investment, disrupt the financial return, and seriously affect the property rights of international oil companies. Additionally, the host government will avoid being considered an unattractive and threatening country for foreign investment.

[5] Article 5 of the Netherlands-India BIT (1995); Article 1110 NAFTA; Article 5 of the Barbados-Cuba BIT (1996).
[6] Article 31 of the Vienna Convention on the Law of the Treaties (1969).
[7] There are instances where the state taking of private property without compensation may be regarded as legitimate act. This is where the taking of property occurs as a defense measure in wartime or when the state exercises its police power to regulate public morals, health and safety or to make private interests subservient to the general interests of the community (Brownlie, 2003).

4. Compensable property rights

The host government interference will affect the property rights of the international investor, and thus compensation is to be paid for such affected rights by governmental measures. For the aim of this research, property rights in the field of petroleum and the relevant arbitral awards will be examined to determine the legal nature of property in the law of expropriation. In international law, there is a general agreement on the notion of property rights. The concept of the property comprises rights over things. The owner of the property would have the right to dispose of the property, right to use, and right to the interests of the property (Macpherson, 1978, p.10). The owner does not need permissions to use the property unless it is against public policy and is banned by law. Several arbitrations defined the concept of property in petroleum jurisprudence. In *AMOCO,* the tribunal held this view that property can cover tangible and intangible when interpreting Article IV of the Treaty of Amity. The Iran–US Claims Tribunal awarded that no convincing explanation has been adduced to justify such a narrow interpretation, which is not in line with common usage of the word, nor with the express terms of the treaty protecting not only property but also interests in property (*AMOCO International Finance Corp. versus Government of the Islamic Republic of Iran*).

In a similar vein, the arbitrator in *LIAMCO* defined property rights as rights that have a pecuniary or monetary value (62 ILR, 1982, p.142). A property might be tangible or intangible and covers all material things, such as chattels, lands, and other things of material nature. In the *AMOCO* arbitration, the Iran–US Tribunal held that contractual rights under the Khemco agreement have economic value and can be expropriated.[8] Hence, in light of international arbitral practice in the petroleum industry, contractual rights such as rights arising from contracts of concession, purchases, or loans constitute property rights and those measures that have an adverse effect on which or any termination or taking over of the contractual rights must be compensated. It is evident by many international arbitrations and academic commentators (Brower and Brueschke, 1998, p. 478). Notably, rights that are economically significant to the investors can be expropriated. Indeed, all rights and interests with economic content come into play, including immaterial and contractual rights. This principle is reflected in the definition of investment in the treaties to protect investments. For example, the ECT in Article 1(6) and NAFTA in Article 1139 refer to tangible and intangible property.

4.1. Shareholder's rights

It may be helpful to discuss the status of shareholders' rights, whether they constitute property rights, and whether taking over them will bring about the payment of compensation. It is also noteworthy because these rights are usually accompanied by rights such as the right to receive interests, management, and voting in the company. In the AMOCO case, the tribunal found that AMOCO's shares in other companies were property rights and compensable. The company's shares had financial value in the market and could be considered property rights. In the case of Sedco, three provisional managers were appointed by the government for Sediran Company, where an American investor (Sedco) had shareholder's rights. The claimant alleged that it was deprived of attending the decision-making process and did not control Sediran activities. The tribunal found these circumstances potentially evidencing a taking (Sedco Inc. versus National Iranian Oil Company).

However, Iran–US Claims Tribunal explained its reason and held that the appointment of managers has often been regarded as a highly significant indication of expropriation because of the attendant denial of the owner's right to manage the enterprise. When as in the instant case, the seizure of control by the appointment of temporary managers ripens into the outright taking of title, the date of appointment presumptively should be regarded as the date of taking (Sedco arbitration, p.278). Following the award, it is almost transparent that those actions that adversely affect a company's rights in the other company cannot always form a taking. In this decision, although the host government has deprived the foreign company of the process of making decisions and monetary fund of Sediran, the tribunal did not recognize this as an expropriation. Indeed, the governmental measure has to affect the property rights and transfer the legal title of the property to the host state or the state entity.

In the Mobil Oil case, the claimants alleged that the host state had renounced the Sale and Purchase Agreement signed in 1973, and those established rights under the agreement were expropriated. The tribunal

[8] Khemco was an investment agreement between AMOCO International Finance Corporation and National Petrochemical Company of Iran (NPC) to install a natural gas plant in Iran. This contract was nullified by Single Article Act after revolution in 1980.

recognized that contractual rights can be the subject matter of property rights and could be therefore expropriated (Mobil Oil Iran, Inc. versus Iran, Award No. 311-74/76/81/150, 1987). In the Philips Petroleum case, the claimants alleged that their rights under the exploration and exploitation contract with the National Iranian Oil Company (NIOC), were expropriated and compensation was required (21 Iran–US CTR 79, Award No. 425-39-2, 1989). The tribunal decided that financial interests are established by contractual rights and expropriation or attributable to a state of the property of an alien gives rise under international law to liability for compensation. The expropriation is formal or de facto, and the property is tangible, such as real estate or a factory, or intangible, such as the contract rights in this case.

In the Philips Petroleum case, the Iran–US Claims Tribunal has endorsed that compensation is to be paid for expropriation of both tangible and intangible properties. Whereas recognition of tangible property is not a difficult task, determination of different types of intangible properties, such as interests, economic benefits, and contractual rights, might be questionable. This issue is examined in petroleum jurisprudence, and contractual rights were recognized as property rights. However, the international tribunals have no established practice on determining measures that affect shareholder's rights, which may constitute expropriation. Therefore, it will be helpful to consider surrounding circumstances, and a case-by-case approach is illustrative.

4.2. Right of access to the market

The modern concept of property is less the tangibility of things, but rather the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return (Waelde and Kolo, 2001, p.835). International arbitral tribunals have favored a more expansive concept of property rights. It could be seen in the Pope and Talbot. The claimant was a US company that operated softwood lumber in British Columbia to export to the United States. The claimant alleged that the new export control regime which was in implementation of the US–Canada softwood lumber agreement had deprived the investor of its ordinary ability to alienate its product to its traditional and natural market (the US market) and hence expropriated its investment (Pope and Talbot, Inc. versus Government of Canada, 2000, paras. 81–86). The claimant stated that it was due to the requirement that companies had to obtain export permits and the payment of a fee for a certain number of board feet required. The respondent reasoned that the right to access a market could not be considered as property, either tangible or intangible (Pope and Talbot, para.87). However, the tribunal held that Pope and Talbot's right to the US market was a property interest, falling within the scope of Article 1110 NAFTA.

Further, the tribunal decided Pope and Talbot's access to the US market is an abstraction; it is, in fact, an essential part of the business of the investment. Interference with that business would necessarily have an adverse effect on the property that the investor had acquired in Canada, which, of course, constitutes the investment (Pope and Talbot, paras.86–91). Hence, the notion of property includes both tangible and intangible rights, and such rights created under the contract will constitute property rights.

5. The basic international legal requirements for a lawful taking

It is generally accepted that host governments can expropriate the foreign investor's property, but specific requirements must be fulfilled for the lawful expropriation. The critical requirements imposed by international law are that the lawful taking of property rights must be for the public purpose, non-discriminatory, and with the payment of prompt, adequate, and effective compensation (Shaw, 2003). These conditions have been formulated in almost all BITs, multilateral investment treaties, and international investment contracts. They are included in almost all contracts and treaties to provide greater certainty (Van Houtte, 2002, p.248). The distinction between lawful and unlawful expropriation, which these restrictions create, is essential. In a lawful taking, compensation must be paid; however, in an unlawful taking damages are required. Damages will include loss of future interests, earnings, and property loss, resulting in more than usual compensation in a lawful taking. The requirements for legality under the international practice that arbitral awards have shaped will be examined.

5.1. Public purpose

This requirement was first suggested by Grotius[9] and has been endorsed by the United Nations General

[9] Grotius has defined it as a limit on the sovereign right of eminent domain.

Assembly Resolution 1803 (1962) on Permanent Sovereignty over Natural Resources, bilateral and multilateral treaties, and national legislations (Sornarajah, 1986, p.174). This resolution does not establish rules in international law, but it is an essential factor for the development and protection of investment in international law. The condition of public interest was also supported by BITs as a requirement for lawful taking (Khalil, 1992, p.339). However, the public purpose is a broad concept, and international law has not provided a precise definition yet. Consequently, sovereign states determine the scope of the public purpose requirement. It is, therefore, challenging to prove that expropriation was not for the public purpose or the welfare of society (Rubins and Kinsella, 2005, p.177). As a result, there are few cases, if any, where expropriation has been considered unlawful for the public purpose requirement.

In *ADC versus Hungary*, the tribunal found that expropriation of the claimant's interests in the operation of a terminal at the Budapest Airport by the Hungarian government was not lawful. The tribunal held that no public interest was served by depriving the claimants of their interests. In the tribunal's opinion, a treaty requirement for public interest requires some genuine interest of the public. If mere reference to the public interest can magically put such interests into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met (*ADC Affiliate Ltd and ADC and ADC Management Ltd versus the Republic of Hungary*). Similarly, in LETCO versus Liberia, the tribunal found that revoking a concession and taking the concession areas away from LETCO were not for the public purpose.

In addition, if the sole purpose of taking property rights is a political issue, it might not fall into the scope of public purpose. In *British Petroleum versus Libya*, the ad hoc arbitrator found that expropriation was unlawful for purely extraneous political reasons as an act of retaliation for a British foreign policy decision (53 ILR 297,1974).

In the AMOCO case, the Iran–US Claims Tribunal examined the issue of public purpose. The claim arose out of the Khemco[10] Agreement, entered into on 12 July 1966 between AMOCO and the Iranian National Petrochemical Company (NPC),[11] pursuant to which the parties agreed to make a joint venture company, Khemco, for building and operating a plant for the production and marketing of sulfur, natural gas liquids and liquefied petroleum gas derived from natural gas (15 Iran–US CTR. 191). Civil unrest and events in 1978 and 1979 in Iran obstructed the operation of oil processing facilities, including those of Khemco. AMOCO International then evacuated its personnel. The Special Commission in December 1980 declared that the Khemco agreement was null and void with the provision of the Single Article Act.[12] The claimant (AMOCO) alleged it was unlawfully deprived of its 50% property interests in Khemco. AMOCO asserted that nationalization was merely to release NPC from the contractual obligations under the Khemco agreement and, particularly, from the obligation to share the profits of the venture. Therefore, nationalization was not valid. The tribunal then examined the public purpose requirement and found that a precise definition of the public purpose for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. States have been granted extensive discretion in determining public interests (15 Iran–US CTR. 189, p.233).

The tribunal also pointed out that an expropriation, the only purpose of which would have been to avoid the state's contractual obligation or an entity controlled by it, might not be treated as lawful under international law. The tribunal then added that such expropriation would be contrary to the principle of good faith and would run counter to the well-settled rule that a state has the right to commit itself by a contract to foreign corporations. It has also generally accepted that a state has no right to expropriate a foreign concern only for financial purposes.

Further, the tribunal addressed the legality of nationalization under the requirement of the public purpose. The tribunal found that the government's action was in the public interest. The tribunal stated it has generally agreed that states were not entitled to

[10] Kharg Chemical Company Limited, a company established under the laws of Iran.
[11] A company established under the laws of Iran. It is one of the respondents in AMOCO case.
[12] On 8 January 1980, the revolutionary Council of the Islamic Republic of Iran promulgated the Single Article Act concerning the nationalization of the oil industry of Iran. The Single Article Act stated 'All Oil Agreements considered by a Special Commission appointed by the Minister for oil to be contrary to the nationalization of Iranian oil industry Act shall be annulled'. (15 Iran-US CTR. 189-205).

expropriate for solely financial purposes. It concluded that even if financial considerations were considered in adopting such a decision, which would be natural, it would not be sufficient to prove that it was not taken for a public purpose (15 Iran–US CTR. 189, p.234). Indeed, every government considers financial interests while dealing with nationalization on the grounds of public purpose. Therefore, it would not affect the legality of the public purpose requirement.

In the *AMINOIL* case, the government of Kuwait decided to reduce the revenues for the oil company up to 92 percent per barrel. As a result, AMINOIL asked for a renegotiation with the government of Kuwait, but the parties could not reach an agreement for the payment method. The Kuwaiti government announced Decree Law No. 124 that terminated the concession agreement with the AMINOIL Company, declaring that all AMINOIL's properties were nationalized and fair compensation would be paid. AMINOIL objected and alleged that nationalization was illegal, and the other side, the Kuwaiti government asserted it was legal. The main argument was whether Decree Law No.124, 1977 was a valid Act for nationalization. The foreign oil company objected and argued that taking was unlawful because it was not for the reason of public interest. The foreign oil company also contended that the host government promulgated the decree law and terminated contractual relations which parties were negotiating. Indeed, it was issued to free the government from its contractual obligations (*AMINOIL* Arbitration, para. 106).

The ad hoc arbitral tribunal examined the claimant's contentions and stated that Decree Law No. 124 was passed for a public purpose and completed the government's program to nationalize the petroleum industry. In addition, the tribunal discussed the alleged justification for nationalization that was only to put an end to the contractual relationship. The tribunal argued that circumstances showed it was not the case here. The Kuwaiti government sought nationalization as a part of a general program to take control of the entire petroleum industry. The tribunal also held that nationalization for the sole purpose of termination of a contractual relationship would be unlawful.

However, an international petroleum arbitration considered that the requirement of the public proposal was not a necessary condition for a lawful nationalization. In *Libyan American Oil Company (LIAMCO) versus The Government of the Libyan Arab Republic*, which concerned nationalization of the concession rights under a petroleum concession by the government of Libya, the tribunal addressed the requirement of public purpose. The American company (the claimant), namely, the Libyan American Oil Company, alleged that the government's measures were unlawful due to the lack of public purpose requirement and being politically motivated. Despite the AMINOIL case, the sole arbitrator found that the requirement of public purpose was not met and then decided that the public purpose requirement was not necessary for a lawful nationalization.

In *AGIP Company versus the Popular Republic of the Congo*, the tribunal considered the question of public purpose. In this case, the government of the Congo nationalized assets of a foreign company named AGIP (Brazzaville) S.A, an Italian company, which was established under Congolese law and in Congo. AGIP started its activities in the oil distribution sector in 1965. On 12 January 1974, Law No.1/74 nationalized the oil distribution sector, and consequently, all assets were transferred to the Hydro-Congo State Company. However, due to the signing of an agreement protocol with the government under which AGIP undertook to sell the shares representing 50% of the company's capital to the government of Congo, the foreign company (AGIP) was not affected by the governmental measures. In return, the Congolese government undertook to guarantee up to 50% credits and financing granted to the company and take the steps and parastatal organizations provided by the company. Although AGIP and the host government signed an agreement, Hydro-Congo embarked a growing and aggressive competition with AGIP. As a result, the foreign company asked for renegotiation, but during the renegotiations, the President of Congo decided to nationalize AGIP by order No. 6/75. AGIP challenged the validity of nationalization in that it did not satisfy the primary condition laid down by the constitution that was required for the national interest. AGIP then sought to distinguish between the government's actions in the general interest and those actions in the private interests.

Concerning this argument, the Congolese government, in the order, declared considering that the company AGIP (Brazzaville) S.A. has ceased all commercial activities and is therefore unable to meet its obligations and considering that this situation is seriously damaging the Congolese state as a shareholder in this company. Further, the tribunal rejected the contention of AGIP concerning a distinction between the general interest and the private interest of the government activities as a shareholder and added whether a state

performs an act in the private sphere analogous to the action of an individual in participating in the formation of the capital of a company. It is nonetheless acting in the community's general interest for which it is responsible. Thus, the state that nationalizes a company as a shareholder cannot alone warrant the conclusion that this step is not taken in the general interest.

The examination of the cases mentioned above supports the view of most scholars that the definition of public purpose has not been made clear. On this point, the arbitral awards have a prominent role in developing unclear issues. Excluding the *LIAMCO* case, all other cases held that the public purpose condition required lawful nationalization. It is generally agreed that public purpose is one of the requirements for lawful expropriation. In petroleum jurisprudence, arbitrations did not define the condition of public purpose. In addition, all petroleum arbitral awards examined earlier have not found expropriation unlawful in international law on the specific basis of the violation of the public purpose requirement. The discussion crystallized that governments have broad discretion in determining the scope of public purpose. Further, the arbitral tribunals should consider the surrounding circumstances and all the facts pertinent to the case in the determination of whether host states have met the public purpose condition.

5.2. Non-discrimination

Another requirement of the international law for lawful taking is that expropriation must not be discriminatory. It is generally agreed that discriminatory treatment under international law is unlawful. This view was supported by some bilateral and multilateral treaties and also awards. If the host government's action has targeted foreign investors based on religion or nationality, this may be classified as discrimination, and expropriation will therefore be unlawful. Typically, treaties contain this requirement that expropriation shall not be with discriminatory treatment, but they do not provide a clear definition of discriminatory measures. There are some arguments concerning the meaning and framework of the principle of non-discrimination. It is stated that when foreigners are equal with the nationals of the host government and are treated equally, then international law is not violated (Dolzer and Schreuer, 2008).

Despite the difficulty in presenting a comprehensive definition of discriminatory measures, we should have some criteria in determining treatment. It might be the host state's intention to apply that measure. However, it is difficult to prove it before the international tribunals. It might be helpful to consider all the relevant factors and circumstances. Determining the extent of inequalities that can constitute illegal discrimination in international law is not easy. Notably, discriminatory expropriation on the ground of ethnicity, origin, or nationality is not lawful. Arbitrary and racially motivated measures are unlawful and prohibited. Moreover, if discrimination is unreasonable, it is not lawful. The host government's conduct must be in good faith to be considered lawful.

It has been argued that the distinction between unlawful discrimination and a lawful action must have an objective justification, the means employed to establish a different treatment must be proportionate to the justification for differentiation, and there is the burden of proof on the party seeking to set up an exception to the equality principle (Brownlie, 2003, p.547). However, determining an unreasonable and unjust measure by taking into account all-encompassing circumstances in each case has to be performed by the tribunal. Several arbitrations supported the condition of non-discrimination. The LIAMCO arbitration has addressed this condition. The claimant (LIAMCO) argued that nationalization by the government of Libya had taken place because of its American corporate nationality and that those measures were used as a weapon of political retaliation against the corporate established in those countries whose politics were contrary to those of the Libyan regime. The tribunal then found that it is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. That is a rule well established in international legal theory and practice. Therefore, a purely discriminatory nationalization is illegal and wrongful. The sole arbitrator then observed that political motivation might take the shape of discrimination as a result of political retaliation and also added that LIAMCO was not the first company to be nationalized, nor was the only oil company nor the only American company to be nationalized. Other companies were nationalized before it, and other American and non-American companies were nationalized with it and after it; other American companies are still operating in Libya (LIAMCO arbitration, p.60).

The arbitrator decided that the Libyan government's measures were not discriminatory and held the political motive was not the predominant motive for nationalization and that such motive per se does not constitute sufficient proof of purely discriminatory measure. The tribunal recognized the requirement of non-discrimination as a condition for a lawful

nationalization in international law. In addition, the tribunal observed that discrimination against nationals of a specific country could be illegal. The tribunal's award also indicated that expropriation for political retaliation and purely political reasons is discriminatory and is therefore unlawful.

The AMOCO arbitration also discussed this requirement. In this case, AMOCO contended that expropriation of AMOCO's property rights was discriminatory and unlawful under international law. The claimant then argued that the Japanese share of a consortium in another NPC joint venture, the Iran–Japan Petrochemical Company (IJPC), was not expropriated. The respondent (Iran) stated that nationalization did not occur because of the American claimant's nationality. The Single-Article Act applied to the entire oil industry, irrespective of the nationality of the foreign companies involved in this industry. Nationalization was applied to the United States companies and non-United States companies. The reason for the non-nationalization of the Japanese company was due to exceptional circumstances. The respondent also added that the fact that the operation of the IJPC was not closely linked with other contracts relating to the exploitation of oil fields, whereas the operations of the Khemco plant was linked to the supply of gas from the oil fields operated jointly by AMOCO and NIOC pursuant to JSA (AMOCO Case, 15 Iran–US CTR 189, 232).

Therefore, the special committee did not include the contract with the IJPC among nullified ones. The tribunal rejected the contention of discriminatory nationalization and accepted the respondent's justification. In addition, the tribunal stated that discrimination is widely held as prohibited by customary international law in the field of expropriation. Thus, the tribunal declined to find that Kehmco's expropriation was discriminatory.

5.3. Due process of law

Today, it is generally accepted that the legality of a measure of expropriation is conditioned upon three (or four) requirements. These requirements are contained in most treaties. They are also part of customary international law, and some treaties explicitly require that the expropriation procedure follow "due process" principles. Due process expresses the minimum standard under customary international law and the requirements of fair and equitable treatment. Therefore, it is not clear whether such a clause, in the context of the rule on expropriation, adds an independent requirement for the legality of the expropriation. Due process of law could be seen in some international treaties such as the ECT and the NAFTA.[13] In international investment contracts, the requirement would suggest that the investor has the right to advanced notification and a fair hearing before the expropriation. Further, the decision should be taken by an unbiased official and after the passage of a reasonable period.

Nevertheless, in UNCTAD, it is suggested that the due process requirement in international investment agreements should apply after the taking to require some independent review of government action (UNCTAD, 2000). Accordingly, that is an issue of state responsibility and not related to expropriation. The majority of legal jurists do not list such conditions for the legality of the expropriation (Dolzer and Schreuer, 2008, p.109). In addition, this requirement is not mentioned in Resolution 1803.

5.4. Compensation

There is no doubt that the exercise of the host state's right to terminate the foreigners' property rights must accompany the payment of compensation. Compensation is essential for both the host government and the potential investor. It is a decisive factor for the potential foreign investor in determining whether the host country is appropriate for investing. On the other hand, for the government, it is essential because it may affect its economy and establish a practice for future foreign investors.

In both lawful and unlawful taking of the foreign investor's property, the investor is entitled to compensation. However, there is a difference in the calculation and amount of compensation. While in a lawful expropriation, compensation covers the actual loss, in an unlawful expropriation, compensation should cover the loss suffered (damnum emergens) plus the lost future profits (lucrum cessans) (Van Houtte, 2002, p.383).

There are two competing norms regarding the amount of compensation, which will be discussed below. The classical viewpoint is that in the event of expropriation of foreign private property by the host government, compensation has to be paid according to international law. It has been endorsed by the United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources, 1803, (1962).

[13] Article 13 (1) of the Energy Charter Treaty; Article 1110 (1) of the NAFTA.

Although the United Nations General Assembly Resolutions are not binding, rules set by resolution 1803 (by developing and developed countries) are treated as customary international law.

In Texaco Overseas Petroleum Co. and California Asiatic Oil Co., the Government of the Libyan Arab Republic, the sole arbitrator, examined the governing law for assessing compensation. He supported the customary international law nature of Resolution 1803 (1962) by referring the compensation assessment to international standards.

Furthermore, there is a disagreement over the payment standards of compensation and what constitutes fair compensation. There are two practical approaches to compensation requirements. The first is the "Hull formula", requiring "prompt, adequate, and effective" compensation (Dugan and Wallace, 2011, p.573), and the second approach is "appropriate compensation", which requires that the host state pay the total value of the property taken. This view is supported by developing countries and is rooted in Article 4 of Resolution 1803 although it is not standard in international investment (Dugan and Wallace, 2011, p.574).

The requirements for the payment of compensation in case of taking foreign investors' property by the host state are introduced by the Hull formula, which requires prompt, adequate, and effective compensation. The former US Secretary of State, Cordell Hull, formulated this in 1938, known as the "Hull formula". Several investment treaties and investment contracts followed this compensation formula (Dugan and Wallace, 2011, p.580). Almost all western states and many scholars in America and Europe supported this view that if expropriation of foreign investors' property is with the payment of prompt, adequate, and effective compensation, it will be lawful (Brownlie, 2003, 509). The Energy Charter Treaty in Article 13 has also recognized the prompt, adequate, and effective formula.

The second view was taken in the Chorzow factory, the Permanent Court of International Justice, (The Tribunal) in 1928, where it was held that in a lawful expropriation, the "appropriate method" for calculating compensation is the values of undertaking at the moment of dispossession, plus interests on the day of payment. It also added that in an unlawful taking, reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Notably, the tribunal did not call for adequate, prompt, and effective compensation (Factory at Chorzow (Germany versus Poland), 1928 PCIJ (ser. A) N0.17, 47.)

However, several international arbitrations have endorsed the standard of appropriate compensation as an alternative for adequate, prompt, and functional conditions. In the AMINOIL arbitration, the arbitral tribunal followed the General Assembly Resolution 1803 and applied for appropriate compensation. The tribunal decided that determining the amount of an award of appropriate compensation is better carried out utilizing an inquiry into all circumstances relevant to the particular case than through abstract theoretical discussion. In addition, in the Texaco case, the sole arbitrator argued that appropriate compensation had reflected in customary international law and would be in line with the General Assembly Resolution 1803. Interestingly, the question of compensation is still debatable.

6. Conclusions

This article has sought to examine the nature of the taking of foreign-owned property in the petroleum industry by the host government to highlight the problems that arise out of intervention. The host government has a right to control the foreign investor. Host states may control foreign investment in their territory at the time of entry. Moreover, once the investment has been made, they can regulate and control the operations of the foreign investor in their jurisdiction. Indeed, host governments exercise maximum control over international oil companies that operate in their territory, and it is settled that they are authorized to control foreign oil companies over the life of the energy project. The concept of property rights in the field of petroleum and the relevant arbitral awards has also been examined. The property might be tangible or intangible and covers all material things, such as chattels, lands, and other things of material nature. International arbitral tribunals have favored a more expansive concept of property rights. The modern concept of property is less the tangibility of things but rather the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return. It is undisputed that international law allows that property of nationals and foreign investors may be expropriated, provided that specific requirements are met. In addition, it was shown that the host government has to comply with certain conditions (public purpose, non-discriminatory action, due process of law, and payment of compensation) for lawful expropriation. It has been discussed that in a

lawful expropriation, compensation covers the actual loss; however, in an unlawful expropriation, compensation should cover the loss suffered (damnum emergens) plus the lost future profits (lucrum cessans), which considerably increases the amount of compensation. Furthermore, limitations set by international law for the exercise of the host government's power over international petroleum companies in petroleum arbitral awards have been examined. Finally, this paper addressed that expropriation should be in rare situations and only for society's public interest.

References

ADC Affiliate Ltd and ADC and ADC Management Ltd v. Republic of Hungary, ICSID Case No. ARB/03/16, (2 October 2006).

AGIP Company v. Popular Republic of the Congo, (1982) 21 ILM 726.

AMOCO International Finance Corp. v. Government of the Islamic Republic of Iran, Award No. 310-56-3 (14 July 1987), 15 Iran–US Claims Tribunal Reports, 189, 220.

British Petroleum v Libya, 53 (1974) ILR 297.

Brower, Charles and Brueschke, Jason, (1998), The Iran–United States Claims Tribunal, The Hague: Martinus Nijhoff Publisher.

Brownlie, Ian, (2003), Principles of Public International Law, 6th ed., Oxford University Press.

Charter on Economic Rights and Duties of States (CERDS) UNGAR 3281 of 1974.

Dolzer, Rudolf and Schreuer, Christoph, (2008), Principles of International Investment Law, Oxford University Press.

Dugan, Christopher; Wallace, Don and Sabahi, Borzu, (2011), Investor-State Arbitration, Oxford University Press.

Ellindis, George Thomas, (1995) "Foreign Direct Investment in Developing and Newly Liberalized Nations", 4 J. Int'l L and Prac. 299.

Government of the State of Kuwait v. American Independent Oil Co. (AMINOIL), (1982) 21 ILM, 976.

Herz, John, (1941) "Expropriation of Foreign Property", 35 Am. J. Int'l L. 243.

Hoffmann, Anne, (2008) "Indirect Expropriation" in Reinisch, August (ed.), Standards of Investment Protection, Oxford University Press.

Ingram, George (1974), Expropriation of US Property in South America: Nationalization of Oil and Copper Companies in Peru, Bolivia, and Chile, New York: Praeger Publishers.

Khalil, Mohamed (1992) "Treatment of Foreign Investment in Bilateral Investment Treaties", 7 ICISD Rev. FILJ 339.

Liberian Eastern Timber Corporation (LETCO) v. the Republic of Liberia, ICSID Case No. ARB/83/2 (1986).

Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, (1981) 20 ILM 1.

Macpherson Crawford, (1978) "The Meaning of Property", in Macpherson, Crawford (ed.), Property: Main Stream and Critical Positions, Oxford: Basil Blackwell.

Mewett, Alan, (1959) "The Theory of Government Contracts", 5 McGill L. J. 222.

Mobil Oil Iran, Inc. v. Iran, Award No. 311-74/76/81/150-3 (14 July 1987), 16 Iran–US Claims Tribunal Reports 3.

Muchlinski, Peter (1995), Multinational Enterprises and the law, Oxford, Cambridge, Blackwell.

Phillips Petroleum Co. Iran v. Iran, Award No. 425-39-2, (1989) 21 Iran–US Claims Tribunal Reports 79.

Pope and Talbot, Inc. v. Government of Canada, Interim Award, (26 June 2000).

Rubins, Noah and Kinsella, Thomas, (2005), International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide, Oceana Publications.

Sedco Inc. v. National Iranian Oil Company (Sedco v. Iran), (1987) 9 Iran–US Claims Tribunal Reports, 284.

Sedle-Hohenveldern, Ignaz, (1999), International Economic Law, The Hague, London, Kluwer Law International.

Shaw, Malcom, (2003), International Law, 5th ed., Cambridge.

Sornarajah, Muthucumaraswamy, (1986), The Pursuit of Nationalized Property, Kluwer Academic Publishers.

Texaco Overseas Petroleum Co. And California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (TOPCO), (1977) 53 ILR. 389.

The Factory at Chorzow (Germany v. Poland), 1928 PCIJ (ser. A) N0.17, 47.) 1928.

The United Nations General Assembly Resolution (UNGAR) 1803 (XVII) of 14 December 1962, Permanent Sovereignty Over Natural Resources.

United Nations Conference on Trade and Development (UNCTAD) (2000), Taking of Property, (United Nations, New York, and Geneva.

Van Hecke, George, (1951) “Confiscation, Expropriation and the Conflict of Laws”, 4 International Law Quarterly, 545.

Van Houtte, Hans, (2002), The Law of International Trade, 2nd ed., London, Sweet and Maxwell.

Vienna Convention on the Law of the Treaties, (1969).

Waelde, Thomas and Kolo, Abba, (2001) “Environmental Regulation, Investment Protection and “Regulatory taking” in International Law”, 50 ICLQ 811.

Wallace, Cynthia, (2002), The Multinational Enterprise and legal Control: Host State Sovereignty in an Era of Economic Globalization, The Hague, London, New York, 2nd ed., Martinus Nijhoff Publishers.