

**^{4f}INDIRECT EXPROPRIATION AS A CONCEPT OF POLITICAL RISK IN
TERMS OF INTERNATIONAL ENERGY INVESTMENTS**
(ULUSLARARASI ENERJİ YATIRIMLARI BAKIMINDAN BİR POLİTİK RİSK KAVRAMI
OLARAK DOLAYLI KAMULAŞTIRMA)

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ÖZ

Kaynak açısından zengin devletler ve yükselen ekonomiler, uluslararası yatırımcıları ve yatırımları çekme eğilimindedir. İdeal olarak, yatırımcının bir ülkeye yatırım yapmaya karar verme sürecinde, yatırımının gelecekteki ekonomik sonucu kadar dikkatini vermesi gereken bir kriter vardır. Bu kriter, ev sahibi devletin özellikle dolaylı kamulaştırmaya ilişkin potansiyel politik riskleridir. Yatırımcılar, gelecekteki yatırımlarını güvenli ve elverişli tutabilmek için hedef ülkelerin dolaylı kamulaştırma risklerini ve düzenlemelerini göz önünde bulundurmalıdır. Gerçek duruma gelince, hem yatırımcılar hem de hükümetler bu hem yerel hem de uluslararası hukuk ve yönetmelik alanındaki belirsizlikten negatif etkilenmektedir. Bu bağlamda, bu makalenin amacı, politik bir risk olarak dolaylı kamulaştırma kavramına hukuki anlamda daha iyi bir anlayış ve açıklık getirmektir.

Anahtar Kelimeler: Uluslararası Enerji Yatırımları, Politik Risk, Kamulaştırma, Dolaylı Kamulaştırma

ABSTRACT

The states, which are affluent in terms of resources, and the emerging economies both tend to attract the international investors and investments. Ideally, the course of making the decision to invest in a country by an investor incorporates a criteria to take into account as much as the economic outcome of such investment in future. Such criterion consists of the potential political risks, particularly with respect to the indirect expropriation, exposed by the host state. For the purpose of keeping any investment, it will have made in future, safe and favorable, any investor must take into account the indirect expropriation risks and regulations of the target country. When it comes to the actual circumstance, both the investors and the governments are negatively affected from the uncertainty in respect of both the local and the international law as well as the regulations. Accordingly, the purpose of this article is to provide a better understanding for the concept of indirect expropriation as a political risk, and also to clarify such concept in legal terms.

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I INTRODUCTION

As a requirement and advantage brought by the developing world and economy, it may be considered that the international investments would also increase rapidly and in number since the national boundaries can now be crossed readily by the investors. The profitable and attractive investments, being made by the private sector which is being nourished also by the contributions made by the competitive environment and evolving both economically and technically, give rise to the fact that expropriation of such investments is desired by the host countries. However, the increased cost of the expropriation procedures, carried out duly, to the governments, has given rise to the emergence of a new concept, namely indirect expropriation, in the international law, particularly following the 70s and 80s when the expropriation has peaked.²

When considered in terms of the international investments, the lack of a conclusive legal ground for entire of the actions, which are considered as a type of political risk³ and called as indirect expropriation⁴ allows us to characterize such actions commonly as unlawful acts. The significance of the matter is further increased since such actions consist of the governmental acts which are unpredictable and which restrict the exercise of some rights⁵. Therefore, this article describes the concept of political risk, encountered in terms of international energy investments, and also, in particular, the indirect expropriation encountered indirectly by the investors due to the payment of the compensation by the host country.

II THE CONCEPT OF POLITICAL RISK IN TERMS OF INTERNATIONAL INVESTMENTS

The companies, which intend to make international investment, analyze the profitability of such investment to be made by taking numerous criteria as the basis and assessing the risks in various fields before making an investment decision. Identification and assessment of the political risks with respect to the host country where the investment will be made, in addition to the geographical, technical and business⁶ ones among such risk, are of

² SAMLI, Zekican, "Uluslararası Hukukta Dolaylı Kamulaştırma Tanımı, Ayırtedici Özellikleri ve Sonucu" (*Definition, Characteristics and Outcome of Indirect Expropriation in International Law*), Ankara Üniversitesi Hukuk Fakültesi Yayınları, Mecmua, 1. Bası, Ankara 2008, s. 824.

³ The concept of political risk is also addressed in the article for the purpose of describing the cost of indirect expropriation much better.

⁴ "Indirect expropriation" is also expressed by the term "creeping expropriation" in international law. It is possible to observe that some academicians prefer to use the term "*de facto* expropriation" instead of indirect expropriation.

⁵ BILSON C.M., BRAILSFORD T.J., HOOPER V.J., "The Explanatory Power of Political Risk in Emerging Markets", The Australian National University, Working Paper Series in Finance 99-04, 1999, Page 4 (see also <https://core.ac.uk/download/pdf/156616336.pdf>) (Date of Access: 15.04.2021)

⁶ Business risks constitute the developments which emerge upon the change of the rules and practices with respect to the business life in consequence of the economic, social and political pressures and which are not encountered so frequently. (SCHWENDIMANN, J. S.: "Multinational Corporation

great importance in terms of protection of such investment for the long-term. Desiring to point out such matter, John Gault states in his article⁷ that the political risks are harder to predict as compared to the geographical, technical, business and financial risks, and also that such uncertainties pose a significant threat in terms of the investments.

In general terms, political risk can be described as the probability of emergence of any change to the government policies, expropriation, confiscation, war, civil war, insurrection, terrorist actions, political unrest, discriminatory practices by the host country⁸, and civil disorder which might affect the investors negatively in a country. Since the political risks arise from any act of the host country or any occurrence that might arise in the host country, which would jeopardize the profitability and continuity of a foreign investment, some analysis is being conducted by the private companies for the purpose of preventing any such risk before its occurrence, or the foreign investments are being insured by means of political risk insurances for the purpose of indemnifying any damage and/or loss that might result from any such risk.

The Economic Intelligence Unit (EIU), the International Country Risk Guide (ICRG), the Business Environment Risk Intelligence (BERI) and MARSH can be cited as the independent consultants conducting political risk analysis by countries. The countries are being graded with scores from 1 to 100 as based on the relevant system. There are many countries with a score of high risk and being named as the highest risk group⁹ that a foreign investor may still wish to make an investment in any such country following the identification of the political risks thereof. Profitability of the energy investments even causes the investors to ignore some political risks. Then, certain insurances come into question for the purpose of protecting such investments. The Overseas Private Investment Corporation (OPIC), a governmental entity of the U.S.A., and also the Multilateral Investment Guarantee Agency (MIGA), which is within the organization of the World Bank, can be cited as the entities that provide political risk insurance for as much as the involvement of OPIC or MIGA in the project suffices for discouraging the local governments to foreclose the letters of guarantee as based on a political decision in many cases.¹⁰

and the Host Country Environment”, A Century of Foreign Investment in the Third World (ed. Michael J. Twomey), New York 2000, Page 187.) See also KIRLI, Deniz Defne, “Çok Taraflı Yatırım Garanti Kuruluşu (MIGA) ve Yabancı Yatırımların Politik Risklere Karşı Korunması”, Yüksek Lisans Tezi, Ankara, 2004 (Multilateral Investment Guarantee Agency (MIGA) and Protection of Foreign Investments Against Political Risks) Postgraduate Thesis, Ankara, 2004, Page 1.

⁷ GAULT, J., “Coping with Political Risk”, Journal of World Energy Law & Business, Oxford University Press, December 2012, Page 281.

⁸ Any country, where any foreign investment would be made, shall hereinafter be referred to as the host country.

⁹ Political Risk Map 2020: Trade Tensions Threaten Political Stability - file:///C:/Users/User/Downloads/political-risk-map-2020-report.pdf (Date of Access: 05.04.2021).

EUI Country Risk Service Handbook - <http://graphics.eiu.com/upload/regulatory-affairs/EIU-Country-Risk-Service-Handbook-September-2020.pdf> (Date of Access: 05.04.2021)

¹⁰ KÖKSAL, T., “Model Sözleşme Örnekleri ile Uluslararası İnşaat Hukuku” (*Forms of Model Agreements and International Building Law*), Adalet Yayınevi, Ankara, 2011, Page 12.

III CONCEPT OF INDIRECT EXPROPRIATION

One of the most notable political risks against the international energy investments made in the developing countries is the indirect expropriation. Indirect expropriation refers to the actions of the host country which have an effect that is as much as radical as those of a direct expropriation that virtually requires the payment of a compensation on the use of the investment assets, and the transformations in the global economy have resulted in the enforcement of indirect expropriation in a wide range, including the industry and finance, both in terms of international and national law.¹¹ Schreuer indicates that the practices, which result in the significant loss of control of the investment or lead to a substantial decrease in the economic value expected from an investment, without any physical possession of a foreign investment, constitute the most notable characteristic of indirect expropriation.¹²

From the point of the investor, any expropriation circumstance may easily be considered as a political risk, however, the host country would pay a certain compensation to the investor in consideration of the investment it will have directly expropriated. In the case of indirect expropriation, the host country mostly tends to implement the practices that discourage the investor with the aim to abstain from the burden to pay compensation, and it causes the investor to withdraw from the country voluntarily. Indirect expropriation may in some cases reveal itself as taking over the management, use, control, or depreciation of the value significantly or taking away the assets, which might give rise to the effective loss of the investor's ownership, rather than necessarily confiscation of the property physically.¹³ The uncertainty being experienced with respect to the fact that such kind of acts and actions of the host country to alienate the investor from the country would be considered as indirect expropriation, or not, has made the matter significantly important. Therefore, it will be relevant to descend to the particulars of the matter.

Despite the fact that it is stated by the doctrine that the current political risks occasionally result from the actions of the host country, which are aimed at alienating the foreign investors from the country,¹⁴ the difficulties being experienced in respect of determination of an indirect expropriation, we encounter as the sub-heading of the expropriation but which is of unlawful nature, demonstrate that it is not that much simple to make such a sweeping statement. Additionally, although sufficient sensitivity is not being shown for the significance of the indirect expropriation by some sources, it would be beneficial to indicate that, between 1994 and 2015, 317 lawsuits have been filed¹⁵ against the host countries by the foreign investors who allege indirect expropriation, according to the data provided by UNCTAD.

¹¹ COTULA, L., "Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties, Special Issue", *RECIEL, Review of European, Comparative & International Environmental Law*, Volume 24, Issue 3, 2015, Page 278.

¹² SCHREUER, Christopher H., "The Concept of Expropriation Under the ECT and Other Investment Protection Treaties", *Investment Arbitration and the Energy Charter Treaty*, Ed. By Clarisse Ribeiro, New York, Juris, 2006, Page 115.

¹³ DAZA-CLARK, A. M., "International investment law and water resources management: An Appraisal of Indirect Expropriation", *Nijhoff International Investment Law Series*, Leiden; Boston: Brill Nijhoff, | Series: Nijhoff International Investment Law Series; Volume 6, 2017, Page 86.

¹⁴ KOKSAL, Page 10.

¹⁵ DAZA-CLARK, Page. 99.

A. INDIRECT EXPROPRIATION IN INTERNATIONAL LAW

As we have previously addressed hereunder, the indirect expropriation circumstances, whereby the rights and powers on the assets are lost gradually, are shown as the most notable and greatest risk factor apart from the direct expropriations encountered by the international investors at the present.¹⁶ For the purpose of avoiding the heavy burden of compensation as brought in particular by direct expropriation, host countries may issue some regulations, which directly affect the foreign investments, by asserting grounds such as the public interest as well as protection of public health and the environment, and such regulations may give rise to the fact that the operations of foreign investments are affected or their production is interrupted or that some of such investments are closed down. Such circumstances, which affect the continuity and profitability of an investment, would cause the investor to leave the country by abandoning its investment; and the host country, which does not become obliged to pay compensation, becomes the owner of a profitable investment, eventually.

In general terms, in international law, expropriation is the circumstance, whereby the right of ownership of the rightful owner is taken over by the government by paying compensation in return, so as to be in compliance with the procedural rules in case of existence of public interest. The right to expropriate arises from the sovereign power of the states, and the exercise of such right by a state may not be precluded, however, any state may exercise such right by observing certain requirements as per the principle of protection of private ownership; and there is no regulation in the international law that would prevent any state to expropriate.¹⁷ Expropriation is also defined as the takeover of the assets of an investor by the host country for the public interest; possession of the expropriation power by a state is an established circumstance in the international law, however, it is obvious that a state may expropriate the assets owned by a foreign national only if it is for public interest and the appropriate compensation is paid thereto.¹⁸

The fundamental principles with respect to expropriation are set out in the bilateral investment agreements, multilateral investment agreements and the international arbitration awards, and in particular, the ICSID awards are of guidance nature in this respect.¹⁹ At this point, it would be relevant to review the bilateral investment agreements, multilateral investment agreements and the relevant articles thereof; The "North America Free Trade Agreement" (NAFTA) Article 1110, Energy Charter Treaty (ECT) Article 13, Multilateral Investment Guarantee Agency Convention (MIGA) Article 11 (a) ii²⁰ and Section 4, bearing the heading "Expropriation and Unilateral Alterations or Termination of Contracts", of the "1992 World Bank Guidelines" may be cited as such agreements and the relevant articles.

Section 4, bearing the heading "Expropriation and Unilateral Alterations or Termination of Contracts" of the "1992 World Bank Guidelines" reads as follows;

¹⁶ WELLS, L. T.: "Private Foreign Investment in Infrastructure: Managing Non-Commercial Risk" School of Business Administration, Harvard University, Boston, MA 02163. 1999, Page 178.

¹⁷ BAKLACI, P., Uluslararası Yatırımlarda 'Dolaylı Kamulaştırma' ve Düzenleyici Yetkiler" (*Indirect Expropriation in International Investments and the Regulatory Powers thereto*), Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Cilt 28, Sayı 1-2 (2008), Page 3. (see also <https://dergipark.org.tr/en/download/article-file/99323>)

(Date of Access: 05.04.2021)

¹⁸ KIRLI, Page 56.

¹⁹ BAKLACI, Page 3.

²⁰ BAKLACI, Page 8.

"A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation."²¹

Article 1110 of the North American Free Trade Agreement protects the investments against any indirect expropriation as specified as follows:²²

"1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation") except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with in accordance with paragraphs 2 through 6".

Considering Article 13, which set out "expropriation", of the Energy Charter Treaty (ECT), it is seen that it reads as follows;

"1. Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by the payment of prompt, adequate and effective compensation."²³

As mentioned herein above, considering the respective articles of the said agreements, it is seen that four principal conditions are sought for the expropriation. The first one of such conditions stipulates the public interest, and the existence of public interest is an indispensable condition for the purpose of expropriation. The second one stipulates that the expropriation must not be of discriminatory nature. The third condition stipulates that the expropriation must be performed in accordance with the procedural rules, and ultimately, the fourth condition stipulates the compensation, that is to say that the expropriating state is obliged to pay compensation in return.²⁴ Any expropriation, whereby such four conditions are satisfied, is called "direct expropriation".

"Indirect expropriation is the act of a state to limit the right of ownership, either actually or indirectly by means of the regulations it issues but without a total confiscation or taking over the legal entity, and to hinder the utilization of the benefits, they have, by the individuals."²⁵

²¹ SAMLI, Page 828.

²² <http://www.sice.oas.org/trade/NAFTA/chap-111.asp>

(Date of Access: 20.12.2020).

²³ <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>

(Date of Access: 20.12.2020).

²⁴ BAKLACI, Page 5.

²⁵ SAMLI, Page 827.

Considering the relevant articles of the agreements and treaties given hereunder, it is seen that the indirect expropriation is not regulated by means of a separate inclusion but that it is set out by pointed out within the regulations with respect to expropriation. The common expressions, incorporated in the expropriation-related provisions of all such agreements and treaties, whereby it is stated that the investments of any of the contracting parties in the territory of any other contracting party shall be definitely not expropriated, nationalized or subjected to any measure having effect equivalent to nationalization or expropriation, except where such expropriation is required for a public purpose, and is accordance with due process of law and is on payment of compensation and is on a non-discriminatory basis, indicate that indirect expropriation is principally a circumstance that is similar to direct expropriation and nationalization.

As noted, it is difficult to determine whether an indirect expropriation exists. Such difficulty arises from the complication to determine what actions fall under the exercise of the sovereign right of the host country and what actions fall under the abuse of the exercise of its sovereign right by the host country. Considering the doctrine and the arbitration awards, it may be told that, in principle, three key criteria are taken into account for determining the existence of an indirect expropriation. The first one of such criteria is the extent of the actions of the host country to affect the right of ownership, and the second one consists of the characteristics, purpose and contents of the measures of the host country; and the third and the last criteria in respect of determining whether an indirect expropriation exists shows up as the extent of the intervention by such host country.²⁶

Considering in terms of such criteria, to set an example as based on a lawsuit;... As indicated pointedly also in a concrete case tried by the ICSID: Albeit an action of expropriation or confiscation due to protection of the environment could be considered to be for the public interest and be lawful, in fact, acquisition of the ownership for such reason would affect neither the nature nor the extent of the compensation required to be paid due to confiscation. Accordingly, confiscation of the property for the purpose of protecting the environment does not affect the legal characteristic of such confiscation and ultimately the requirement to pay an appropriate compensation thereto. Environmental measures with expropriation are identical to all such other expropriations performed by the state to accomplish its policies, even if it is entirely commendable and beneficial to the society. Even if such expropriation is for environmental reasons, if and when a property is expropriated, the obligation of the state to pay compensation shall continue irrespective of the fact that whether it is of domestic or international nature." In other words, any regulation issued for the public interest would not relieve the state of its obligation to pay compensation, if it extends to expropriation".²⁷

Considering the host country's practices, which may be deemed as an indirect expropriation, and also the percent values of such practices as provided in the light of the statistical data; tax increase reported as 40.4% stands as the most common host country practice among the actions giving rise to indirect expropriation. Tax increase is followed by the discriminatory regulations, reported as 25%; prevention of the exercise of some rights, reported as 15.4%; the environmental reasons, reported as 12.2%; and also by the actions,

²⁶ YANNACA-SMALL, C., *Indirect Expropriation* and the "Right to Regulate in International Investment Law, OECD Publishing, September, 2004, Page 10. See also. https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf
(Date of Access: 05.04.2021)

²⁷ SAMLI, Page 839.

reported as 3.2% and aimed at indirect expropriation, emerging with respect to the human rights; and the remaining portion of 3.8% originates from the other reasons.²⁸

Considering the indirect expropriation upon analyzing the statistical data, it is seen that the host countries, in particular taking into account the huge investments, in some cases abuse their sovereignty rights for the purpose of abstaining from the burden of compensation as brought by the expropriation, and acquire the foreign investments by means of their acts, which are indeed malevolent or unlawful, despite they seem to have a legal ground, for the purpose of alienating such investments from the country, as the phrase is, and incorporating them into their own organization, by means of their regulatory actions. Indeed, such act as mentioned herein is an acquisition in the consequential context because there is no apparent confiscation directly, however, they provide for the occurrence of such outcome by means of their acts, which give rise to either the restriction or preclusion of the exercise of the right, or by their unlawful actions/acts.

B. ACTIONS DEEMED AS INDIRECT EXPROPRIATION

Despite the fact that a foreign investor may perceive that any and all kinds of dispositions and acts of a host country, which would, in the sight of such investor, substantially damage its investment and prevent such investor to access the economic profitability it expects from such investment, should be deemed as an indirect expropriation; what matters for us is to demonstrate that which actions would constitute an indirect expropriation in legal terms, in which circumstances and in line with the criteria as determined by the arbitration tribunals and so as to not to constitute an intervention in the sovereignty of such host country. There is no definitive agreement, law or consensus with respect to the actions that constitute an indirect expropriation²⁹, however, the unfavorable actions taken by the host country with respect to the licenses and authorizations, disproportionate tax increases, intervention in the administration or profitability of the investment, as specific to the international energy investments, can be listed as such dispositions, as based on the arbitral awards and the doctrine.

As is known, the areas of activity of energy investments require a license all over the world, and no operation may be carried out in the energy markets without having such investment licensed. Therefore, it would be appropriate to state that the intervention to the licenses and authorizations by the host country, wrongly and unlawfully and to the detriment of the investor, is one of the most notable dispositions that would give rise to any consequence that would be deemed as an indirect expropriation on an international energy investment. Under normal circumstances, granting of a license for an investment and revocation of such license are, indeed, both under the sovereignty power of the host country, however, any type of disposition, which alienates an investor from the country and is aimed at taking over the investment without incurring the burden to pay a compensation for an investment, cannot be considered to fall under such scope.

On the other hand, disproportionate taxes stand as another vital action that can be deemed as an indirect expropriation. By its very nature, any taxation-related disposition of each state is a prominence of its sovereign right and power. It is not possible to deem every

²⁸ ERKAN, M., *International Energy Investment Law: Stability through Contractual Clauses*, Wolters Kluwer Law & Business, December 2010, Page 82.

²⁹ ERDEN, N. H.Z., “Milletlerarası Yatırım Hukukunda Dolaylı Kamulaştırma” (*Indirect Expropriation in International Investment Law*), Oniki Levha Yayıncılık, 1. Baskı, İstanbul, 2015, Page 222.

tax practice as indirect expropriation. At this point, the important matter is the probability of the fact that whether the respective host country's tax-related regulations, which might result in the substantial loss of the control of such international investment on the part of the investor or which might give rise to a substantial decrease in the economic value expected from such investment by such investor and which could be regarded to be of disproportionate nature, would constitute an indirect expropriation, as mentioned herein above. Indeed, this does not purport any taxation regulation that would be regarded as disproportionate; it is normal that an investment would be subject to different tax brackets if and when its profit increases, however the point to consider herein is the fact that whether such tax imposed is excessive, repeated, discriminatory or is a heavy tax imposed only on foreign investors.³⁰

Another disposition by a host country that can be deemed as an indirect expropriation is intervention in the administration of foreign investment. Any unlawful government intervention in a manner to hinder the administration of its investment, either physically or lawfully, by a foreign investor³¹ may give rise to the fact that such investor cannot achieve the economic benefit it expects from its investment, and to abandon such investment. As it will be seen also from the precedent given herein below, a host country can remove/dismiss an executive who is of key nature for the investment, by adopting an unlawful resolution, which would restrict the liberty about the individuals who are in charge of administration of an investment, or push the investment into bankruptcy by precluding the growth of such investment by cancelling the resolutions and transactions with respect to the share transfers of such investment by means of court decisions. As it is seen, such type of unlawful dispositions of a host country would give rise to the consequences that are the same with the expropriation, and allow the state, which pursues such procedure, to take over the investment without paying any compensation thereto.

There is an up-to-date arbitration award that covers almost all of such dispositions made by a host country, as mentioned herein above and which can be deemed as indirect expropriation.³² Considering the arbitration award with respect to the dispute between the company called Yukos Universal Limited (Isle of Man), which is regarded as one of the most powerful energy companies in the world, and the Russian Federation, and the type of action of which was determined as the "International Investment Agreement" UNCITRAL (1976) arbitration rules applied. It is seen that, according to the arbitration tribunal, the Russian Federation ultimately caused the said company go bankrupt by imposing unlawful and high tax penalties and preventing the use of the assets by the investor by freezing the assets of such investment, and sentencing the senior executives of the said company to imprisonment and obtaining court decisions that invalidate the share transfers following the announcement made by the company that the company would merge with another company. The arbitration tribunal concluded that the initial purpose of the Russian Federation seemed to solely collect tax, but its primary purpose was to confiscate all assets of the Yukos company upon its bankruptcy, and it has adjudicated that such disposition was an indirect expropriation that constitute a confiscation, and also that a compensation should be paid to the Yukos company.

³⁰ ERDEN, Page 222.

³¹ ERDEN, Page.232.

³² Yukos Universal Limited v. The Russian Federation, UNCITRAL PCA Case No: 2005-04/AA227, Final Award, 18 July 2014.

C. INDIRECT EXPROPRIATION IN TURKEY

Considering the status of indirect expropriation in Turkey, such a concept is not regulated separately just as it is done by international law. Despite the indirect expropriation is not covered in the laws of the Republic of Turkey, Turkey has become acquainted with such concept to the international commercial treaties to which it is a party. It would be beneficial to take a glance at the expropriation-related regulations as prescribed by the laws of the Republic of Turkey, before addressing such treaties to which the Republic of Turkey is a party.

Expropriation is set out under Article 46 of the Constitution of the Republic of Turkey. As per the relevant article, *"If and when so required for public interest, the State and any governmental legal entity shall be entitled to expropriate, and establish any administrative easement on either the whole or any portion of the privately owned immovable properties in accordance with the principles and procedures as specified by law, provided that the fair value of any such property shall have been paid in advance."*³³ Section 1, which sets out the purpose and the scope of the Law on Expropriation³⁴ provides guidance with respect to the manner of performance of expropriation by incorporating the inscription that reads as *"This Law sets out the procedures to be carried out in respect of expropriation of any immovable property, which is owned by any real person or private legal entity, by the State or any governmental legal entity, if and when so required for the public interest, and also the calculation of the price to be paid for such expropriation...."*

Considering both the Constitution of the Republic of Turkey and also the Law on Expropriation, it is seen that three conditions must be satisfied in order for performance of expropriation by the government in Turkey. Such conditions consist of emergence of a circumstance as required for public interest, and payment of the fair value of such property in advance to the owner of the expropriated property, and performance of such expropriation in accordance with the principles and procedures as prescribed by the law.

In addition to those two regulations, there is also another important regulation of Turkey which is named as "Foreign Direct Investments Law"³⁵ that aims to encourage foreign direct investments and to protect rights of foreign investors at international standards. Expropriation is set out under Article 3/b of the Foreign Direct Investments Law. As per the relevant article *"...in accordance with the current legislation; Foreign direct investments, cannot be expropriated or nationalized unless the public interest requires and the value of investment is paid."*

The following treaties may be cited for the sake of example for the international commercial treaties, to which Turkey is a party, as well as the articles of such treaties in respect of expropriation; the Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (Article 3), the Treaty Between the Republic of Turkey and the People's Republic of China Con-

³³ The Constitution of the Republic of Turkey, Law Number: 2709, Date of Enactment: 7.11.1982 (see also <http://www.tbmm.gov.tr/anayasa.htm>) (Date of Access: 05.04.2021)

³⁴ Law on Expropriation, Law Number: 2942, Date of Enactment: 04/11/1983, Promulgated on the Official Journal on: 08/11/1983.

³⁵ "Foreign Direct Investments Law", Law Number: 4875, Date of Enactment: 05/06/2003, Promulgated on the Official Journal on: 17/06/2013.

cerning the Reciprocal Encouragement and Protection of Investments (Article 3)³⁶, the Treaty Between the Republic of Turkey and the Kingdom of Spain Concerning the Reciprocal Encouragement and Protection of Investments (Article 5)³⁷ and the Energy Charter Treaty (Article 13 (1)).³⁸

As per Article 5 of the Treaty Between the Republic of Turkey and the Kingdom of Spain Concerning the Reciprocal Encouragement and Protection of Investments; "*Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with the applicable regulations and the general principles as set out under Article III and Article IV hereof.*"³⁹

As per Article 13(1) of the Energy Charter Treaty; "*Investments of investors of a contracting party in the area of any other contracting party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation, except where such expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.*"

Considering the Article, the explicit provision of which is given herein above, and also the relevant articles of such other treaties; it is concluded that a consensus is reached with respect to the following inscriptions under the international treaties: "*The investments of any of the contracting parties in the territory of any other contracting party shall be definitely not expropriated, nationalized or subjected to any measure having effect equivalent to nationalization or expropriation, except where such expropriation is required for a public purpose, and is accordance with due process of law and is on payment of compensation and is on a non-discriminatory basis.*"

The Convention on the Settlement of Investment Disputes Between States and Nationals of other States (ICSID), to which Turkey is a party, provides for essential and reliable arbitration in respect of any investment dispute, and this is of prime importance in respect of creation of the opinion by the respective investor that its investment is secured, even though it does not mitigate the political risks.

As it is seen, indirect expropriation is not incorporated explicitly by the domestic legislation in Turkey, but only the procedures and principles for the expropriation are set out, however, considering the relevant articles of the treaties, to which Turkey is a party, the existence of indirect expropriation can be pointed out and it can be indicated that such expropriation is acknowledged together with its consequences.

IV CONCLUSION

With reference to the fact that political risks can be described as the probability of emergence of any circumstance, which might negatively affect any investment that would come to a country, in particular any sudden and unexpected change to the government poli-

³⁶ https://www.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc076/kanuntbmmc076/kanuntbmmc07603882.pdf
(Date of Access: 05.04.2021).

³⁷ https://www.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc080/kanuntbmmc080/kanuntbmmc08004267.pdf
(Date of Access: 05.04.2021).

³⁸ BAKLACI, Page 11.

³⁹ Official Journal, 01.12.1997, Page 23187.

cies, expropriation, confiscation, war, civil war, insurrection, terrorist actions, political unrest, discriminatory practices by the host country, and civil disorder; it is seen that the importance of creation of an investment environment, which is stable, healthy and foreseeable in the sight of the investors, by a country is essential as much as the return of such investment. The difficulties in determining the dispositions, which would be deemed as indirect expropriation, in particular the difficulty in determining the start and the end of the sovereignty of the host country, which is a controversial topic, make the indirect expropriation, which is one of the political risks, much more noteworthy as compared to the other risks. It is evident that, for the purpose of enabling the investors to make their decisions more readily and feel safe while making their investments, both the local and the international regulations should be amplified further in terms of transparency, clarity and predictability in this regard. In fact, the development of and reaching a powerful position at the world stage by a country are greatly influenced and will remain to be influenced by the investments it hosts. Thus, any investor, relying upon the fact that it would be able to secure its right against the risk of indirect expropriation, may, with its mind at peace, change its point of view towards the indirect expropriation or the size of the risk among the political risks it will have identified before making its investment.

On the other hand, considering that any country, seeking indirect expropriation with the intent to abstain from the burden of compensation, would act reservedly to create an environment where the investors would feel safe by means of the regulations under its domestic law; we also would like to indicate our opinion that the most crucial task in respect of determining the dispositions that would fall under the scope of indirect expropriation and also ensuring that the compensation, payable to a foreign investor, is paid appropriately and equitably once again falls upon the international regulations, i.e. the United Nations Commission on International Trade Law (UNCITRAL).

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