

Despacho de Abogados Miembro de

**Baker
McKenzie.**

*The Columbia Center on Sustainable Investment:
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***“Trapped Between a Wall and an Empty Shelf:
Expropriations, Controls and Other Policies
(in Venezuela) under Arbitration and Bilateral
Investment Treaties”***



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1. 20 Years Ago (or so)

- Investment Arbitration not an issue
- ICSID 1993 / 1995 / BITs early 1990's
- 1975 Oil Nationalization
- 1976 Iron Nationalization
- Friendly economic attitudes - 1998 (The ***hat*** of the Planning Minister and Foreign Investors-IMF-WB)
- 2 ***IA Cases*** (Fedax, Aucoven)
- Chavez elected



2. Government Policies in an Oil-Dependent Country (*Petro-State*)

The Recipe:

- **Oil-Fueled** Statism and Populism
- Gross mismanagement
- Nationalizations (Expansion of State-Owned Enterprises)
- Currency Devaluation
- Exchange Controls
- Price Controls
- Lavish State Contracts



2. Government Policies in an Oil-Dependent Country (*Petro State*)

- Massive Social Handouts (mostly for supporters)
- Oil Boom
- Cronyism
- Corruption
- Anti-business policies and measures

3. Results

- Price Distortions
- Scarcity → Consumer Goods / Medicines
- Agricultural Stagnation
- Food Shortages
- Black Market
- Public-Sector Payroll
- Capital Flight
- Productivity Plummeted - Deindustrialization (Sudden shutdowns)
- More (***and more and more and more and more...***) Nationalizations
- Hyperinflation
- Poverty

3. Results



3. Results



3. Results





4. Expropriation: Who's Next?

- Oil-Fueled Policy
- Arbitrary
- Expropriation as a Political Sanction
- No Due Process
- Special Avenues for Materializing Expropriations (deviation of power)
- Formal Grounds for Expropriation: Work Stability, Food Security, Strategical Reasons, Oil Production, Dignified Housing, etc.
- No Compensation



5. State Control Over the Economy

“The State can afford to corner the private sector into underperformance and thus generate demand for more State interventions.”

Javier Corrales and Michael Penfold

5. State Control Over the Economy





6. Other Measures of Similar Effects

- Recovery of Lands (The Lands Law)
- Judicial Measures of Occupation and Administration to By-Pass Legal Requirement of Anticipated Occupation in Urgent Cases (*Ocupación Previa*) under the Expropriation Law (through Consumer Protection, Agri-Business Sovereignty Law, etc.)
- *Ad-Hoc* Boards (Labor Law)



7. All Sectors Hit by Government Policies

- Policies Follow Different Approaches For Forced Acquisitions
- Oil Nationalization / Related Activities
- Cattle / Lands
- Mining
- Agribusiness
- Coffee-Roasting
- Airport / State Concessions / Electricity
- Cement Industry
- Consumer Goods
- Banking
- Radio/TV/Press



8. BITs-ICSID and other Experiences in Investment Arbitration

- Venezuelan Judiciary
- The Netherlands-Venezuela BIT
- ICSID Convention
- 1999 Investment Protection Law
- The Issue of Consent Before and After ICSID Convention
- *Ratione Personae* (Individual and Legal Entities)
- Arbitration Fees
- Choosing Arbitrators
- Legal / Illegal Expropriation



8. BITs-ICSID and other Experiences in Investment Arbitration

- MFN
- Fair and Equitable Treatment: Flexibility
- Valuation Issues: Country-Risk-Factor
- Annulment / Challenges
- Enforcement of Awards (a real problem)



9. Balance

- Around 45 ICSID / AF cases
- Around 4 UNCITRAL Investment Arbitration cases
- Around 17 cases in favor (jurisdiction/merits)
- Around 9 cases against
- Around 11 cases pending

Are BITs necessary for the encouragement and protection of foreign investments?

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MUCHAS GRACIAS!!!

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