

Resource Nationalism in International Investment Law

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It is a well-established and proven fact that long-term investment agreements in the extractives sectors (oil, gas and mining) are more prone to certain types of risks - especially political risks - than in the other sectors. This reality manifests itself every now and again under various guises.

In a time of relatively low commodity prices following a highly lucrative period both for the investors and the host states, scholarly works that point out the cyclical relationship between the international energy investments, the commodity price, and unilateral host state actions become particularly relevant. When commodity prices go down or geographical conditions keep investors away, the host states craving for investments often start to offer more incentives to lure international investors. Once the bulk of the investment is sunk and the price enjoys an upward trend, then the host states are inclined to change the rules of the game and take unilateral actions often underpinned by resource nationalistic sentiment to the detriment of the investors.

This relatively short book, mainly based on the author's Ph.D. thesis, attempts to provide yet another clarification to this phenomenon of a resource nationalism cycle, which is one of the most acute risks that investors in natural resources sectors face.

The book consists of seven chapters including an introduction and a conclusion. Chapter 2 sets the scene for further analysis and defines the key concepts of the book such as foreign direct investment, the resource nationalism cycle, obsolescing bargains, and the methods of mitigating the political risks. What stands out from this chapter is that

it provides a well-designed and well-implemented background to the issues to follow. A particularly important argument is that the occurrence of resource nationalism in a host state mainly depends on the lack of checks and balances on the one hand and the existence of political pressure on the government on the other. Therefore, it is less likely to witness resource nationalism in either authoritarian states (no political pressure) or democratic states (existence of checks and balances) since they sit on both ends of the political spectrum. It concludes that it is easier to adopt such a path in hybrid types of states where there is still political pressure on the executive by the public but fewer institutional checks and balances.

After providing a general overview of the tools available to mitigate the political risk, Chapter 3 delves into perhaps the most important contractual mechanism to tackle the political risk, the stabilization clauses. Recent scholarly works on stabilization clauses often follow similar approaches to the issue by discussing various types of stabilization clauses and their practical validity and effect, and referring to the view of the arbitral jurisprudence, and this book is no exception. One of the reasons that this kind of chapter remains mostly descriptive without further novelty is that there are no publicly available recent arbitral decisions that deal with the new forms of stabilization clauses that would assist to create a new perspective.

Chapter 4 revolves around the issue of compensation under the international investment regime. The author links the rigidity of the stabilization clauses to the compensation regime and concludes that there is a need for flexibility in contractual terms so that the host states will not have to pay compensation as a remedy of their acts even if conducted for legitimate public purposes. The book therefore suggests the insertion of renegotiation clauses into the contracts instead of inflexible stabilization clauses in order to give the state some elbow room to act without breaching its promises. Notwithstanding the quality of this chapter and its ability to tell the whole story in a condensed way, there are still some parts remaining ambiguous to the reader. It would have been a more complete approach if the author had solidly established the link between the stabilization clauses and the consequences of compensation which would lead us to the need for a more flexible contractual environment. Since much of the attention is allocated to the

principles and standards of compensation, the link between the stabilization clauses and compensation is left slightly out of focus. The difference in terms of compensation between a contract that includes a stabilization clause and one that does not should have been pointed out clearly so as to make the conclusion more persuasive.

One of the most stimulating chapters of the book deals with a case study on Zambia. In chapter 5, the author firstly provides the reader with a comprehensive overview of the Zambian mining industry and its political and social effects on the country. The chapter focuses on Zambia's copper mining and the transformation it has experienced within the last century. The value of this chapter lies with its ability to present a concrete example of what were discussed theoretically in previous chapters i.e. resource nationalism. The author clearly presents the interrelationship between volatile copper prices and actions taken by Zambian governments either in the form of incentives or interferences depending on the price level. When the price of copper soared, Zambian governments took over the mining companies or presented windfall taxes and when the price slumped they were forced to privatize those companies by granting tax incentives to international investors due to the difficulty in keeping the country on track. However, the deficiency in establishing a powerful link between the compensation issue and the other stories being told continues in this chapter too. Even though Zambia is a good example to show the resource nationalism cycle at work, it does not provide the author with enough room to elaborate more on the compensation issue since the compensations awarded by Zambia after nationalization were determined by negotiations between the parties and not by arbitral tribunals. Furthermore, these examples were ones of compensation in the face of nationalization and not for a mere breach of a stabilization clause.

The book concludes by highlighting the importance and the need of a more flexible contractual environment to be able to adapt the contractual relationship to the changing circumstances. It proposes the use of renegotiation clauses instead of stabilization clauses and also argues that even in the absence of such a clause, there might be a duty arising from *rebus sic stantibus* principle to renegotiate a contract, albeit under limited circumstances. The author not only provides a

definition of the renegotiation clause and leaves it like that; but he goes on to provide a road map on what to do in the case of a failure of renegotiations, which is a valuable contribution to the literature.

Overall, the book represents a valuable and significant contribution to the body of scholarship on the resource nationalism problem, stabilization and renegotiation clauses; its suggestions are well grounded. The case study on Zambia in particular offers a basis for testing and proving the arguments relevant to the resource nationalism issue. Nonetheless, the link between the compensation chapter and the rest of the book seems loose. This book would be a good addition to the libraries of both scholars and practitioners since it provides a treatment of theoretical and practical aspects together. I would recommend it to anyone who is interested in international investments in the extractives sector and in particular to those who focus on “hybrid” types of states as the author does, since protecting an investment against the possible impact of resource nationalism should be at the forefront of an investment plan in those areas.

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