THE VENEZUELA AWARDS: TRIBUNALS SHOULD NOT RULE OUT EXPROPRIATION RISK

Comment to Marcos García Domínguez, *Calculating Damages in Investment Arbitration: Should Tribunals Take Country Risk into Account?*

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"¡Exprópiese!" — Hugo Chávez, February 2010

I. INTRODUCTION

I thank the Board for asking me to write in response to this very important contribution. The publication of an article on international investment arbitration in this Journal was long overdue. The editor's choice, *Calculating Damages in Investment Arbitration: Should Tribunals Take Country Risk into Account?* by Marcos García Domínguez[1] puts the spotlight on the important and complex area of valuation for international investment arbitration.

García Domínguez answers the question in his article's title with a resounding yes.[2] This is understandable because in a normal foreign investment scenario, investors benefit from the country risk premium applicable at the time

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[1] Marcos García Domínguez, *Calculating Damages in Investment Arbitration: Should Tribunals Take Country Risk into Account?* 34 ARIZ. J. INT'L & COMP. L. 93 (2016).

[2] *Id*. at 121−22.

the investment is made. Consequently, if country risk is not discounted at the time an award is made, an investor could obtain a windfall to the extent it would benefit from both the premium received at the time of the investment and the compensatory award based on the full fair market value assessment of the expropriated investment. This, García Domínguez argues, would be contrary to universal legal principles that preclude unjust enrichment and double recovery.[3]

A narrower, more complex question arises once a determination has been made to discount country risk from the final computation of damages. This question asks whether arbitral tribunals should maintain the risk of the expropriation sub-component of country risk as part of the equation for determining the quantum of damages.[4] García Domínguez concludes that arbitral tribunals should not include the risk of expropriation[5] and suggests that host states should not be rewarded for the materialization of risks under the State's sole control (i.e., the wrongful and uncompensated expropriation of foreign investments).[6]

At the root of the problem are a number of awards from the late part of 2014—all involving expropriations in Venezuela (Venezuela Awards)[7]—where the tribunals adopted seemingly dissimilar approaches regarding the issue of inclusion and exclusion of expropriation risk from country risk analysis. While García Domínguez's proposed approach does not provide a definitive answer to these complex issues, his work deserves praise for fueling a much-needed interdisciplinary debate where few scholars from the legal and economics fields have weighed in.

II. VENEZUELA AWARDS: BIT'S AND IIA'S ARE ADEQUATE DEVICES THAT FAIL TO ASSIST TRIBUNALS IN EFFECTIVELY DETERMINING THE QUANTUM OF EXPROPRIATION DAMAGES

Suppose a global mining company, a multinational oil company, or an airport facilities operator from developed countries have a choice between two investments. These options are either to invest at home subject to minimal risks and expect an almost certain return or to place the same investment in a developing country and benefit from the expectation of a higher profit on account of higher risk exposure. Oftentimes, the expectation of a higher rate of return is

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3 *See id.* at 115–16.

4 *Id*. at 96.

5 *Id*. at 122.

6 *See* García Domínguez, *supra* note 1, at 122.

7 *See* Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, (Sept. 22, 2014); Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, (Oct. 9, 2014); Flughafen Zürich AG & Gestion e Ingineria IDC SA v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/19, Award, (Nov. 18, 2014).

not enough for a given economy to attract the necessary number of foreign investors, who by definition are risk-averse. After all, if the risk materializes—say, if the host state revokes the mining company's concession to extract minerals, or imposes taxes on oil extraction that increases the royalties due by the oil multinational, or simply expropriates the investment made in an airport facility—the expectation of receiving a higher return vanishes into thin air.[8]

But, as sophisticated business entrepreneurs, investors are aware that host states usually expropriate their investments. Hence, they have figured out two important ways to further protect their ventures and to mitigate the risks of doing business in developing countries. First, before the investment is made, investors will use their bargaining power to demand adequate assurances from host states (e.g., to obtain higher interest rates, additional collateral, tax breaks, etc.)[9] in compensation for taking the higher risk. This exchange is known as the country risk premium, a premium that is calculated by taking into account a number of sub-risks present in the country, including risk of expropriation and the whole panoply of political risks.[10]

Second, as powerful political constituents, investors have been successful at convincing their respective governments to enter into a number of international treaties with developing nations, including the so-called Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs). These instruments are designed to fulfill a triple function. In the first place, BITs and IIAs create special causes of action for resolving disputes arising out of or in connection with the investment; second, BITs vest jurisdiction in investor-state arbitral tribunals to decide such disputes; and finally, multilateral international treaties guarantee that signatory states will recognize and enforce the resulting arbitral awards.[11]

When such disputes arise and are arbitrated, "the quantum of damages matters."[12] Often addressed last in breach of contract analyses, the question of damages is certainly first in the minds of the parties and counsel.[13] In international investment arbitration, as in breach of contract cases, the decision of whether to arbitrate depends heavily on the likelihood of receiving a favorable

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[8] Any resemblance with the facts in *Gold Reserve*, *Venez. Holdings*, or *Flughafen* is purely coincidental.

[9] *See* García Domínguez, *supra* note 1, at 98.

[10] *See id.* at 99–100.

[11] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter N.Y. Convention] (156 countries have ratified the NY Convention as of the date of print).

[12] *See* García Domínguez, *supra* note 1, at 96.

[13] Like the fictional contract law professor in John Jay Osborn, Jr.'s 1970 classic—*The Paper Chase*—real life law professors assign the famous case, Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (N.H. 1929), discussing expectation damages for the breach of contract for the first day of classes in law school, thereby recognizing the importance of the subject.

damages award. In a 1.5 trillion USD system[14]—where arbitral tribunals have to apply national laws, BITs, IIAs, investment contracts, etc.—the analysis does not get any more complex.

Finally, the combination of Venezuela's mineral wealth, significant foreign investment needs, and President Chavez's expropriatory policies[15] (increasing the overall perception of country risk) served as a hotbed for some of the world's largest investor-state arbitrations in the last years.[16] It should be no surprise that the three diverging decisions on expropriation risk discussed in García Domínguez's work all involve Venezuela as the respondent.

III. FUTURE EXPROPRIATION CASES: SHOULD REFRAIN FROM EXCLUSION OF EXPROPRIATION DAMAGES AND DEVELOP THE VENEZUELA AWARDS' RATIONALE AWARDING DAMAGES ONLY IN UNLAWFUL EXPROPRIATION

Like other commentators, García Domínguez suggests that the different conclusions reached in the Venezuela Awards regarding the allocation of expropriation risk are hard to reconcile because the factual similarity present in the three cases should have led to similar outcomes.[17] While we all can agree that the tribunals missed the opportunity to provide clear reasoning in support of their conclusions on the issue of expropriation risk, the Venezuela Awards can be distinguished. The seemingly irreconcilable holdings, read in conjunction with the specific facts of each case, can indeed shed some light over the tribunals' lines of reasoning. Because it is essential for the debate, I turn now to the scrutiny of these "conflicting" awards.

Commentators present *Gold Reserve v. Venezuela* as an *unlawful* expropriation case that stands for the proposition that host states should not be

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[14] *See* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 411 (2012) (making reference to the data published in UNCTAD, Global Investments Trend Monitor No. 8 (24 January 2012)).

[15] "Expropriate it! Expropriate it!" or, as quoted in Spanish at the top of this Comment, "*¡Exprópiese!*," was the catch phrase Venezuela's late president Hugo Chávez coined in 2010 to communicate, on national television, not only his decision to expropriate certain real estate in downtown Caracas, but the start of one Venezuela's historically lengthiest expropriatory streaks.

[16] *See, e.g.,* Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, (Sept. 22, 2014); Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, (Oct. 9, 2014); Flughafen Zürich AG & Gestion e Ingineria IDC SA v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/19, Award, (Nov. 18, 2014); OI European Group B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/25, Award, (Mar. 10, 2015); Tidewater Inc., et al. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/5, Award, (Mar. 13, 2015).

[17] García Domínguez, *supra* note 1, at 108, 112–14.

rewarded for their expropriatory actions.[18] *Gold Reserve* arose under the Canada-Venezuela BIT and the resulting award was the first of a string of International Centre for Settlement of Investment Disputes (ICSID)[19] awards (all involving Venezuela) that expressly addressed the issue of taking expropriation risk into account for the calculation of country risk.[20] In *Gold Reserve*, Claimant, a Canadian mining company, invested 300 million USD in two mining projects for the extraction of gold and copper in Venezuela.[21] Before any extraction occurred, the government refused to renew Claimant's mining concessions alleging that Claimant had committed a number of acts that unjustifiably delayed the mining operation.[22]

In October of 2009, Claimant filed its request for arbitration claiming that Venezuela had generated conditions[23] that violated the Fair and Equitable Treatment (FET) standard protected under Article II of the Canada-Venezuela BIT. This resulted in the expropriation of the investment in violation of article VII(1) of the BIT.[24] The Tribunal held that the Respondent's failure to open an administrative procedure prior to the termination of the mining concessions constituted an egregious violation of Claimant's due process rights actionable under the BIT-FET provision.[25] On the other hand, the Tribunal dismissed the expropriation claims reasoning that the Respondent's acts only constituted "an exercise of regulatory powers" under the 1999 Venezuelan mining law and were not expropriatory in nature.[26]

Like the *Venezuela Holdings* and *Flughafen* awards discussed later in this section, the *Gold Reserve* Tribunal applied the Discounted Cash Flows (DCF)[27] method for determining the value associated with the country risk

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[18] *See* PRICEWATERHOUSECOOPERS, REWARDING EXPROPRIATION? 3–7 (2015), www.pwc.co.uk/assets/pdf/rewarding-expropriation.pdf.

[19] A dispute resolution entity created through the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. This convention is also known as the ICSD Convention. The ICSID Convention has been ratified by Canada, entry into force December 2013; Chile, entry into force October 1991; the Netherlands, entry into force October 1966; Switzerland, entry into force June 1968; and Venezuela entry into force June 1995; denounced by Venezuela on January 24, 2012.

[20] *See supra* note 8.

[21] Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, ¶ 271 (Sept. 22, 2014).

[22] *Id*. ¶¶ 25–28.

[23] *Id*. ¶ 29.

[24] *Id*. ¶¶ 537–44, 633–42.

[25] *Id*. ¶ 662.

[26] Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, ¶ 668 (Sept. 22, 2014).

[27] *See* García Domínguez, *supra* note 1, at 103–05 (looking at García Domínguez's meticulously footnoted discussion of DCF is particularly useful for understanding the method used in determining the country risk discount premium in *Gold Reserve*, *Venez.*

premium. Following a clash of divergent expert opinions where Venezuela's expert proposed a rather high country risk premium between 6.7% and 16.4% that "took account of Venezuela's . . . policy of ousting North American companies from the mining sector,"[28] the Tribunal sided with the Claimant's expert's proposal to exclude the expropriation risk. For the Tribunal, a 4% country risk premium discount rate, not "over-inflated on account of expropriation risks,"[29] was in line with the idea that "it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations."[30]

The award in *Venezuela Holdings v. Venezuela* was released shortly after *Gold Reserve*.[31] The claimants in *Venezuela Holdings* made investments in two separate joint ventures with Venezuela's state-owned oil company (PDVSA).[32] The first multibillion venture was for the construction, operation, and management of a heavy oil production facility in the Orinoco Belt;[33] the second was for the exploration and exploitation of a light-oil area in Lake Maracaibo.[34] After the political change that took place in 1999, the new government started taking a series of measures[35] to remove the incentives Venezuela had granted Claimants to secure their investment in the early 1990s. Namely, the government increased the royalties due to the host state through the imposition of new extraction taxes; imposed production and import curtailments; and finally, ordered the direct expropriation of the two joint ventures where Claimants had invested.[36]

Like in *Gold Reserve*, Claimants requested this arbitration claiming that Respondent's behavior violated the FET and the arbitrary and discriminatory provision under Article 3(1) of the Netherlands-Venezuela BIT, later followed by the unlawful expropriation of the investment in violation of Article 6 of the BIT.[37]

At first glance, *Venezuela Holdings* and *Gold Reserve* are very similar; however, the way *Venezuela Holdings* resolved the issue of expropriation risk and country risk discount calculation could not have departed more radically from the *Gold Reserve* approach. In *Venezuela Holdings*, Respondent persuaded the Tribunal to accept the argument that "elements such as the risk of taxation,

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Holdings, and *Flughafen*); *see also* Florin A. Dorobantu et al., Country Risk and Damages in Investment Arbitration, 31 ICSID REV. 219, 229 (2016).

[28] Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, ¶ 840 (Sept. 22, 2014).

[29] *Id*. ¶ 842.

[30] *Id*. ¶ 841.

[31] *See* sources cited *supra* note 7.

[32] Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶ 45 (Oct. 9, 2014).

[33] *Id*. ¶ 69.

[34] *Id*. ¶ 70.

[35] *Id*. ¶ 86.

[36] *Id*. ¶¶ 88–97, 100–16.

[37] Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 128–29 (Oct. 9, 2014).

regulation, and expropriation are essential to the country risk and must be taken into consideration for determining the discount rate."[38] The Tribunal imposed a rather steep 18% discount rate that included "confiscation" (expropriation) risk and was curiously close to Respondent's proposed 18.5–23.9% range.[39]

The common features *Gold Reserve* shares with *Venezuela Holdings* regarding country risk are now apparent. First, the experts agreed on many aspects for the valuation of damages, like using the DCF or some other valuation method, but clashed over the inclusion/exclusion of expropriation risk in the calculation of country risk.[40] Second, the tribunals carefully and extensively reproduced the experts' views;[41] and finally, the tribunals sided with one of the experts without providing much reasoning.[42]

Additionally, the distinguishable elements present in each case are apparent. For example, the Tribunal in *Venezuela Holdings* rejected the Claimants' argument that the expropriation was unlawful, finding that the manner in which the host State effectuated the expropriation was compatible with the due process obligation under Article 6 of the Netherlands-Venezuela BIT.[43] On the other hand, while the egregious violations present in *Gold Reserve* did not amount to the level unlawful expropriation, the Tribunal found that they constituted a serious violation to the FET obligations under Article II(2) of the Canada-Venezuela BIT.

As Alberro (2015) observes, "[o]ne of the reasons [to exclude expropriation risk] may be that [the tribunal] rejected the claim that the expropriation was unlawful."[44]

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38 *Id.* ¶¶ 364–65 (reasoning that "the compensation must correspond to the amount that a willing buyer would have been ready to pay to a willing seller in order to acquire his interests but for the expropriation, that is, at a time before the expropriation had occurred or before it had become public that it would occur").

39 *Id.* ¶¶ 366–68.

40 *See* Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 690, 840 (Sept. 22, 2014); Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 308, 361–62 (Oct. 9, 2014).

41 *See* Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 819–28 (Sept. 22, 2014); Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 360–63 (Oct. 9, 2014).

42 *See* Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 839–44 (Sept. 22, 2014); Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 364–68 (Oct. 9, 2014).

43 Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶ 297 (Oct. 9, 2014).

44 Jose Alberro & Sharon B. Johnson, *Controversial Topics in Damage Valuation: Complex Issues Require Sophisticated Analytical Methods*, *in* INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2015 37 (Global Legal Group 2015), https://www.cornerstone.com/Publications/Articles/Controversial-Topics-in-Damage-Valuation (alteration in the original).

Setting aside any considerations as to the viability of punitive damages in international law, the logical conclusion following the *Gold Reserve* and *Venezuela Holdings* awards is that arbitral tribunals will tend to exclude expropriation risk from the computation of country risk when the expropriation is found to be unlawful (*Gold Reserve*). Likewise, when tribunals find the expropriation to be nothing but the lawful exercise of the host state's sovereign power, and the investor's due process rights under national laws and BIT/IIA are respected, then tribunals will tend to include expropriation risk in the computation of country risk (*Venezuela Holdings*).

Building on the decisions of *Gold Reserve* and *Venezuela Holdings*[45] is *Flughafen v. Venezuela*.[46] As explained in this section, despite sharing some common features with the previous two cases (and despite being a case of unlawful expropriation) the Tribunal in *Flughafen* was not convinced to follow the guidelines set forth in *Gold Reserve* and *Venezuela Holdings*.

In *Flughafen*, a consortium of Swiss and Chilean investors entered into a contract for the maintenance, management, and operation of the Isla Margarita International Airport, off the Venezuelan coast.[47] The government took measures to rescind the contract and, with a little help from the Venezuelan judiciary, forced Claimants to relinquish control of the airport facilities over to the executive branch.[48] Arbitration ensued, and the Tribunal unanimously sided with Claimants, finding that the host state had expropriated the investment.[49] Nonetheless, as far as the calculation of country risk was concerned, the majority decided to adopt an intermediate position between *Gold Reserve* and *Venezuela Holdings* and included the pre-investment expropriation risk rate in the equation for country risk.[50]

The reasoning in *Flughafen*, however, demonstrates that the holding was not capricious. The portion of expropriation risk that the Tribunal decided to discount related to the risk that pre-existed and was known to the investors at the time of the investment.[51] Finally, the Tribunal's decision echoed the Claimants' expert testimony that a state cannot adopt expropriatory policies after an investment is made with the intention to benefit from the inclusion of a higher

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[45] *See* Gold Reserve Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/09/1, Award, (Sept. 22, 2014); Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, (Oct. 9, 2014)

[46] Flughafen Zürich AG & Gestion e Ingineria IDC SA v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/19, Award, (Nov. 18, 2014).

[47] *Id.* ¶¶ 1–3.

[48] *Id.* ¶ 103.

[49] *Id.* § X.

[50] *Id.* ¶¶ 896–907.

[51] Flughafen Zürich AG & Gestion e Ingineria IDC SA v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/19, Award, ¶ 907 (Nov. 18, 2014) (loosely translated by author: "When in 2004 Claimants decided to invest in Nueva Esparta, country risk already existed, and the investors knew perfectly well of its existence as well as the political and juridical incertitude.")

expropriation risk rate that will in turn reduce the amount of the compensatory award.[52]

Flughafen adds another takeaway to the *Gold Reserve*/*Venezuela Holdings* conclusions reached before. Irrespective of the lawfulness of the expropriation, tribunals may, in all reason, be reluctant to exclude the expropriation risk rate known to exist at the time of the investment. This takes us back to the general investment scenario described in Part II: investors benefit from country risk at the time they place their investment, and not applying the discount premium could constitute an unwarranted windfall for the investor at the time of the award.

Even if the Venezuela Awards shed some light over the penumbra, two more recent cases (also involving Venezuela as Respondent), *Tidewater Inc. v. Venezuela*[53] and *OI European Group B.V. v. Venezuela*,[54] take a toll on the validity of the conclusions presented in this section. This is especially true in *OI European Group*, an unlawful expropriation case that adopted the *Venezuela Holdings* lawful expropriation approach and incorporated expropriation risk into the country risk analysis.

There is no *stare decisis* in investor-state arbitration. For this reason, tribunals should not follow the conclusions that derive from the Venezuela Awards without considering some policy considerations associated with the incentives that are created by awards that exclude or incorporate expropriation risk.[55] In this sense, Dorubantu describes a first scenario that is more beneficial for the host state, where expropriation risk is included in the computation of country risk. Under this scenario, more expropriation means a smaller monetary award that the host state will have to pay—and more decline in investment value that the investor will sustain. Conversely, a second scenario where expropriation risk is excluded would penalize the host state ex-ante (imposing a higher country risk premium to attract investors).[56]

In contradistinction, García Domínguez urges future tribunals facing similar valuation problems to ignore the conclusions and the incentive analysis presented in this section and exclude expropriation risk altogether from the computation of country risk. García Domínguez rests his arguments on the civil law doctrine (which treats obligations to be performed under the debtor's exclusive will as null and void) and its common law counterpart, the consideration

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[52] *Id.* ¶ 905.

[53] *See generally* Tidewater Inc., et al. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/5, Award, (Mar. 13, 2015).

[54] *See generally* OI European Group B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/25, Award, (Mar. 10, 2015).

[55] Dorobantu et. al, *supra* note 27, at 226.

[56] *Id.*

doctrine (which renders illusory promises unenforceable).[57] By way of analogy, García Domínguez concludes that host states, being debtors of the BIT obligation regarding expropriation, cannot benefit from the materialization of a risk that is under the State's exclusive will.

Indeed, Planiol and Ripert's classic commentary to Article 1174 of Code Napoleon decrees the nullity of those obligations entered "under a potestative condition of him who binds himself."[58] For common law lawyers, the examples of a person who promises to do something "if I feel like it" or "unless I change my mind" represent instances of illusory consideration.[59] In Planiol and Ripert's own words, "[t]his has to do with a condition purely potestative, or condition *si voluero*; he who contracts under such condition does not obligate himself, he does not actually express his will to be bound."[60]

It seems unlikely that arbitral tribunals will start excluding expropriation risk from country risk analysis based on the theory that renders the obligations to be performed under the debtor's exclusive will unenforceable. BITs coupled with IIAs create special causes of actions for investors to recover in case of unlawful expropriations. These instruments are not designed to ban expropriatory actions. To the contrary, these instruments recognize that, under national constitutions and laws, host states retain the sovereign right to expropriate foreign investments.

The fact that a decision to expropriate an investment rests solely in the hands of the host state has no bearing on the validity of an obligation under the treaty. Clearly, the obligation under the treaty is not to refrain from expropriating. In fact, under most BITs, the obligation imposed on the host state is to provide just compensation for the investment that is expropriated and to conduct such expropriation in a manner that observes the investor's due process rights.

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[57] *See* García Domínguez, *supra* note 1, at 119 (citing to Article 1174 of the French Civil Code and Wickham & Burton Coal Co. v. Farmer's Lumber Co., 189 Iowa 1183, 179 N.W. 417 (1923)).

[58] MARCEL PLANIOL & GEORGES RIPERT, 2 TREATISE ON THE CIVIL LAW § 1269A 721 (11th ed. 1939), (translated by the Louisiana Law Institute with the Authority of Librarie Génerale de Droit et de Jurisprudence, Paris).

[59] *See id.* at 117 n.181.

[60] *See generally id.*

IV. CONCLUSION

García Domínguez presents the seemingly contradictory holdings in the Venezuela Awards as "leading to more unpredictability in an already erratic area." This Response provides nuance to García Domínguez's clear-cut approach to remove expropriation risk from country risk analysis based on theories that render obligations null and void like *obligations subject to conditions purely facultative* (*potestative*) and the doctrine of illusory consideration.

Before accepting García Domínguez's proposition, this Response urges scholars entering the debate, and tribunals deciding the issue of whether to include expropriation risk in country risk analysis, to consider narrowing down the discussion to: (1) whether the expropriation was lawful or unlawful, and whether it makes sense to apply *Venezuela Holdings* or *Gold Reserve* accordingly; (2) the assessment of the existing risk of expropriation at the time of the investment versus the increased expropriation risk due a perception created by the host state, and whether *Flughafen* should be followed; and (3) the different policy considerations and the consequences that might attach to scenarios (1) and (2) as well, if a rule like the one García Domínguez proposes is adopted.

After considering the distinction between lawful and unlawful expropriations and the ex-ante benefit investors receive on account of country risk, the main argument should now be construed around the idea that tribunals should avoid rewarding the state for *unlawfully* expropriating investments and to prevent investors from getting a second bite at the apple.