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# The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State

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# NOTES AND COMMENTS

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## I. INTRODUCTION

The eminent economic historian Alexander Gerschenkron has noted that the more economically backward a nation, the more drastic and explosive will be its road to industrialization.[1] In England, historically the wealthiest nation in the world, the industrial revolution was accomplished solely by the bourgeoisie.[2] In Germany, the banks provided the necessary capital for industrialization.[3] In Imperial Russia, the most backward European state, direct state intervention was needed to finance economic modernization.[4] In the so-called Third World,[5] however, even state intervention has been ineffective in achieving development.[6] A severe shortage of capital in these developing nations has slowed the process of industrialization.[7] Consequently these nations have appealed to capital exporting states to facilitate industrialization.[8] The result of this appeal has

1. A. GERSCHENKRON, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE 8, 44, 353-54 (1962).

2. *Id.* at 14, 45.

3. *Id.* at 13-16, 45.

4. *Id.* at 19-20, 45-46.

5. For the purposes of this note the terms "Third World," "developing nations" and "less developed nations" will be used interchangeably They refer to those countries of Latin America, Africa and Asia which, because of political and economic colonialism, are retarded in industrial development. These nations possess two common characteristics: (1) a lack of capital relative to the industrialized nations and (2) a prior history of colonial rule. *See* W. RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 13-14 (1974).

6. *Cf.* GERSCHENKRON, *supra* note 1, at 8 ("Borrowed technology . . . was one of the primary factors assuring a high speed of development in a backward country entering the stage of industrialization").

7. A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 12-16 (1962).

8. *Id.*

not been without its problems. A strong sense of nationalism and a desire to retain control over natural resources and the means of production have caused less developed countries to resort to expropriation of foreign-owned capital.[9]

Until relatively recently, numerous scholars as well as international and municipal tribunals, have asserted that a traditional international norm governs the ability of a state to take the property of nationals of another state.[10] This classical standard requires that (1) the taking be for the public purpose, (2) the taking be nondiscriminatory against aliens, and (3) the state provide prompt and full compensation in an effectively realizable form.[11] However, in recent years this norm has been subject to considerable attack, particularly from the developing nations.[12] The bulk of the controversy has centered on the classical standard's compensation requirement.[13]

This note will analyze the continuing viability of the traditional requirement of paying full compensation. It will conclude that full compensation is not currently, and indeed never was, the international standard. Rather, it will be shown that international law grants the primary responsibility of setting the amount of compensation to the taking state. Only when the amount of indemnification paid does not comport with some subjective, ad hoc standard of reasonableness will international law refuse to defer to the sovereignty of the expropriating nation. Section II of this note will attempt to narrow the parameters of the issue by reviewing the positions of various antagonists to the

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9. One argument is that foreign ownership of capital in Third World nations is a form of neo-colonialism which has impeded, rather than promoted, economic development. The rationale is that any accumulated capital is removed to the developed nation and hence is not used to develop a domestic industrial infrastructure. *See, e.g.*, RODNEY, *supra* note 5, at 14, 149; R.J. BARNET & R.E. MULLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS 135 (1974). Accordingly, Third World nations have sought to attain control of their national wealth. *But see* Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 9 VAND. J. TRANSNAT'L L. 517, 521 (1976) (asserting that foreign investment is an important source of economic development in Third World nations).

10. L. OPPENHEIM, 1 INTERNATIONAL LAW § 155d, at 351-52 (Lauterpacht 8th ed. 1955); Neville, *The Present Status of Compensation by Foreign States for the Taking of Alien-Owned Property*, 13 VAND. J. TRANSNAT'L L. 51, 63-66 (1980). The Chorzów Factory Case (Ger. v. Pol.), 1928 P.C.I.J., ser. A., No. 13, at 47 (Judgment of Sept. 13). Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 385 (S.D.N.Y. 1961), *rev'd on other grounds*, 376 U.S. 398 (1964).

11. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 166, 185, 187-190 (1965).

12. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-30 (1964).

13. *See infra* notes 15-18 and accompanying text.

dispute. Section III will consider the effect of two United Nations General Assembly Resolutions on the law of expropriation. Sections IV and V attempt to extract a rule from an evaluation of treaty law, which is considered to be the primary means whereby international law is formed.[14] Section VI will analyze the decisions of international tribunals and municipal courts which have been confronted with the compensation question. Finally, Section VII will review the actual practice of nations when faced with a nationalization dispute and will pose the question of whether an international standard is necessary.

## II. THE SCOPE OF THE DISPUTE: THE POSITIONS OF THE PARTIES

In the landmark case of *Banco Nacional de Cuba v. Sabbatino*,[15] the United States Supreme Court declared that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[16] This disagreement is not between capital exporting states; rather it is between industrialized nations and the Third World.[17] Importantly, the debate does not focus on *whether* compensation should be paid, but instead centers on *how much* compensation should be paid.[18]

The United States' position on the question of expropriation "can be simply stated: [it] recognize[s] the right of any country to expropriate the property of a United States investor . . . so long as the taking is non-discriminatory, for a public purpose, and accompanied

14. *See, e.g.*, 1 OPPENHEIM, *supra* note 10, § 18, at 27-28. *See also infra* text accompanying notes 75-79.

15. 376 U.S. 398 (1964).

16. *Id.* at 428 (footnote omitted).

17. J.M. SWEENEY, C.T. OLIVER, & N.E. LEECH, THE INTERNATIONAL LEGAL SYSTEM 1183 (2d ed. 1981). *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 429-30.

18. Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUM. J. TRANSNAT'L L. 35, 37 (1981); Neville, *supra* note 10, at 63. *See also* The Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 167 (Jessup, J., separate opinion) (in expropriation cases "the issues now turn largely on the measure of compensation").

Muller points out that two related problems exist in the context of the amount of compensation. The first problem deals with the total amount of liability of the nationalizing state; that is, whether international law requires full or partial compensation. The second problem involves valuation, i.e., the various accounting methods employed to estimate the value of the property. Muller, *supra* note 18, at 37. This comment will only concern itself with the first problem. For a good discussion of valuation methods, see Smith, *supra* note 9.

by prompt, adequate, and effective compensation."[19] The phrase "prompt, adequate, and effective compensation" was first expressed in 1940 by Secretary of State Cordell Hull in a note to the government of Mexico,[20] and has since been referred to as the Hull Doctrine. Prompt, adequate and effective compensation is essentially the same as the just (i.e., full) compensation requirement of the fifth amendment of the United States Constitution.[21]

Conversely, the Third World's position is that although international law imposes an obligation on the expropriating state to provide compensation, the measure of such compensation is governed entirely by the domestic law of the taking state.[22] This position may be viewed as a modern invocation of the Calvo Doctrine.[23] Professor García-Amador has stated that this doctrine developed in reaction to the international minimum standard and the principles governing the treatment of aliens (i.e., the Hull Doctrine),[24] which were seen "as mere tools to satisfy the imperialistic aims and actions of more powerful, developed nations."[25] Capital exporting nations had promulgated rules which effectively precluded less developed nations from expropriating the property of foreign investors, thus assuring themselves a source of raw materials. Indeed, Judge Padilla Nervo, writing separately in the *Barcelona Traction* case,[26] stated:

> The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection and the imposing of sanctions in order to oblige a

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19. Smith, *supra* note 9, at 518.

20. 2 DEP'T ST. BULL. 380-81 (1940).

21. Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 888 (2d Cir. 1981); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 188 (1965).

22. *See, e.g.*, Orrego Vicuña, *Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile*, 67 AM. J. INT'L L. 711, 722 (1973).

23. The Calvo Doctrine states that aliens are entitled to no greater protection than is accorded to nationals. García-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1, 2 (1980); Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437, 441 n.23 (1981).

24. García-Amador, *supra* note 23, at 2.

25. *Id.* at 9. *See also* Jessup, *Non-Universal International Law*, 12 COLUM. J. TRANSNAT'L L. 415, 419 (1973).

26. The Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Judgment of Sept. 13).

government to make the reparations demanded.[27]

Accordingly, developing nations maintain that conditions in the nationalizing state, such as its ability to pay, must be taken into account when establishing the amount, time and form of compensation.[28] This position has received support from western scholars. For example, Oppenheim asserts that a state's duty to respect the property of aliens comes into conflict with its power to expropriate in situations where it seeks to implement far-reaching social and economic reforms. Consequently, in such cases, "[i]t is probable that, consistently with legal principle, [a] solution must be sought in the granting of partial compensation."[29]

Finally, it has been argued that:

> The immense majority of new states did not participate in the process of formation and development of the numerous juridical institutions and rules of law that were consolidated and systematized during the nineteenth century. First of all, more than half of the presently existing states had not yet become independent. But even the small countries existing at that time did not participate very actively in this process. The political mechanics of the nineteenth century and the concomitant method of creating international law, based on the . . . recognized supremacy of the states that formed the Concert of Europe, naturally resulted in according a comparatively minor role to the smaller states.[30]

Therefore, since international law obtains its legitimacy from consensus,[31] developing states argue that the traditional standard of compensation[32] is invalid today. Developing states argue that because they were excluded from the creation of the traditional standard of compensation and because this standard has subsequently been rejected by a large segment of the international community, the traditional standard of compensation no longer represents the consensual

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27. *Id.* at 246 (Padilla Nervo, J., separate opinion).

28. *See* García-Amador, *supra* note 23, at 48-49.

29. 1 OPPENHEIM, *supra* note 10, § 155d, at 352.

30. Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 38, 39 (1961).

31. 1 OPPENHEIM, *supra* note 10, §§ 11-12.

32. *See supra* notes 10-11 and accompanying text for a discussion of the classical standard.

norm of international law.[33]

Acknowledging the opposing postions, an examination of the extent of compensation mandated by international law is now required. That is, the question of whether international law imposes a certain level of compensation or whether this issue is exclusively a domestic matter will be examined.

## III. UNITED NATIONS RESOLUTIONS

The ultimate source of international law is the consensus of nations.[34] One of the primary means of determining international consent to a particular rule is the custom and practice of nations.[35] While not binding in a statutory sense,[36] United Nations General Assembly resolutions are evidence of custom.[37] In recent decades the General Assembly has adopted two controversial resolutions which deal with expropriation. This section will review their content and effect on international law.

In December, 1962, the United Nations General Assembly adopted Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, which proclaimed, inter alia:

> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted . . . .[38]

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33. No single state can argue that since it did not consent to the creation of a customary norm, it is not bound by its provisions. 1 OPPENHEIM, *supra* note 10, § 12, at 18. However, a consensual rule requires "the express or tacit consent of such an overwhelming majority of the members [of the international community] that those who dissent are of no importance as compared with the community" as a whole. *Id.* § 11, at 17. In this regard the Third World is clearly not an insignificant actor in the community of nations. In fact, it represents a substantial percentage of the population of the world.

34. 1 OPPENHEIM, *supra* note 10, § 10, at 15-17; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 2 (3d ed. 1979).

35. BROWNLIE, *supra* note 34, at 2.

36. *Id.*

37. *Id.* at 2, 5.

38. G.A. Res. 1803 (XVII), 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962), *reprinted in* 2 I.L.M. 223 (1963), 57 AM. J. INT'L L. 710, 712 (1963). This resolution was approved by the General Assembly by a vote of 87 in favor, 2 opposed and 12 abstentions.

Thus, Resolution 1803 requires that compensation be paid in the event of an expropriation. Although the measure of such compensation is to be made "in accordance with the rules in force in the State" performing the nationalization, the General Assembly clearly did not intend that the state have exclusive control over the amount of damages awarded. This intent is evidenced by the phrase "and in accordance with international law" and the sentence "[i]n any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted."

In December, 1974, the United Nations passed Resolution 3281 (XXIX), known as the Charter of Economic Rights and Duties of States.[39] It was promulgated by the overwhelming vote of 120 to 6, with 10 abstentions.[40] Article 2 of the Charter provided:

> 2. Each State has the right:
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> (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
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> . . . .
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> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation *should* be paid by the State adopting such measure, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. *In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals,* unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[41]

The radical nature of the Charter is obvious when its provisions are compared with those of Resolution 1803. The Charter merely provides that compensation "should" be paid and is quite explicit in

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39. G.A. Res. 3281 (XXIX), 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 251, 254 (1975), 69 AM. J. INT'L L. 484, 487 (1975) [hereinafter cited as the Charter].

40. 14 I.L.M. at 251 n.*, 69 AM. J. INT'L L. at 484 n.*. Voting against the Charter were Belgium, Denmark, West Germany, Luxembourg, Great Britain and the United States. Abstaining were Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain. 14 I.L.M. at 265.

41. The Charter art. 2(2)(a), (c), 14 I.L.M. at 254-55, 69 AM. J. INT'L L. at 487 (emphasis added).

declaring that the expropriating state has exclusive authority to decide how much compensation shall be tendered.[42]

Consequently, in view of the revolutionary nature of the Charter as compared to traditional concepts of international expropriation law as well as Resolution 1801, the question becomes whether the Charter has modified traditional international law. Several scholars[43] and at least one international court have recently considered this question. In *Texaco Overseas Petroleum Co. v. Libya*,[44] an arbitration arising out of Libyan oil nationalizations, the arbitrator, Professor Dupuy, answered this question in the negative. First, Professor Dupuy noted that "under Article 10 of the UN Charter, the General Assembly only issues 'recommendations' . . . having no binding force and carrying no obligations for the Member States."[45] While acknowledging that "it is now possible to recognize that resolutions of the United Nations have a certain legal value,"[46] Dupuy added that this legal value must be "determined on the basis of circumstances under which they were adopted and by analysis of the principles which they state . . . ."[47] He therefore proceeded to consider these two factors.

In discussing the principles set forth in the Charter, Dupuy distinguished between resolutions which essentially codify an existing area of agreement and those which attempt to create a new principle.[48] He stated that the former "do not create a custom but confirm one," while the latter are only binding to the extent that they have been accepted.[49] In this context, Dupuy's analysis of the voting patterns of the two resolutions became particularly important. He previously observed that Resolution 1803

> was passed by the General Assembly by 87 votes to 2, with 12 abstentions. It is particularly important to note that the majority voted for this text, including many States of the Third World, but also several Western developed countries with market economies, including the most important one, the United States. The prin-

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42. Burns H. Weston states that "the repudiation of the principle of compensation as an *international* regulatory norm seems a reasonable conclusion." Weston, *supra* note 23, at 449 (emphasis in original). *Accord* García-Amador, *supra* note 23, at 51.

43. *See infra* note 61.

44. Texaco Overseas Petroleum Co. v. Libya, 53 I.L.R. 389 (1979), *reprinted in* 17 I.L.M. 1 (1978).

45. *Id.* at 487, 17 I.L.M. at 28 (citations omitted).

46. *Id.* at 490, 17 I.L.M. at 29.

47. *Id.* at 491, 17 I.L.M. at 30.

48. *Id.* at 491, 17 I.L.M. at 30.

49. *Id.*, 17 I.L.M. at 30.

> ciples stated in this Resolution were therefore assented to by a great many States representing not only all geographical areas but also all economic systems.[50]

From this Dupuy concluded that "consensus by a majority of States belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules . . . incorporated [in Resolution 1803]."[51] On the other hand, even though the Charter was also adopted by a very large majority,[52] Dupuy emphasized that "all the industrialized countries with market economies [had] abstained or . . . voted against it."[53] This, combined with the fact that international law is formed in large part by consensus,[54] substantially detracted from the notion that the Charter's provisions on compensation were legally binding.

In addition, Dupuy held that to the extent that the Charter purported to abolish the international minimum standard of compensation, it conflicted with customary international law.[55] To support this conclusion, he reasoned that

> a great many investment agreements entered into between industrial States or their nationals, on the one hand, and developing countries, on the other, state, in an objective way, the standards of compensation and further provide, in case of dispute regarding the level of such compensation, the possibility of resorting to an international tribunal.[56]

In other words, the Charter was deemed inconsistent with international investment practice, which imposes a compensation requirement and a duty to submit a dispute to review by an international tribunal.[57]

Finally, Dupuy reviewed the circumstances surrounding the Charter's adoption. He noted that the Charter was originally proposed as an attempt to codify and further develop international expropriation law. Yet, in the face of opposition, the original proposal was

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50. *Id.* at 487, 17 I.L.M. at 28.

51. *Id.* at 492, 17 I.L.M. at 30.

52. *See supra* note 38 and accompanying text.

53. 53 I.L.R. at 489, 17 I.L.M. at 29.

54. *See, e.g.*, BROWNLIE, *supra* note 34, at 2; 1 OPPENHEIM, *supra* note 10, § 10, at 15-17.

55. 53 I.L.R. at 493, 17 I.L.M. at 30.

56. *Id.* at 493, 17 I.L.M. at 30-31.

57. While Dupuy's position is well taken, it is somewhat overstated. Many treaties are either not objective as to the amount of compensation or specifically subject foreign investors to the laws of the host country. *See infra* text accompanying notes 81-94, 96, 99-107, 135-56, 170-78, 184-86, 189-90, 195-97, 199-201, 203-06, 213, 221.

dropped.[58] Thus, Dupuy declared that "[a]rticle 2 of this Charter must be analyzed as a political rather than as a legal declaration . . . ."[59]

Hence, because the provisions of the Charter were deemed contrary to many traditional principles of international law, failed to receive support of a significant sector of the international community, and were primarily political, Dupuy held that the Charter had not become law. Furthermore, in view of the universal acceptance of Resolution 1803, he concluded that it represents the current compensation requirement.[60]

Most commentators agree with Professor Dupuy's decision in *Texaco Overseas Petroleum Co.* that the Charter does not, in itself, reflect international law.[61] Nevertheless, these scholars have not been as adamant in rejecting its effect on international legal norms. Rudolf Dolzer has written that the effect of the Charter "on the process of changing customary law can only be denied if one assumes that the votes cast in favor of [this resolution] have no legal character . . . ."[62] In this regard, he noted that "the extensive debates in the General Assembly have made clear that legal—and not only political—views were discussed" prior to adoption of the Charter.[63] Dolzer maintains that "[m]uch of the writing on the legal effect of General Assembly resolutions misses [the] point by failing to distinguish between the derogatory effect on existing rules on the one hand, and the establishment of new rules on the other."[64] Because the continuing validity of a customary norm requires the support of a clear majority of states, "the conclusion is inescapable that the existence of the Hull rule as a rule of present law is not sustained by the prevailing doctrinal opinion within the international community."[65]

It has also been suggested that although the Charter may not be a binding norm, it is an indicator of the future course of international

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58. 53 I.L.R. at 492, 17 I.L.M. at 30.

59. *Id.* at 492, 17 I.L.M. at 30.

60. *Id.* at 491-92, 17 I.L.M. at 30.

61. *See, e.g.*, Weston, *supra* note 23, at 455; Neville, *supra* note 10, at 62; von Mehren & Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 526-29 (1981); Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 295, 300-02 (1975).

62. Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553, 563 (1981).

63. *Id.*

64. *Id.* at 564 (footnote omitted).

65. *Id.* at 565. *Accord* Neville, *supra* note 10, at 63.

law.[66] Indeed, there is historical support for such a conclusion. Assuming that the Hull Doctrine did at one time represent the international rule, the trend toward a greater role of the domestic law of the nationalizing state in fixing the amount of compensation, and consequently away from a full market value standard, is marked. It is significant to note that Resolution 1803 did not provide that full compensation must be paid in the event of an expropriation, but specified "appropriate compensation" as the requirement.[67] Moreover, Resolution 1803 clearly accorded the law of the taking nation a role in the determination of damages.[68] These two factors represent a departure from the classical standard of compensation. Building on Resolution 1803, the Charter specified that, unless agreed to otherwise, the expropriating country possesses the sole power to decide the amount of compensation.[69]

Assuming that Professor Dupuy was correct in ruling that General Assembly Resolution 1803 is reflective of current international expropriation law, the question remains as to the meaning of its "appropriate compensation" criterion. It has been suggested that "[i]n the full context of adoption of General Assembly Resolution 1803 (XVII) the words 'appropriate compensation' could only mean prompt, adequate and effective compensation."[70] This contention is inaccurate. Throughout the debates prior to the passage of Resolution 1803 the United States delegation attempted to incorporate a "prompt, adequate and effective" definition of compensation into the resolution. This proposal was met with sharp criticism and eventually the United States withdrew its proposal.[71] Accordingly, in view of the widespread knowledge that "prompt, adequate and effective" compensation connotes full compensation, the use of the term "appropriate compensation" reflects an understanding that the United Nations rejected the full compensation standard in Resolution 1803.[72] The appropriate compensation requirement cannot be characterized as a fixed criterion, rather, as "appropriate" implies, com-

66. Weston, *supra* note 23, at 455.

67. *See supra* note 38. For a more detailed discussion of this point, see *infra* notes 70-74 and accompanying text.

68. *See supra* text accompanying note 38.

69. *See supra* text accompanying note 41.

70. Brower & Tepe, *supra* note 61, at 304.

71. Neville, *supra* note 10, at 68-69; Orrego Vicuña, *supra* note 22, at 722-23.

72. That Resolution 1803 does not mandate full compensation has also been acknowledged by the American Law Institute. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 188 reporter's note 1, at 566-67 (1965).

pensation that is fair and reasonable given the circumstances of the taking is mandated.[73] This interpretation of Resolution 1803 corresponds precisely with the contention of many Third World nations regarding the international compensation standard.[74]

## IV. UNITED STATES TREATIES

Treaties are the most important source of international law today.[75] Certain treaties, which lay down general rules of conduct and are subscribed to by the vast majority of states, are called law making treaties and may directly create a rule of law.[76] In addition, treaties are evidence of custom,[77] which has traditionally been the primary source of international law.[78] Stipulations in bilateral treaties, if sufficiently numerous and uniform in their requirements, may become rules of customary international law.[79] Accordingly, this section will examine United States treaties to determine their effect on international custom, and the next section will review treaties to which the United States is not a party.

Over the past two hundred years American treaty practice regarding property protection in general and expropriation in particular has undergone a substantial transformation. The trend has been toward an increasingly greater focus on expropriation. In addition, the standards governing expropriation of foreign-owned property have evolved from rather vague provisions to much greater specificity. These treaties may be classified into three chronological periods: pre-1923, 1923 to the Second World War, and from the end of World War II to the present.

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73. *See* Orrego Vicuña, *supra* note 22, at 723; Weston, *supra* note 23, at 488 n.54; Murphy, *Limitations Upon the Power of a State to Determine the Amount of Compensation Payable to an Alien Upon Nationalization*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 49, 52 (R.B. Lillich ed. 1972).

74. *See supra* text accompanying note 28.

75. 1 OPPENHEIM, *supra* note 10, § 18, at 27.

76. *Id.* § 18, at 28 & § 492, at 878-80. *Cf.* I.C.J. STATUTE art. 38(1)(a).

77. BROWNLIE, *supra* note 34, at 5, 13-14. *See* Nottebohm Case (Liechtenstein v. Guat.), 1955 I.C.J. 4, 22-23 (Judgment of Apr. 6) (U.S. bilateral treaty practice cited as evidence of international practice); The Panevezys-Saldutiskis Rwy Case (Estonia v. Lithuania), 1939 P.C.I.J. ser. A/B, No. 76, at 51-52 (Judgment of Feb. 28) (Erich, J., dissenting) (citing exhaustion of local remedies as a customary rule developed by common treaty practice).

78. 1 OPPENHEIM, *supra* note 10, § 17, at 25-26.

79. BROWNLIE, *supra* note 34, at 13-14. *Cf.* The State (Duggan) v. Tapley, 18 I.L.R. 336, 337-39 (Ir. 1950) (the political crime exception in extradition treaties held insufficiently uniform to constitute a rule of customary international law).

### A. The Pre-1923 Period

Prior to 1923 American treaties rarely referred to the problem of expropriation. In fact, the issue was dealt with in only six instances. The American treaties with Nicaragua and El Salvador stated that no property shall be taken "without full and just compensation . . . ."[80] However, treaties with the Swiss Confederation and the Orange Free State merely required that the taking nation place citizens of the other state on an equal footing with its own citizens with "respect to indemnities for damages they may have sustained."[81] The treaty with the Congo provided that property "shall not be taken . . . without an ample and sufficient compensation."[82] Finally, an 1868 treaty with China declared that the eminent domain power of China was not relinquished.[83] While this last compact did not concern substantive questions of such power, its wording indicates that whatever the Chinese eminent domain law may have been at the time, its substance remained intact. In effect, an expropriation would be governed by domestic Chinese law.

None of the more than ninety remaining commercial treaties the United States entered into prior to 1923 directly involved the question of expropriation.[84] However, as R.R. Wilson notes, "[o]ver the period beginning with the signing of a treaty with The Netherlands on Oct. 8, 1782, and ending with the treaty with Ethiopia, signed Dec. 27, 1903, the United States in twenty-eight agreements included provisions against seizures or detentions, sometimes in relation to embargoes."[85] Three of these treaties, with the Netherlands, Sweden and Spain, provide that seizures and detentions of ships or their goods,

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80. Treaty of Friendship, Commerce and Navigation, June 21, 1867, United States-Nicaragua, art. IX(3), 18(2) Stat. 566, 569; Treaty of Amity, Commerce, and Consular Privileges, Dec. 6, 1870, United States-Republic of Salvador, art. XXIX, 18(3) Stat. 725, 740.

81. Convention of Friendship, Commerce and Extradition, Nov. 25, 1850, United States-Swiss Confederation, art. II, 18(2) Stat. 748, 749; Convention of Friendship, Commerce and Extradition, Dec. 22, 1871, United States-Orange Free State, art. II, 18(2) Stat. 580.

82. Treaty of Amity, Commerce and Navigation, Jan. 24, 1891, United States-Congo, art. III, 27 Stat. 926, 928.

83. Additional Articles to the Treaty of June 18, 1858, July 28, 1868, United States-China, art. I, 18(2) Stat. 147.

84. A chronological listing of all commercial treaties concluded by the United States from 1778 to 1960 may be found in R.R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 331-34 Appendix I (1960).

85. *Id.* at 107 (footnotes omitted).

"must be by way of law, according to the forms of justice."[86] The remainder of these provisions essentially follow a standard format. The 1824 convention with Colombia is typical. "The citizens of neither of the contracting parties shall be liable to any embargo, nor be detained with their vessels, cargoes, merchandises, or effects, for any military expedition, nor for any public or private purpose whatever, *without allowing those interested a sufficient indemnification.*"[87] An 1831 treaty with Mexico calls for "corresponding compensation"[88] while four other treaties require either "equitable" or "equitable and sufficient" indemnification.[89] However, three different compacts with Peru and one with Bolivia call for "full and sufficient indemnification."[90]

These provisions derive their importance from the fact that they deal with detentions and seizures, albeit of ships and their cargoes. Nevertheless, with the exception of the Bolivian and the three Peruvian treaties, none of the remaining twenty-four treaties specify according to what standards "sufficient" indemnity is to be determined. However, one final relevant principle may be extracted from pre-1923 American treaties. While these compacts uniformly provide for the protection of foreign property rights and freedom of trade and commerce, in over forty-five agreements foreigners were explicitly subjected to domestic laws and regulations.[91] One of the first of these agreements, the July 3, 1815 Convention for the Regulation of Commerce with Great Britain, is typical. "[T]he merchants and traders

86. Treaty of Amity and Commerce, Oct. 8, 1782, United States-the Netherlands, art. VIII, 18(2) Stat. 533, 535. *See* Treaty of Amity and Commerce, Apr. 3, 1783, United States-Sweden, art. XVII, 18(2) Stat. 722, 726-27; Treaty of Friendship, Limits and Navigation, Oct. 27, 1795, United States-China, art. XX, 18(2) Stat. 704, 709-10.

87. Convention of Peace, Amity, Navigation and Commerce, Oct. 3, 1824, United States-Colombia, art. V, 18(2) Stat. 150, 151 (emphasis added).

88. Treaty of Amity, Commerce and Navigation, Apr. 5, 1831, United States-Mexico, art. VIII, 18(2) Stat. 476, 478.

89. Treaty of Amity and Commerce, July 11, 1799, United States-Prussia, art. XVI, 18(2) Stat. 648, 653; Treaty of Peace, Amity, Navigation and Commerce, Dec. 13, 1846, United States-New Granada, art. VIII, 18(2) Stat. 550, 552; Treaty of Amity, Navigation and Commerce, Jan. 2, 1850, United States-San Salvador, art. VIII, 18(2) Stat. 675, 677; Treaty of Amity, Commerce, and Consular Privileges, Dec. 6, 1870, United States-Republic of Salvador, art. VIII, 18(3) Stat. 725, 729.

90. Treaty of Friendship, Commerce and Navigation, July 26, 1851, United States-Peru, art. II, 18(2) Stat. 612, 613; Treaty of Friendship, Commerce and Navigation, Aug. 31, 1887, United States-Peru, art. II, 25 Stat. 1444, 1445-46; Treaty of Friendship, Commerce and Navigation, Sept. 6, 1870, United States-Peru, art. II, 18(3) Stat. 698, 699; Treaty of Peace, Friendship, Commerce and Navigation, May 13, 1858, United States-Bolivia, art. III, 18(2) Stat. 68, 69.

91. *See infra* Appendix A for a listing of these treaties.

of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes" of the other.[92] Indeed, the 1860 treaty with Venezuela and two subsequent accords with other Latin American nations declare that it is "distinctly understood" that foreigners are subject to domestic laws regarding business activities.[93] In addition, an 1833 agreement with Chile specified that the rights of American citizens are protected to the full extent of Chilean law, "but no special favors or privileges" were to be granted.[94]

Two propositions may be abstracted from these early United States treaties. First, as noted above,[95] international law has traditionally required the payment of full compensation upon an expropriation of an alien's property. However, no support for this so-called classical norm is present in early American treaties. Indeed, these treaties rarely dealt with the problem of expropriation and those that did are at best inconclusive as to a standard of compensation.[96] Second, it is arguable that far from creating a full compensation requirement, pre-1923 United States treaties support the position that indemnification is to be determined by the domestic laws of the taking nation. Although it was generally specified that the property of foreigners shall be protected, it is also clear that this property was subject to the laws of the state where it was situated.[97] As several conventions with Latin American countries emphasized, aliens were not entitled to any greater protection than that accorded to natives.[98]

### *B. The 1923 to World War II Period*

During the period from 1923 to the Second World War the United States entered into twelve commercial treaties which dealt with the

92. Convention for the Regulation of Commerce, July 3, 1815, United States-Great Britain, art. I, 18(2) Stat. 292, 293.

93. Treaty of Amity, Commerce, Navigation and Extradition, Aug. 27, 1860, United States-Venezuela, art. III, 18(2) Stat. 797, 798; Treaty of Amity, Commerce, Navigation and Extradition, Nov. 3, 1864, United States-Hayti, art. VI, 18(2) Stat. 412, 413; Convention of Amity, Commerce, Navigation and Extradition, Feb. 8, 1867, United States-Dominican Republic, art. III, 18(2) Stat. 178, 179.

94. Additional and Explanatory Convention to the Treaty of Amity, Commerce and Navigation of May 16, 1832, Sept. 1, 1833, United States-Chili, art. II, 18(2) Stat. 112, 113.

95. *See supra* notes 10-11 and accompanying text.

96. Indeed, an argument may be made that they provided that the law of the taking nation governed the amount of compensation. *See supra* text accompanying notes 80-83.

97. *See supra* notes 84-92 and accompanying text.

98. *See supra* notes 93-94 and accompanying text.

issue of nationalization.[99] The first of these, the compact with Germany, used language which is virtually identical in each of the others:

> The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.[100]

The due process requirement in these treaties does not refer to the due process requirement of the United States Constitution, but to the due process required by international law.[101] Consequently, these treaties merely require adherence to the nebulous concepts of international due process and just compensation. The vagueness of these terms could result in varying interpretations of what amount of compensation is "just" and how much process is due. Indeed, one commentator states that "[r]eference to 'just compensation' lacks precision and accordingly could result in quite different assertions as to the methods used in determining the valuation of property."[102] Therefore, other than helping to establish an international requirement of at least some compensation, this set of treaties is of

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99. Treaty of Friendship, Commerce and Consular Rights, Dec. 8, 1923, United States-Germany, art. I, 44 Stat. 2132, 2133-34, T.S. No. 725; Treaty of Friendship, Commerce and Consular Rights, June 24, 1925, United States-Hungary, art. I, 44 Stat. 2441, 2441-42, T.S. No. 748; Treaty of Friendship, Commerce and Consular Rights, Dec. 23, 1925, United States-Estonia, art. I, 44 Stat. 2379, 2379-80, T.S. No. 736; Treaty of Friendship, Commerce and Consular Rights, Feb. 22, 1926, United States-El Salvador, art. I, 46 Stat. 2817, 2818-19, T.S. No. 827; Treaty of Friendship, Commerce and Consular Rights, Dec. 7, 1927, United States-Honduras, art. I, 45 Stat. 2618, 2618-20, T.S. No. 764; Treaty of Friendship, Commerce and Consular Rights, Apr. 20, 1928, United States-Latvia, art. I, 45 Stat. 2641, 2641-42, T.S. No. 765; Treaty of Friendship, Commerce and Consular Rights, June 5, 1928, United States-Norway, art. I, 47 Stat. 2135, 2136-37, T.S. No. 852; Treaty of Friendship, Commerce and Consular Rights, June 19, 1928, United States-Austria, art. I, 47 Stat. 1876, 1877-78, T.S. No. 838; Treaty of Friendship, Commerce and Consular Rights, June 15, 1931, United States-Poland, art. I, 48 Stat. 1507, 1508-10, T.S. No. 862; Treaty of Friendship, Commerce and Consular Rights, Feb. 13, 1934, United States-Finland, art. I, 49 Stat. 2659, 2660-61, T.S. No. 868; Treaty of Friendship, Commerce and Navigation, Nov. 13, 1937, United States-Siam, art. I, 53 Stat. 1731, 1731-32, T.S. No. 940; Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, art. I, 54 Stat. 1739, 1939-40, T.S. No. 956.

100. Treaty of Friendship, Commerce and Consular Rights, Dec. 8, 1923, United States-Germany, art. I, 44 Stat. 2132, 2133-34, T.S. No. 725.

101. WILSON, *supra* note 84, 115.

102. Piper, *International Investment Law*, 4 INT'L TRADE L.J. 315, 333 (1978).

little value in resolving the extent of such remuneration. However, by employing accepted methods of treaty interpretation some light may perhaps be shed on the subject.

One such method is the application of the ordinary meaning[103] of the term "just" compensation which would connote an ad hoc and equitable computation of remuneration rather than a fixed standard of full compensation. Another means of interpreting treaties is the integration principle.[104] Under this approach the meaning of terms are determined by examining the treaty as whole,[105] or a particular article thereof,[106] and not merely to the particular phrase in question. With this in mind, it must be noted that the articles in these treaties which deal with expropriation and property protection require, as a condition for such protection, submission to the conditions imposed on nationals.[107] This clause, when read with the "just compensation" clause, suggests that the amount of compensation shall be the same as that paid to nationals, but must always meet some international minimum standard of justice.

### *C. The Post World War II Period*

Since the Second World War the United States has concluded twenty-four bilateral treaties which address the issue of expropriation. These treaties are different from their pre-War counterparts in one important respect: they have tended to be precise as to the standard of compensation. Four treaties signed between 1946 and 1951, with the Republic of China,[108] Italy,[109] Ireland,[110] and Ethiopia,[111] call for "the prompt payment of just and effective compensation" in the event

103. *See* BROWNLIE, *supra* note 34, at 624. *See also* Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 8 (Advisory Opinion of Mar. 3) (the natural and ordinary meaning of words should be the primary method of treaty interpretation).

104. BROWNLIE, *supra* note 34, 624.

105. The Competence of the International Labour Organization to Regulate Agricultural Labour, 1922 P.C.I.J., ser. B, No. 2, at 23 (Advisory Opinion of Aug. 12).

106. Case of the Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J., ser. A/B, No. 46, at 140 (Judgment of June 7).

107. *See supra* note 100 and accompanying text.

108. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, art. VI(2), 63 Stat. 1299, T.I.A.S. No. 1871, 25 U.N.T.S. 69, 98.

109. Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. V(2), 63 Stat. 2255, 2262, T.I.A.S. No. 1965, 79 U.N.T.S. 171, 178.

110. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. VIII(2), 1 U.S.T. 785, 792-93, T.I.A.S. No. 2155, 206 U.N.T.S. 269, 278.

111. Treaty of Amity and Economic Relations, Sept. 7, 1951, United States-Ethiopia, art. VIII(2), 4 U.S.T. 2134, 2141, T.I.A.S. No. 2864, 206 U.N.T.S. 60, 68.

of an expropriation of property owned by a foreign national. While this standard is fairly vague and therefore capable of varying interpretations, its similarity with the Hull Doctrine, which calls for "'prompt, adequate and effective compensation,'" is notable.[112] Thus, it is also possible that full market value was intended as the measure of compensation.

However, beginning in 1951 with the Treaty of Friendship, Commerce and Navigation with Greece,[113] United States treaties required full compensation to be paid. The third paragraph of article VII of the Greek treaty provides:

> Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public benefit, nor shall it be taken without the prompt payment of just compensation. *Such compensation* shall be in an effectively realizable form and *shall represent the full equivalent of the property taken* . . . .[114]

This language was repeated almost verbatim in all but two of the subsequent treaties.[115] Of the remaining two treaties, one is a 1975

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112. As noted above the "prompt, adequate and effective" standard of the Hull Doctrine is synonymous with full market value. *See supra* notes 19-21 and accompanying text.

113. Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057, 224 U.N.T.S. 300.

114. *Id.* art. VIII(3), 5 U.S.T. at 1845-47, 224 U.N.T.S. at 306 (emphasis added).

115. *See* Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. VI(3), 5 U.S.T. 550, 556, T.I.A.S. No. 2948, 219 U.N.T.S. 252, 258; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. VI(3), 12 U.S.T. 908, 913-14, T.I.A.S. No. 4797, 421 U.N.T.S. 105, 110; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VI(3), 4 U.S.T. 2063, 2068-69, T.I.A.S. No. 2863, 206 U.N.T.S. 192, 198; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. V(4), 7 U.S.T. 1839, 1844, T.I.A.S. No. 3593, 273 U.N.T.S. 3, 8; Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, art. IV(2), 8 U.S.T. 899, 903, T.I.A.S. No. 3853, 284 U.N.T.S. 110, 114; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, art. VI(4), 9 U.S.T. 449, 454, T.I.A.S. No. 4024, 367 U.N.T.S. 3, 8-10; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. VI(4), 8 U.S.T. 2043, 2051, T.I.A.S. No. 3942, 285 U.N.T.S. 231, 239; Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Republic of Korea, art. VI(4), 8 U.S.T. 2217, 2221-22, T.I.A.S. No. 3947, 302 U.N.T.S. 304, 310; Treaty of Amity, Economic Relations and Consular Rights, Dec. 20, 1958, United States-Muscat and Oman, art. IV(2), 11 U.S.T. 1835, 1837, T.I.A.S. No. 4530, 380 U.N.T.S. 196, 198-200; Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, art. VI(4), 12 U.S.T. 110, 113, T.I.A.S. No. 4683, 404 U.N.T.S. 259, 264-66; Treaty of Establishment, Nov. 25, 1959, United States-France, art. IV(3), 11 U.S.T. 2398, 2402-03, T.I.A.S. No. 4625, 401 U.N.T.S. 75, 78-80; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, art. IV(3), 14 U.S.T. 1284, 1291, T.I.A.S. No. 5432, 480 U.N.T.S. 149, 157; Treaty of Amity and Economic Relations, Apr. 3, 1961, United States-Republic of Viet-

Agreement of Trade Relations with Romania, which states that assets will not be "expropriated without the payment of prompt, adequate and effective compensation."[116] In light of the specific language in the other eighteen treaties 1951, it is perhaps significant that this agreement failed to expressly require full compensation. Nevertheless, its use of the exact wording of the Hull Doctrine cannot reasonably lead to a conclusion other than an obligation to provide for full compensation.

The only other treaty since 1951 which does not call for full compensation is the Treaty of Amity and Economic Relations signed on May 29, 1966 with Thailand.[117] Article III(2) of this treaty requires that an expropriation be accompanied by the "payment of just compensation in accordance with the principles of international law."[118] This treaty, therefore, represents a reversion to the vague language of the 1923 to World War II period.[119]

It is necessary to consider the impact of post-War United States treaty practice on international legal norms. As noted previously,[120] bilateral treaties are an important source of international law in that they reflect custom and consensus. It would therefore appear that the post-War treaties lend strong support to the argument that full compensation is mandated by customary international law. However, the persuasiveness of these treaties is substantially diminished by an analysis of the nations involved. Of the twenty-three treaties that support or tend to support full compensation (this includes the four that required "prompt payment of just and effective compensation"), eleven were with various west European nations, Japan and

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Nam, art. IV(2), 12 U.S.T. 1703, 1707, T.I.A.S. No. 4890, 424 U.N.T.S. 150, 154; Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, art. IV(3), 14 U.S.T. 251, 255, T.I.A.S. No. 5306, 474 U.N.T.S. 3, 10; Treaty of Amity and Economic Relations, Feb. 8, 1966, United States-Togo, art. IV(2), 18 U.S.T. 1, 4, T.I.A.S. No. 6193, 680 U.N.T.S. 159, 164; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States-Egypt, art. III(1), 21 I.L.M. 927, 935; Treaty Concerning the Treatment and Protection of Investment, Oct. 27, 1982, United States-Panama, art. IV(1), 21 I.L.M. 1227, 1231-32.

116. Agreement on Trade Relations, Apr. 2, 1975, United States-Romania, Joint Statement on Economic, Industrial and Technological Cooperation, para. 5, 26 U.S.T. 2305, 2345, T.I.A.S. No. 8159.

117. Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540, 652 U.N.T.S. 253.

118. *Id.* art. III(2), 19 U.S.T. at 5847, 652 U.N.T.S. at 272.

119. *See supra* text accompanying notes 99-102.

120. *See supra* notes 75-79 and accompanying text.

Israel.[121] Significantly, ten of these eleven countries abstained or voted against the Charter of Economic Rights and Duties of States.[122] In addition, seven of the remaining twelve were with nations which, at the time the treaty was signed, were U.S. client states.[123] The only treaties with non-aligned Third World nations were those with Ethiopia, Oman, Pakistan and Togo.[124] Of these the treaty with Ethiopia was within the group of ambiguous treaties which were concluded shortly after the Second World War.[125] Finally, the Trade Agreement with Romania was the only one with a socialist-bloc nation. When viewed from this perspective it is clear that post-War United States treaties simply do not have the necessary breadth to establish a customary rule of law. That is, there is insufficient consent to provide full compensation from Third World nations. A customary rule of international law requires either the express or tacit consent of the vast majority of nations.[126]

It is apparent that United States treaties before the Second World War do not support the conclusion that international law requires the payment of full compensation in the event of a nationalization of foreign-owned property. To the extent that international law is created by treaties, the notion that there existed a traditional norm which required full compensation[127] is not supported by early United States treaties. Rather, if any rule may be derived from these compacts it is that the amount of damages is a matter of the domestic law of the expropriating state. If this was the international rule prior to the Second World War, recent United States practice has not gathered sufficient world-wide support to repudiate it and establish a full compensation requirement in its place.

## V. NON-UNITED STATES TREATIES SINCE WORLD WAR I

The treaty practice of foreign nations dealing with the issue of expropriation has also witnessed a substantial change in recent de-

121. These eleven nations were: Belgium, Denmark, France, West Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg and the Netherlands. *See supra* notes 109-10 & 113-15.

122. *Compare supra* note 121 *with supra* note 40.

123. These seven nations were: The Republic of China (Taiwan), Egypt, Iran, South Korea, Nicaragua, Panama and South Vietnam. *See supra* notes 108 & 115.

124. *See supra* notes 111 & 115.

125. *See supra* text accompanying note 111.

126. *See supra* notes 75-79 and accompanying text.

127. *See supra* notes 10-11 and accompanying text for a discussion of this traditional norm.

cades. Since the First World War the requirements of expropriation provisions in non-United States treaties have varied depending on the era in which the treaty was concluded. Three historical periods are evident from a review of treaty practice concerning property taking. During the first period, between the First and Second World Wars, treaties tended to require only that the taking state pay foreigners the same amount of compensation as that paid to its own nationals and/or nationals of the most-favored nation.[128] The years from World War II until the early 1960's were a time of emergent change. Most of the treaties signed in this period followed the inter-War approach.[129] However, several specified more ambiguous standards, such as "just" compensation or adherence to international law.[130] Several also required full compensation.[131] Since the early 1960's, almost all of the treaties concluded between foreign countries have required either full remuneration[132] or a more vague standard of "effective and adequate" indemnification in accordance with international law.[133] Only a very few treaties have required treatment no less favorable than that accorded to nationals.[134]

### *A. The Inter-War Period*

The expropriation provisions of treaties signed between the First and Second World Wars fall into three categories. By far the largest of these groups consists of treaties which either specified national treatment,[135] most-favored nation treatment[136] or both[137] with respect

128. *See infra* notes 135-69 and accompanying text.

129. *See infra* notes 170-74 and accompanying text.

130. *See infra* notes 175-78 and accompanying text.

131. *See infra* notes 179-80 and accompanying text.

132. *See infra* notes 181-83, 191-94, 198, 202, 207-12, 214-16, 218-20 and accompanying text.

133. *See infra* notes 184-86, 189-90, 195-97, 199-201, 203-06, 213, 221 and accompanying text.

134. *See infra* notes 187-88, 217, 222 and accompanying text.

135. Agreement Concerning Conditions of Residence, Business and Legal Protection in General, Aug. 3, 1926, Germany-U.S.S.R., art. 8 and Additional to art. 8, 53 L.N.T.S. 85, 89, 93, 149; Convention Regarding Conditions of Residence and Business, May 31, 1927, Turkey-Czechoslovakia, art. 7, 75 L.N.T.S. 79, 85; Convention Regarding Conditions of Residence and Legal Protection, Dec. 1, 1927, Greece-Switzerland, art. 7, 84 L.N.T.S. 271, 275; Convention of Commerce and Navigation, Aug. 22, 1928, Denmark-Greece, art. 2, 94 L.N.T.S. 263, 267; Convention Regarding Conditions of Residence, Feb. 17, 1929, Germany-Persia, art. 9, 111 L.N.T.S. 258, 260; Treaty of Establishment, Commerce and Navigation, May 10, 1929, Sweden-Persia, art. 7, 102 L.N.T.S. 9, 15; Treaty of Commerce and Navigation, Aug. 12, 1929, Finland-Turkey, art. 6, 96 L.N.T.S. 239, 243; Commercial Convention, June 3, 1930, Greece-Hungary, art. 2, 122 L.N.T.S. 37, 41; Treaty of Estab-

to expropriation of foreign-owned property. For example, article 7 of a May 10, 1929 treaty between Sweden and Persia provided that "[t]he nationals of either of the Contracting States may not be expropriated or deprived even temporarily of the enjoyment of their property, except under the conditions and on payment of the compensation prescribed by the local law in respect of nationals."[138] Similarly, the Treaty of Friendship, Establishment and Commerce of February 20, 1934 between Denmark and Persia stated that neither party would expropriate the property of the nationals of the other "except under the conditions and in return for the compensation stipulated by the local law in regard to nationals of the most-favoured nation."[139]

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lishment, Commerce and Navigation, Mar. 16, 1931, Norway-Turkey, art. 6, 138 L.N.T.S. 41, 47; Convention Respecting Conditions of Residence, Aug. 29, 1931, Poland-Turkey, art. 7, 144 L.N.T.S. 367, 373; Convention of Commerce and Navigation, Dec. 14, 1934, Spain-Poland, art. 1, 168 L.N.T.S. 315, 317; Treaty of Establishment, Apr. 7, 1937, Egypt-Turkey, art. 7, 191 L.N.T.S. 95, 99; Treaty of Establishment, Commerce and Navigation, May 13, 1937, Romania-Yugoslavia, art. 3, 197 L.N.T.S. 145, 147-79; Commercial Convention, Jan. 12, 1938, Latvia-Turkey, art. 6, 201 L.N.T.S. 229, 233.

136. Treaty of Commerce, Oct. 31, 1925, Italy-Germany, art. 6, 52 L.N.T.S. 311, 315; Convention Concerning Conditions of Residency, Oct. 6, 1927, Belgium-France, art. 3, 69 L.N.T.S. 49, 51-53; Convention of Commerce and Navigation, May 28, 1928, Latvia-Turkey, art. 6, 94 L.N.T.S. 295, 299; Convention of Commerce, Navigation and Establishment, Mar. 11, 1929, France-Greece, art. 21, 95 L.N.T.S. 401, 417; Commercial Agreement, Mar. 15, 1929, Estonia-France, art. 18, 89 L.N.T.S. 381, 391; Treaty of Friendship, Establishment and Commerce, Feb. 20, 1934, Denmark-Persia, art. 5, 158 L.N.T.S. 299, 303; Convention of Establishment, Apr. 25, 1934, Switzerland-Persia, art. 9, 160 L.N.T.S. 173, 179-81; Treaty of Establishment, Commerce and Navigation, Aug. 27, 1935, Iran-U.S.S.R., art. 3, 176 L.N.T.S. 299, 303.

137. Treaty Concerning the Establishment of Economic Relations, June 28, 1926, Germany-Latvia, art. 1(6), 58 L.N.T.S. 417, 419-21; Treaty of Commerce and Navigation, Mar. 24, 1928, Germany-Greece, art. 7, 90 L.N.T.S. 79, 81-83; Treaty of Commerce and Navigation, Oct. 30, 1928, Germany-Lithuania, art. 5, 89 L.N.T.S. 149, 151-52; Convention of Establishment, Aug. 27, 1930, France-Romania, art. 2, 158 L.N.T.S. 379, 383; Convention Regarding Establishment and Navigation, Feb. 20, 1933, Belgium-Netherlands, art. 8, §§ 4-5, 165 L.N.T.S. 404, 407-08; Convention of Establishment and Labour, Apr. 1, 1933, Luxembourg-Netherlands, art. 8, §§ 3-4, 179 L.N.T.S. 31, 34-35; Convention Concerning the Rights of Nationals and Commercial and Shipping Matters, May 12, 1933, Canada-France, art. 3, 253 U.N.T.S. 285, 288; Convention Regarding Conditions of Residence and Business, July 9, 1933, Romania-Switzerland, art. 6, 152 L.N.T.S. 89, 93; Treaty Concerning the Treatment of Nationals, Companies, Co-operative Societies and Associations of the Other Country, May 7, 1935, Finland-Switzerland, art. 4, 166 L.N.T.S. 35, 39; Convention of Establishment, Nov. 5, 1937, Belgium-Siam, art. 5, §§ 4-5, 190 L.N.T.S. 163, 169.

138. Treaty of Establishment, Commerce and Navigation, May 10, 1929, Sweden-Persia, art. 7, 102 L.N.T.S. 9, 15.

139. Treaty of Friendship, Establishment and Commerce, Feb. 20, 1934, Denmark-Persia, art. 5, 158 L.N.T.S. 299, 303.

The effect of provisions stipulating national and/or most-favored nation treatment is the same. Both allow the taking state to decide the amount of compensation. This is so because a nation determines how to treat its own nationals as well as what treatment will be accorded to citizens of the most-favored nation. Therefore, as long as the expropriating legislation does not treat the nationals of the other signatory power worse than its own citizens (or citizens of any other nation), no violation of the treaty has occurred. Indeed, one commentator, writing in the 1930's, stated that a rule of parity with nationals would mean "that if nationals receive no compensation, none need be accorded to aliens."[140] A corollary of this would be that if citizens of the most-favored nation receive no compensation, none need be accorded to nationals of a country with a treaty with the taking state which merely requires most-favored nation treatment.

Very closely related to this first group are a number of treaties which, while not specifically mentioning expropriation, require either national[141] or most-favored nation[142] treatment or both[143] with respect to requisitions.[144] For example, a 1930 convention between Greece and Turkey stated that the citizens of each state, in the territory of the other, shall not be subjected to "military or civil requisitions other than those imposed on nationals or companies of the other High

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140. Cutler, *The Treatment of Foreigners*, 27 AM. J. INT'L L. 225, 232 (1933).

141. Treaty of Commerce and Navigation, Oct. 29, 1921, Esthonia-Finland, art. 2, 13 L.N.T.S. 119, 119-21; Commercial Treaty, Dec. 14, 1923, Austria-Belgo-Luxembourg Economic Union, art. 5, 29 L.N.T.S. 37, 41; Treaty of Commerce and Navigation, Nov. 7, 1924, Belgo-Luxembourg Economic Union-Guatemala, art. 6, 69 L.N.T.S. 17, 23; Treaty of Friendship, Commerce and Navigation, June 8, 1925, Netherlands-Siam, art. 5, 56 L.N.T.S. 57, 61; Treaty of Commerce, Oct. 19, 1925, Austria-China, art. 4, 55 L.N.T.S. 19, 21; Treaty of Friendship, Commerce and Navigation, July 13, 1926, Belgo-Luxembourg Economic Union-Siam, art. 3, 62 L.N.T.S. 287, 291; Treaty of Commerce, May 31, 1927, Czechoslovakia-Hungary, art. 6, 65 L.N.T.S. 61, 67; Treaty of Commerce, May 17, 1929, Estonia-U.S.S.R., art. 3, 94 L.N.T.S. 323, 327; Convention of Establishment, Commerce and Navigation, Oct. 30, 1930, Greece-Turkey, art. 9, 125 L.N.T.S. 371, 379.

142. Convention Concerning Conditions of Residence, Business and Consular Matters, Aug. 21, 1924, Italy-Kingdom of Serbs, Croats and Slovenes, art. 5, 82 L.N.T.S. 445, 451; Convention of Commerce and Navigation, Dec. 22, 1924, Latvia-Sweden, art. 5, 36 L.N.T.S. 383, 385.

143. Treaty of Commerce and Navigation, Nov. 23, 1937, Great Britain-Siam, art. 1(5), 188 L.N.T.S. 333, 336-38.

144. A large group of treaties deal specifically with only military requisitions. These treaties have been excluded from the present discussion because of the dissimilarity between a military requisition and a civil expropriation. A requisition for a military purpose is directly tied to the national security. The notion that an alien should receive more favorable treatment than a national is much weaker when the taking is for the paramount purpose of the national security. The treaties cited in *supra* notes 142-43 are not limited to purely military requisitions.

Contracting Party. As regards the procedure in connection with and compensation for such requisitions, they shall be subject to local legislation as in the case of nationals of the country."[145] Although these treaties do not expressly deal with expropriation, the similarity between expropriation and requisition, particularly civil requisition, leaves little doubt that the former concept was included within the latter. Indeed, in many of the treaties in the first group, expropriation and requisition were dealt with together.[146] Thus, it is clear that the two concepts are considered analogous.

The final group of treaties of the inter-War period which deal with expropriation contain provisions which call for either "fair,"[147]

145. Convention of Establishment, Commerce and Navigation, Oct. 30, 1930, Greece-Turkey, art. 9, 125 L.N.T.S. 371, 379.

146. *See* Agreement Concerning Conditions of Residence, Business and Legal Protection in General, Aug. 3, 1926, Germany-U.S.S.R., art. 8 and Additional to art. 8, 53 L.N.T.S. 85, 89, 93, 149; Treaty of Commerce, Oct. 31, 1925, Italy-Germany, art. 6, 52 L.N.T.S. 311, 315; Commercial Agreement, Mar. 15, 1929, Estonia-France, art. 18, 89 L.N.T.S. 381, 391; Treaty Concerning the Establishment of Economic Relations, June 28, 1926, Germany-Latvia, art. 1(6), 53 L.N.T.S. 417, 419-21; Treaty of Commerce and Navigation, Mar. 24, 1928, Germany-Greece, art. 7, 90 L.N.T.S. 79, 81-83; Treaty of Commerce and Navigation, Oct. 30, 1928, Germany-Lithuania, art. 5, 89 L.N.T.S. 149, 151-52; Convention Regarding Conditions of Residence, Feb. 17, 1929, Germany-Persia, art. 9, 111 L.N.T.S. 258, 260; Convention Respecting Conditions of Residence, Aug. 29, 1931, Poland-Turkey, art. 7, 144 L.N.T.S. 367, 373; Convention of Establishment, Apr. 25, 1934, Switzerland-Persia, art. 9, 160 L.N.T.S. 173, 179-81; Treaty of Establishment, Commerce and Navigation, Aug. 27, 1935, Iran-U.S.S.R., art. 3, 176 L.N.T.S. 299, 303; Convention of Establishment, Aug. 27, 1930, France-Romania, art. 2, 158 L.N.T.S. 379, 383; Convention Regarding Establishment and Navigation, Feb. 20, 1933, Belgium-Netherlands, art. 8, §§ 4-5, 165 L.N.T.S. 404, 407-08; Convention of Establishment and Labour, Apr. 1, 1933, Luxembourg-Netherlands, art. 8, §§ 3-4, 179 L.N.T.S. 31, 34-35; Convention Concerning the Rights of Nationals and Commercial and Shipping Matters, May 12, 1933, Canada-France, art. 3, 253 U.N.T.S. 285, 288; Treaty Concerning the Treatment of Nationals, Companies, Co-operative Societies and Associations of the Other Country, May 7, 1935, Finland-Switzerland, art. 4, 166 L.N.T.S. 35, 39; Convention of Establishment, Nov. 5, 1937, Belgium-Siam, art. 5, §§ 4-5, 190 L.N.T.S. 163, 169.

147. Convention Respecting Conditions or Residence, July 23, 1923, Poland-Turkey, art. 8, 49 L.N.T.S. 345, 351; Convention Respecting Conditions of Residence and Business, July 24, 1923, Great Britain, France, Italy, Japan, Greece, Romania, the Serb-Croat-Slovene State-Turkey, art. 6, 28 L.N.T.S. 151, 159; Convention Respecting Conditions of Residence, Jan. 28, 1924, Austria-Turkey, art. 8, 32 L.N.T.S. 303, 309; Establishment Convention, Feb. 29, 1924, Albania-Italy, art. 1, 44 L.N.T.S. 331, 335; Convention Respecting Conditions of Residence, Oct. 18, 1925, Bulgaria-Turkey, art. 8, 54 L.N.T.S. 135, 141; Convention of Commerce and Navigation, June 2, 1926, Finland-Turkey, art. 6, 70 L.N.T.S. 329, 333; Convention Regarding Conditions of Residence, Dec. 20, 1926, Hungary-Turkey, art. 7, 72 L.N.T.S. 245, 249; Convention Concerning Conditions of Residence and Business, Jan. 12, 1927, Germany-Turkey, art. 6, 73 L.N.T.S. 197, 199; Convention Respecting Conditions of Residence and Business, Aug. 7, 1927, Switzerland-Turkey, art. 5, 73 L.N.T.S. 51, 55; Convention of Commerce and Navigation, Feb. 4, 1928, Sweden-Turkey, art. 6, 88 L.N.T.S. 155, 159; Convention of Commerce and Navigation, Mar. 12, 1928, Estonia-

"reasonable"[148] or "proper"[149] compensation in the event of a taking of foreign-owned property. In addition, a November 28, 1928 convention between Egypt and Persia expressed that foreigners, "[l]ike nationals, may only be expropriated or deprived of their property . . . on payment of compensation."[150]

Similar to their United States counterparts during the inter-War period,[151] these treaties provide little specific guidance as to an international rule. However, several conclusions may be reached. First, these treaties tend to establish an international norm that requires that a minimum level of compensation be paid. Yet, if the ordinary meaning approach toward treaty interpretation[152] is applied, the use of words such as "fair" and "reasonable" compensation suggests that full compensation is not required. Rather, the treaties would seem to require an equitable balancing between the interests of the taking state and the foreign national. Moreover, if the integration approach[153] (i.e., various other provisions within the treaty are looked at to give content to the provision in question) is used, it would be reasonable to conclude that, subject to a requirement to provide some fair amount of compensation, the taking state is to determine how much remuneration is paid. All but three of the seventeen treaties which call for "fair," "reasonable" or "proper" compensation also contain provisions which state that foreigners shall be placed on the same footing as nationals with respect to property protection.[154] The

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Turkey, art. 6, 86 L.N.T.S. 453, 457; Treaty of Commerce and Navigation, Sept. 29, 1929, Sweden-Turkey, art. 6, 119 L.N.T.S. 53, 57; Convention of Establishment, Dec. 13, 1930, Switzerland-Turkey, art. 5, 129 L.N.T.S. 331, 335.

148. Treaty of Commerce and Navigation, Oct. 6, 1927, Germany-Kingdom of Serbs, Croats and Slovenes, art. 4, 77 L.N.T.S. 48, 50, 51; Treaty of Commerce, Mar. 24, 1934, Finland-Germany, art. 4, 149 L.N.T.S. 385, 387.

149. Convention Concerning Private Property, Rights and Interests, Feb. 6, 1922, France-Poland, art. 4, 43 L.N.T.S. 399, 403.

150. Treaty of Friendship and Establishment, Nov. 28, 1928, Egypt-Persia, art. 5, 93 L.N.T.S. 395, 397.

151. *See supra* notes 99-107 and accompanying text for a discussion of inter-War United States treaties.

152. *See supra* note 103 and accompanying text.

153. *See supra* notes 104-06 and accompanying text.

154. Convention Concerning Private Property, Rights and Interests, Feb. 6, 1922, France-Poland, art. 4, 43 L.N.T.S. 399, 403; Convention Respecting Conditions of Residence, July 23, 1923, Poland-Turkey, art. 9, 49 L.N.T.S. 345, 351; Convention Respecting Conditions of Residence, Jan. 28, 1924, Austria-Turkey, art. 9, 32 L.N.T.S. 303, 309; Establishment Convention, Feb. 29, 1924, Albania-Italy, art. 1, 44 L.N.T.S. 331, 333; Convention Respecting Conditions of Residence, Oct. 18, 1925, Bulgaria-Turkey, art. 9, 54 L.N.T.S. 135, 141, Convention of Commerce and Navigation, June 2, 1926, Finland-Turkey, art. 7, 70 L.N.T.S. 329, 333; Convention Regarding Conditions of Residence, Dec.

January 28, 1924 Convention Respecting Conditions of Residence between Austria and Turkey[155] is representative. Article 9 of this treaty states that "[n]ationals of each of the Contracting Parties shall enjoy in the territory of the other Party the same treatment as nationals of the country, as regards legal and judicial protection of their persons and property."[156]

In only one treaty concluded during the period between the First and Second World Wars was full compensation specified as the measure of damages. A 1923 treaty between the Soviet Union and Denmark provided that "[f]unds, goods, movable or immovable property, belonging to the nationals of the one country, lawfully imported into or acquired in the other country, shall not be subjected therein to requisition or any other compulsory appropriation on the part of the Government or of any local authorities without full compensation."[157]

Two conclusions may be abstracted from this review of inter-War, non-United States treaties. First, the treaties provide virtually no support for the notion that full compensation was the traditional standard for a taking of foreign-owned property. Second, the treaties show that international custom merely required that foreigners be treated the same as citizens of the taking state or the most-favored nation. Virtually all European nations were signatories to treaties with such provisions.[158] Middle East states such as Turkey,[159] Persia[160] and Egypt[161] also entered into this type of agreement. In the

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20, 1926, Hungary-Turkey, art. 9, 72 L.N.T.S. 245, 249; Convention Concerning Conditions of Residence and Business, Jan. 12, 1927, art. 2, 73 L.N.T.S. 197, 198; Convention Respecting Conditions of Residence and Business, Aug. 7, 1927, Switzerland-Turkey, art. 6, 73 L.N.T.S. 51, 55; Treaty of Commerce and Navigation, Oct. 6, 1927, Germany-Kingdom of Serbs, Croats and Slovenes, art. 1, 77 L.N.T.S. 48, 49; Convention of Commerce and Navigation, Feb. 4, 1928, Sweden-Turkey, art. 7, 88 L.N.T.S. 155, 160; Convention of Commerce and Navigation, Mar. 12, 1928, Estonia-Turkey, art. 7, 86 L.N.T.S. 453, 457; Treaty of Friendship and Establishment, Nov. 28, 1928, Egypt-Persia, art. 6, 93 L.N.T.S. 395, 397; Treaty of Commerce and Navigation, Sept. 29, 1929, Sweden-Turkey, art. 7, 119 L.N.T.S. 53, 58-59.

155. Convention Respecting Conditions of Residence, Jan. 28, 1924, Austria-Turkey, 32 L.N.T.S. 303.

156. *Id.* art. 9, 32 L.N.T.S. at 309.

157. Primary Agreement, Apr. 23, 1923, Denmark-U.S.S.R., art. 4(4), 18 L.N.T.S. 16, 20.

158. *See supra* notes 134-48 and authorities cited therein.

159. *See supra* notes 135-35, 140, 144, & 146.

160. *See supra* notes 134-35, 137-38, & 149.

161. *See supra* notes 134 & 149.

Far East, Japan,[162] China[163] and Siam[164] were countries which agreed to national or most-favored nation provisions with respect to expropriation. As has been illustrated in the previous section, pre-World War II United States treaty practice also supports this principle.[165] Most of the present nations of Africa, of course, were not independent before the Second World War and, therefore, incapable of concluding a treaty. Finally, although almost no such treaties were signed by Latin American nations,[166] their adherence to a rule of national treatment is readily apparent. These countries' espousal of the Calvo Doctrine, which states that aliens are entitled to the same (but no greater) protection as nationals,[167] clearly illustrates their acceptance of the custom evidenced by these treaties. Thus, the world-wide adherence to national and most-favored nation treatment with respect to expropriation demonstrates that it, and not full compensation, was the generally accepted rule prior to the Second World War. Indeed, one commentator writing in the inter-War period stated that national treatment with respect to expropriation and requisition of alien property represented the international practice of the time.[168] As discussed above,[169] such practice grants the taking state, subject to its internal laws respecting compensation to nationals, the right to determine the indemnity paid to foreigners.

### *B. World War II to the Early 1960's*

In the period following the Second World War until the early 1960's, most of the treaties supported the notion that the taking state enjoys the right to determine the amount of compensation paid to expropriated foreigners. However, as will be seen, there also began to emerge support for the full compensation principle. The treaties which support the argument that the measure of compensation is to be determined by the taking state fall into two categories. At least

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162. *See supra* note 146.
163. *See supra* note 140.
164. *See supra* notes 136, 140, & 142.
165. *See supra* notes 80-107 and accompanying text.
166. Guatemala did conclude a treaty with the Belgo-Luxembourg Economic Union which specified national treatment in the event of a requisition. *See supra* note 140.
167. *See supra* notes 22-23 and accompanying text.
168. Cutler, *supra* note 139, at 232.
169. *See supra* text accompanying note 139.

ten conventions directly supported such a rule.[170] The 1961 Treaty of Amity and Commerce between Japan and Indonesia is illustrative:

> Property of nationals and companies of either Party shall not be taken within the territory of the other except for a public purpose, *nor shall it be taken without just compensation in accordance with the laws and regulations of such other Party*. In all matters dealt with in this Article, nationals and companies shall receive, within the territory of the other Party, treatment no less favorable than that accorded to nationals and companies of any third country.[171]

Likewise, a 1946 treaty between Denmark and the Republic of China stated that the property of Danish citizens residing in China "shall be subject to the laws and regulations of the Republic of China concerning eminent domain . . . ."[172]

There also exists a group of treaties which indirectly support the notion that international law allows the taking state to determine the level of compensation to be paid to foreign property owners. These treaties assert that the property of foreigners is subject to the laws of the state where it is situated.[173] A 1952 convention between India

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170. Treaty Concerning the Abolition of Extra-Territorial Rights in China, Oct. 20, 1943, Belgo-Luxembourg Economic Union-Republic of China, art. 6, 14 U.N.T.S. 382, 387; Treaty for the Relinquishment of Extraterritorial Rights in China, May 20, 1946, Denmark-Republic of China, art. 3, 12 U.N.T.S. 59, 63; Convention on Conditions of Residence and Navigation, Feb. 16, 1954, Sweden-France, art. 8, 228 U.N.T.S. 137, 145; Treaty of Establishment, Aug. 23, 1951, France-Italy, art. 4, 291 U.N.T.S. 156, 157; Treaty of Friendship, Commerce and Navigation, Dec. 23, 1957, Federal Republic of Germany-Dominican Republic, art. 6(4), 1959 Bundesgesetzblatt, Teil 1 [BGB1] 1468, *cited in* FATOUROS, *supra* note 7, at 168-69 nn. 212-13; Agreement on Commerce, Apr. 22, 1960, Cuba-Japan, art. 4, 442 U.N.T.S. 261, 279-80; Agreement on Commerce, May 15, 1961, Japan-Peru, art. 4, 451 U.N.T.S. 3, 34; Treaty of Amity and Commerce, July 1, 1961, Indonesia-Japan, art. 4, 517 U.N.T.S. 107, 127, 2 I.L.M. 706, 708-09; Treaty of Friendship, Commerce and Navigation, Dec. 20, 1961, Argentina-Japan, art. 5, 613 U.N.T.S. 323, 357-59; Commercial Treaty, July 19, 1963, El Salvador-Japan, art. 4, 518 U.N.T.S. 135, 161, 4 I.L.M. 477, 481.

171. Treaty of Amity and Commerce, July 1, 1961, Indonesia-Japan, art. 4, 517 U.N.T.S.107, 127, 2 I.L.M. 706, 708-09 (emphasis added).

172. Treaty Concerning the Relinquishment of Extraterritorial Rights in China, May 20, 1946, Denmark-Republic of China, art. 3, 12 U.N.T.S. 59, 63.

173. Treaty of Amity, Aug. 20, 1943, Republic of China-Brazil, art. 3, 14 U.N.T.S. 365, 370; Treaty of Amity, Aug. 1, 1944, Republic of China-Mexico, art. 6, 14 U.N.T.S. 441, 449; Treaty of Amity, Jan. 6, 1946, Republic of China-Ecuador, art. 5, 7 U.N.T.S. 233, 241; Treaty of Commerce and Navigation, Aug. 17, 1946, Denmark-U.S.S.R., art. 13, 8 U.N.T.S. 201, 224; Treaty of Friendship and General Relations, July 9, 1947, Italy-Philippines, art. 4, 44 U.N.T.S. 3, 6; Treaty of Friendship, June 14, 1949, Thailand-Philippines, art. 5, 81 U.N.T.S. 53, 56; Treaty of Friendship, Consular Service and Establishment, Aug. 28, 1950, Greece-Philippines, art. 5, 225 U.N.T.S. 155, 158; Treaty of Friendship, July 11, 1952, India-Philippines, art. 5, 203 U.N.T.S. 73, 80; Treaty of Friend-

and the Phillipines is emblematic. Article 5 of the agreement provides:

> The nationals of each of the High Contracting Parties within the territories of the Other shall be permitted to enjoy reciprocally the right to acquire, possess and dispose of movable and immovable property . . . and to engate in trade, industry and other peaceful and lawful pursuits, *subject always to the constitution, laws and regulations promulgated, or which may hereafter be promulgated by the Other.*[174]

A small group of treaties concluded prior to the early 1960's were more speculative in their terms. A treaty between Spain and the Philippines called for "just compensation."[175] Similarly, two treaties, between India and Afghanistan[176] and India and Iran[177] declared that "real and just compensation" would be provided in the event that either party nationalized the property of citizens of the other. Finally, a 1963 agreement between Great Britain and the Cameroon stated that in the event of an expropriation, the taking state should, "in accordance with international law, make provision of the payment of adequate and effective compensation."[178]

Toward the end of this period, however, several treaties began to call for full compensation. At least three agreements provided for "prompt, adequate and effective compensation."[179] Moreover, a treaty signed in 1960 between Japan and Pakistan specified that compensation representing the "full equivalent of the property taken"

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ship, Aug. 30, 1956, Switzerland-Philippines, art. 5, 293 U.N.T.S. 43, 46; Treaty of Amity, Nov. 19, 1957, Republic of China-Jordan, art. 4, 308 U.N.T.S. 227, 236; Treaty of Friendship, Commerce and Navigation, Mar. 28, 1967, Israel-Haiti, art. 2, 630 U.N.T.S. 293, 295-97.

174. Treaty of Friendship, July 11, 1952, India-Philippines, art. 5, 203 U.N.T.S. 73, 80 (emphasis added).

175. Treaty on Civil Rights and Consular Prerogatives, May 20, 1948, Philippines-Spain, art. 3, 70 U.N.T.S. 143, 146.

176. Treaty of Commerce, Apr. 4, 1950, Afghanistan-India, art. 3, 167 U.N.T.S. 112, 114.

177. Treaty of Commerce and Navigation, Dec. 15, 1954, India-Iran, art. 3, 327 U.N.T.S. 245, 262.

178. Agreement on Commercial and Economic Co-operation, July 29, 1963, Cameroon-Great Britain, art. 5, 478 U.N.T.S. 149, 152, 2 I.L.M. 1030, 1031.

179. Treaty of Commerce, Establishment and Navigation, Mar. 11, 1959, Great Britain-Iran, art. 15, *reprinted in* Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment*, 9 INT'L & COMP. L.Q. 253, 295 (1960); Agreement on Commerce, May 10, 1960, Japan-Malaya [Malaysia], art. 4, 383 U.N.T.S. 293, 298; Treaty of Commerce, Establishment and Navigation, Nov. 14, 1962, Great Britain-Japan, art. 14, 478 U.N.T.S. 29, 100, 2 I.L.M. 151, 157-58.

must be paid.[180] Thus, while international treaty practice from the Second World War to the early 1960's generally supported the right of the nationalizing state to decide the level of compensation, the period also witnessed some emergent movement toward a full compensation standard.

### *C. The Early 1960's to the Present*

Beginning in the early 1960's, and continuing to the present, a dramatic reversal of previous international treaty practice took place. Virtually all the treaties required either full compensation or a standard which, albeit more vague, *resembles* the Hull Doctrine. In only a few of the many agreements concluded in this period was full compensation clearly *not* mandated.

In most of the treaties signed during the last two decades, at least one of the parties was a Third World nation. Typically the other signatory was an industrialized country. The treaties follow various standard formats, depending on which Western state was the other signatory. Therefore, these agreements will be analyzed accordingly.

#### 1. The Federal Republic of Germany

Since the early 1960's the Federal Republic of Germany has concluded by far the largest number of investment treaties. With only three exceptions these treaties leave no doubt that full compensation is mandated in the event of an expropriation. A 1962 treaty concerning the Encouragement of Investments with the Cameroon illustrates the format of most West German conventions:

> The investments of nationals or companies of either Contracting Party in the territory of the other Contracting Party shall not be expropriated except for the public benefit and against compensation. Such compensation shall represent the equivalent of the investment affected and shall be fixed and made without delay; it shall be actually realizable and freely transferable.[181]

This language, with occasional slight variations, was followed in over forty other agreements.[182] Similarly, a December 22, 1960 agree-

180. Treaty of Friendship and Commerce, Dec. 18, 1960, Japan-Pakistan, art. 4(4), 423 U.N.T.S. 197, 200-02.

181. Treaty Concerning Encouragement of Investments, June 29, 1962, Federal Republic of Germany-Cameroon, art. 3(2), 1963 Bundesgestzblatt, Teil 1 [BGB1] 991, INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, 1962 INVESTMENT PROMOTION AND PROTECTION TREATIES 41, 41 [hereinafter cited as INVESTMENT TREATIES].

182. *See infra* Appendix B for a list of these treaties and agreements.

ment with Malaya [Malaysia] declared the standard to be "prompt, adequate and effective compensation."[183]

In only three West German agreements was full compensation not mandated. A 1961 treaty with Thailand called for "just compensation."[184] In the protocol "just compensation" was defined as "fair and equitable compensation to be assessed in conformity with the principles of international law."[185] A 1964 exchange of notes establishing an investment guarantee by India declared:

> The Government of India do [sic] not intend, as a rule to nationalize or expropriate approved foreign investments. . . . In the event of a German investor being directly or indirectly deprived of his investment by nationalization or expropriation the Government of India shall pay fair and equitable compensation and shall permit its effective transfer without undue delay.[186]

Finally, an October 12, 1979 treaty with Romania called for "fair compensation."[187] It went on, however, to provide that "[t]he procedure for determination of the compensation shall conform to the laws of the Contracting Party in whose territory the investment has been made."[188]

### 2. Switzerland

Switzerland is second with respect to the number of investment treaties entered into since the early 1960's. The Swiss form, however, is different from that of West Germany. Most Swiss treaties call for either "an effective and adequate indemnity"[189] or for "an effective

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183. Agreement Concerning the Promotion and Reciprocal Protection of Investments, Dec. 22, 1960, Federal Republic of Germany-Malaya [Malaysia], art. 4(1), 1962 BGBl 1064, 1960 INVESTMENT TREATIES, *supra* note 181, at 1, 2-3.

184. Treaty Concerning the Promotion and Reciprocal Protection of Investments, Dec. 13, 1961, Federal Republic of Germany-Thailand, art. 3(2), 541 U.N.T.S. 192, 194.

185. *Id.* Protocol para. 3(b), 541 U.N.T.S. at 204.

186. Investment Guaranty Agreement, Oct. 15, 1964, Federal Republic of Germany-India, para. 1(d), 4 I.L.M. 491, 493.

187. Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Oct. 12, 1979, Federal Republic of Germany-Romania, art. 3(1), 1980 BGBl 1157, 1979 INVESTMENT TREATIES, *supra* note 181, at 57, 58.

188. *Id.*

189. Treaty Concerning the Protection and Encouragement of Capital Investment, Dec. 2, 1961, Switzerland-Tunisia, art. 3, 3 I.L.M. 524, 524; Convention concernant l'encouragement et la protection réciproque des investissements, Apr. 7, 1971, Switzerland-Republic of Korea, art. 4, 1971 Recueil officiel des lois et ordonnances de la Confédération suisse [ROLF] 731, 1971 INVESTMENT TREATIES, *supra* note 181, at 1, 3; Agreement on the Reciprocal Promotion and Protection of Investments, Mar. 6, 1973, Switzerland-Singapore, art. 4, 1973 INVESTMENT TREATIES, *supra* note 181, at 5, 7; Convention concernant l'en-

and adequate indemnity conforming with international law.''[190] Yet, three treaties did provide that the indemnity shall represent the equivalent of the investment expropriated.[191]

### 3. The United Kingdom

In the middle 1970's the United Kingdom began to negotiate a network of bilateral investment agreements. With only one exception, all of these agreements require compensation equal to the market value of the nationalized property.[192] The first of these treaties, the June 11, 1975 Agreement for the Promotion and Protection of Investments with Egypt,[193] set the basic format for its successors. It stated that neither state would nationalize or expropriate the property of citizens or companies of the other except ''against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated . . . .''[194] The only agreement not expressly requiring full compensation was signed on November 28, 1979 with Thailand.[195] It stipulated that foreign nationals would be entitled to ''fair and equitable treatment'' and ''payment of compensation'' in the event of a property tak-

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couragement et la protection réciproques des investissements, July 25, 1973, Switzerland-Egypt, art. 6, 1974 ROLF 1283, 1973 INVESTMENT TREATIES, *supra* note 181, at 35, 37; Convention concernant l'encouragement et la protection réciproques des investissements, Feb. 6, 1974, Switzerland-Indonesia, art. 6(1), 1976 ROLF 1954, 1974 INVESTMENT TREATIES, *supra* note 181, at 1, 3; Convention concernant l'encouragement et la protection réciproques des investissements, Feb. 17, 1974, Switzerland-Sudan, art. 6, 1975 ROLF 97, 1974 INVESTMENT TREATIES, *supra* note 181, at 7, 9; Convention concernant l'encouragement et la protection réciproque des investissements, Mar. 1, 1978, Switzerland-Malaysia, art. 5, 1978 ROLF 1183, 1978 INVESTMENT TREATIES, *supra* note 181, at 7, 11.

190. *See infra* Appendix C.

191. Convention concernant l'encouragement et la protection réciproques de investissements, May 3, 1965, Switzerland-Tanzania, art. 3(4), 1965 ROLF 861, 1965 INVESTMENT TREATIES, *supra* note 181, at 17, 18; Convention concernant l'encouragement et la protection réciproque des investissements, Aug. 23, 1971, Switzerland-Uganda, art. 6(3), 1972 ROLF 2524, 1971 INVESTMENT TREATIES, *supra* note 181, at 37, 39; Agreement for the Reciprocal Promotion and Protection of Investments, Sept. 23, 1981, Switzerland-Sri Lanka, art. 6, 21 I.L.M. 399, 402-03, 1981 INVESTMENT TREATIES, *supra* note 181, at 79, 82.

192. *See infra* Appendix D.

193. Agreement for the Promotion and Protection of Investments, June 11, 1975, United Kingdom-Egypt, 1976 Gr. Brit. T.S. No. 97 (Cmd. 6638), 14 I.L.M. 1470, 1975 INVESTMENT TREATIES, *supra* note 181, at 25.

194. *Id.* art. 5(1), 14 I.L.M. at 1471-72, 1975 INVESTMENT TREATIES, *supra* note 181, at 27.

195. Agreement for the Promotion of the Investment of Capital and the Protection of Investments, Nov. 28, 1979, United Kingdom-Thailand, 1979 Gr. Brit. T.S. No. 99 (Cmd. 7478), 1978 INVESTMENT TREATIES, *supra* note 181, at 75.

ing.[196] However, it went on to state that the "compensation shall be adequate, shall be effectively realizable and made without delay . . . ."[197]

### 4. France

Most French treaties also require the payment of full compensation. The standard language in these treaties requires the taking state to pay a just indemnity, the amount of which shall correspond to the value of the expropriated investments.[198] In only three instances was this format not followed. A 1975 agreement with Malaysia required the prompt payment of an effective and transferable indemnity.[199] In addition, "just" and "just and equitable" indem-

196. *Id.* art. 6(1)(a), 1978 INVESTMENT TREATIES, *supra* note 181, at 77.

197. *Id.*

198. *See* Convention sur la protection des investissements, Oct. 5, 1972, France-Zaire, art. 3, 1975 Journal Officiel de la République Française [J.O.] 9507, 1972 INVESTMENT TREATIES, *supra* note 181, at 32, 33; Convention sur la protection des investissements, Mar. 22, 1973, France-Mauritius, art. 3, 1974 J.O. 5367, 1973 INVESTMENT TREATIES, *supra* note 181, at 15, 16; Accord pour l'encouragement et la protection des investissements, June 14, 1973, France-Indonesia, art. 6(2), 1975 J.O. 7820, 1973 INVESTMENT TREATIES, *supra* note 181, at 21, 24; Convention sur l'encouragement et la protection réciproques des investissements, Dec. 22, 1974, France-Egypt, art. 4, 1975 J.O. 11,486, 1974 INVESTMENT TREATIES, *supra* note 181, at 85, 87; Agreement Concerning the Promotion and Protection of Investments, Sept. 8, 1975, France-Singapore, art. 4(1)-(2), 1975 INVESTMENT TREATIES, *supra* note 181, at 49, 51; Accord sur l'encouragement et la protection réciproques des investissements, Aug. 11, 1976, France-Malta, art. 4, 1977 J.O. 6361, 1976 INVESTMENT TREATIES, *supra* note 181, at 57, 59; Convention sur l'encouragement et la garantie réciproques des investissements, Dec. 16, 1976, France-Romania, art. 6(2), 1978 J.O. 3594, 1976 INVESTMENT TREATIES, *supra* note 181, at 92, 95; Convention sur l'encouragement et la protection réciproques des investissements, Nov. 28, 1971, France-Syria, art. 5, 1980 J.O. 1418, 1977 INVESTMENT TREATIES, *supra* note 181, at 43, 45; Accord sur l'encouragement et la protection des investissements, Dec. 23, 1977, France-Republic of Korea, art. 3(3), 1979 J.O. 834, 1977 INVESTMENT TREATIES, *supra* note 181, at 49, 51; Convention sur l'encouragement et la protection réciproques des investissements, Feb. 23, 1978, France-Jordan, 1979 J.O. 2758, 1978 INVESTMENT TREATIES, *supra* note 181, at 1, 3; Convention sur l'encouragement et la protection réciproques des investissements, July 31, 1978, France-Sudan, art. 5, 1980 J.O. 2295, 1978 INVESTMENT TREATIES, *supra* note 181, at 33, 35; Convention sur l'encouragement et la protection réciproques des investissements, Nov. 30, 1978, France-Paraguay, art. 5, 1981 J.O. 178, 1978 INVESTMENT TREATIES, *supra* note 181, at 85, 87; Convention sur l'encouragement et la protection réciproques des investissements, Mar. 23, 1979, France-Liberia, art. 5, 1982 J.O. 689, 1979 INVESTMENT TREATIES, *supra* note 181, at 8, 9; Convention sur l'encouragement et la protection réciproques des investissements, Sept. 20, 1978, France-El Salvador, art. 5, 1978 INVESTMENT TREATIES, *supra* note 181, at 39, 40; Convention sur l'encouragement et la protection réciproques des investissements, Apr. 10, 1980, France-Sri Lanka, art. 7(2), 1982 J.O. 1950, 1980 INVESTMENT TREATIES, *supra* note 181, at 41, 44.

199. Accord sur la garantie des investissements, Apr. 24, 1975, France-Malaysia, art. 3, 1977 J.O. 2136, 1975 INVESTMENT TREATIES, *supra* note 181, at 9, 11.

nification were respectively specified in agreements with Yugoslavia[200] and Morocco.[201]

### 5. The Netherlands

Most Dutch treaties also follow the French form. That is, they express that compensation, which shall represent the value of the investments concerned, shall be paid if one nation expropriates the property of nationals of the other.[202] Several Dutch agreements, however, are more ambiguous in their expropriation provisions. One calls for "just" compensation[203] while five others provide for either "effective and adequate" or "just" compensation, in accordance with international law.[204]

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200. Convention sur la protection des investissements, Mar. 28, 1974, France-Yugoslavia, art. 5, 1975 J.O. 4813, 1974 INVESTMENT TREATIES, *supra* note 181, at 14, 15.

201. Accord sur la protection, l'encouragement et la garantie réciproques des investissements, July 15, 1975, France-Morocco, art. 5, 1977 J.O. 677, 1975 INVESTMENT TREATIES, *supra* note 181, at 33, 34-35.

202. *See* Agreement on Economic Cooperation, June 7, 1968, Netherlands-Indonesia, art. 7(c), 1968 Tractatenblad van het Koninkrijk der Nederlanden [Trb.] No. 88, 1968 INVESTMENT TREATIES, *supra* note 181, at 13, 15; Agreement on Economic and Technical Cooperation, Apr. 14, 1970, Netherlands-Tanzania, art. 9(c), 1970 Trb. No. 77, 1970 INVESTMENT TREATIES, *supra* note 181, at 7, 9; Agreement on Economic Cooperation, Apr. 24, 1970, Netherlands-Uganda, art. 9(c), 1970 Trb. No. 87, 1970 INVESTMENT TREATIES, *supra* note 181, 13, 15; Agreement on Economic and Technical Co-operation, Aug. 22, 1970, Netherlands-Sudan, art. 11, 1970 Trb. No. 168, 1970 INVESTMENT TREATIES, *supra* note 181, at 19, 21; Agreement on Economic Co-operation, June 15, 1971, Netherlands-Malaysia, art. 10, 1971 Trb. No. 152, 1971 INVESTMENT TREATIES, *surpa* note 181, at 27, 30; Accord de coopération economique, Dec. 23, 1971, Netherlands-Morocco, art. 11(c), 1972 Trb. No. 14, 1971, INVESTMENT TREATIES, *supra* note 181, at 45, 48; Agreement on Encouragement and Reciprocal Protection of Investment, Oct. 16, 1974, Netherlands-Republic of Korea, art. 5(c), 1974 Trb. No. 220, 1974 INVESTMENT TREATIES, *supra* note 181, at 57, 59; Agreement on the Protection of Investments, Feb. 16, 1976, Netherlands-Yugoslavia, art. 4(c), 1976 Trb. No. 40, 1976 INVESTMENT TREATIES, *supra* note 181, at 1, 2; Agreement on the Reciprocal Encouragement and Protection of Investments, Oct. 30, 1976, Netherlands-Egypt, art. 5(c), 1977 Trb. No. 9, 1976 INVESTMENT TREATIES, *supra* note 181, at 77, 78-79; Agreement on the Encouragement and Protection of Investments, Aug. 3, 1979, Netherlands-Senegal, art. 4(2), 1979 INVESTMENT TREATIES, *supra* note 181, at 35, 36.

203. Agreement on Economic Cooperation, May 16, 1972, Netherlands-Singapore, art. 9(c), 1972 Trb. No. 124, 1972 INVESTMENT TREATIES, *supra* note 181, at 11, 14.

204. Agreement for Encouragement of Capital Investments, May 23, 1963, Netherlands-Tunisia, art. 3, 1963 Trb. No. 106, 523 U.N.T.S. 237, 241, 4 I.L.M. 159, 159, 1971 INVESTMENT TREATIES, *supra* note 181, at 9, 10; Agreement on Economic and Technical

### 6. Sweden

Swedish treaty practice follows essentially two patterns. At least three agreements[205] concluded during the middle 1960's called for "*une indemnité effective et adéquate, conformément au droit des gens.*"[206] In at least five recent treaties "prompt, adequate and effective" compensation was specified as the standard.[207] Finally, a 1982 convention with the People's Republic of China declared that compensation "which shall . . . place the investor in the same financial position as that in which the investor would have been if the expropriation or nationalization had not taken place," must be paid.[208]

### 7. The Belgo-Luxembourg Economic Union

Most of the investment agreements concluded by the Belgo-Luxembourg Economic Union also stipulate that full compensation must be paid in the event of a nationalization. This is accomplished

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Co-operation, Apr. 26, 1965, Netherlands-Ivory Coast, art. 5, 1965 Trb. No. 173, 634 U.N.T.S. 81, 85, 1971 INVESTMENT TREATIES, *supra* note 181, at 55, 56; Agreement on Economic and Technical Co-operation, July 6, 1965, Netherlands-Cameroon, art. 6, 1965 Trb. No. 208, 571 U.N.T.S. 63, 67, 1965 INVESTMENT TREATIES, *supra* note 181, at 55, 56; Agreement on Economic Co-operation, Sept. 11, 1970, Netherlands-Kenya, art. 9, 1970 Trb. No. 166, 1970 INVESTMENT TREATIES, *supra* note 181, at 25, 26; Agreement on Economic Co-operation, June 6, 1972, Netherlands-Thailand, art. 9(c), 1972 Trb. No. 80, 1972 INVESTMENT TREATIES, *supra* note 181, at 21, 23.

205. Accord Commercial, Aug. 27, 1965, Sweden-Ivory Coast, art. 6, 1966 Sveriges Överenskommelser med Främmande Makter [S.Ö.] 31, 1965 INVESTMENT TREATIES, *supra* note 181, at 71, 74; Accord de Commerce, Apr. 10, 1966, Sweden-Madagascar, art. 8, 1967 S.Ö. No. 33, 6 I.L.M. 48, 48, 1966 INVESTMENT TREATIES, *supra* note 181, at 7, 8; Accord Commercial, Feb. 24, 1967, Sweden-Senegal, art. 12, 1968 S.Ö. No. 22, 1967 INVESTMENT TREATIES, *supra* note 181, at 7, 9.

206. An effective and adequate indemnity, in conformity with public international law.

207. Agreement on the Mutual Protection of Investments, July 15, 1978, Sweden-Egypt, art. 3(1)(c), 1979 S.Ö. 1, 1978 INVESTMENT TREATIES, *supra* note 181, at 23, 24-25; Agreement on the Mutual Protection of Investments, Nov. 10, 1978, Sweden-Yugoslavia, art. 3(c), 1979 S.Ö. 29, 1978 INVESTMENT TREATIES, *supra* note 181, at 47, 48; Agreement Concerning the Mutual Protection of Investments, Mar. 3, 1979, Sweden-Malaysia, art. 3(c), 1979 S.Ö. 17, 1979 INVESTMENT TREATIES, *supra* note 181, at 1, 3; Agreement on the Mutual Protection of Investments, Mar. 12, 1981, Sweden-Pakistan, art. 4(1)(c), 1981 S.Ö. 8, 1981 INVESTMENT TREATIES, *supra* note 181, at 19, 20-21; Agreement on the Promotion and Protection of Investments, Apr. 30, 1982, Sweden-Sri Lanka, art. 6(1)(c), 1982 S.Ö. 16, 1982 INVESTMENT TREATIES, *supra* note 181, at 23, 25-26.

208. Agreement on the Mutual Protection of Investments, Mar. 9, 1982, Sweden-People's Republic of China, art. 3(1), 21 I.L.M. 477, 477, 1982 INVESTMENT TREATIES, *supra* note 181, at 17, 18.

through provisions which either require "full "[209] or "market value"[210] compensation or compensation equal to the value of the expropriated property.[211] Several of these treaties also contain "prompt, adequate and effective compensation" clauses.[212] Two earlier treaties which the Belgo-Luxembourg Economic Union entered into specified the more ambiguous standard of "effective and adequate compensation, in accordance with international law."[213]

### 8. Italy

Recent Italian treaties also follow the same format as most of the other European nations. A 1967 agreement with Malta is typical. Article 4 states that "[i]nvestments by nationals and companies of either Contracting Party . . . may not be expropriated except in the public interest and only against payment of indemnity equal to the value of the property expropriated."[214]

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209. Agreement on the Encouragement and Reciprocal Protection of Investments, Dec. 20, 1974, Belgo-Luxembourg Economic Union-Republic of Korea, art. 5(1)(c), 1974 INVESTMENT TREATIES, *supra* note 181, at 67, 70; Agreement on the Encouragement and Reciprocal Protection of Investments, Feb. 28, 1977, Belgo-Luxembourg Economic Union-Egypt, art. 5(1)(c), 1977 INVESTMENT TREATIES, *supra* note 181, at 9, 11; Agreement on the Promotion and Protection of Investments, May 22, 1981, Belgo-Luxembourg Economic Union-Bangladesh, art. 4(1), 1981 INVESTMENT TREATIES, *supra* note 181, at 63, 66.

210. Agreement on the Promotion and Protection of Investments, Nov. 17, 1978, Belgo-Luxembourg Economic Union-Singapore, art. 4(2), 1978 INVESTMENT TREATIES, *supra* note 181, at 53, 55-56; Agreement on the Promotion and Mutual Protection of Investments, Mar. 27, 1980, Belgo-Luxembourg Economic Union-Cameroon, art. 4(3), 1980 INVESTMENT TREATIES, *supra* note 181, at 12, 15.

211. Accord relatif à la promotion, la protection et la garantie réciproques des investissements, May 8, 1978, Belgo-Luxembourg Economic Union-Romania, art. 3(1)(c), 1978 INVESTMENT TREATIES, *supra* note 181, at 17, 19; Accord relatif à l'encouragement et á la protection réciproques des investissements, Nov. 22, 1979, Belgo-Luxembourg Economic Union-Malaysia, art. 4(1), 1979 INVESTMENT TREATIES, *supra* note 181, at 71, 74.

212. Agreement on the Promotion and Protection of Investments, Nov. 17, 1978, Belgo-Luxembourg Economic Union-Singapore, art. 4(1), 1978 INVESTMENT TREATIES, *supra* note 181, at 53, 55-56; Accord relatif à l'encouragement et à la protection reciproques des investissements, Nov. 22, 1979, Belgo-Luxembourg Economic Union-Malaysia, art. 4(1), 1979 INVESTMENT TREATIES, *supra* note 181, at 71, 74; Agreement for the Promotion and Protection of Investments, May 22, 1981, Belgo-Luxembourg Economic Union-Bangladesh, art. 4(1), 1981 INVESTMENT TREATIES, *supra* note 181, at 63, 66.

213. Convention Concerning the Encouragement of Capital Investment and the Protection of Property, July 15, 1964, Belgo-Luxembourg Economic Union-Tunisia, art. 3, 561 U.N.T.S. 297, 301, 5 I.L.M. 1132, 1132; Convention Concerning the Encouragement of Capital Investment and the Protection of Property, Apr. 28, 1965, Belgo-Luxembourg Economic Union-Morocco, art. 4, 620 U.N.T.S. 171, 175.

214. Agreement Concerning Economic Cooperation and Investment Protection, July 28, 1967, Italy-Malta, art. 4, 1967 INVESTMENT TREATIES, *supra* note 181, at 44, 45. *See also* Accord pour proteger et favoriser les investissements de capitaux, Nov. 18, 1968, Italy-

### 9. Romania

Socialist Romania has also concluded a number of investment agreements. Surprisingly, all but one of these agreements require full compensation. Nine treaties require the payment of an indemnity which shall be equal to the value of the expropriated property.[215] Similarly, a 1976 convention with Austria mandates full compensation ("*un plein dedommagement*").[216] Only a 1979 treaty with West Germany allows the taking state to determine the amount of remuneration.[217]

### 10. Miscellaneous Treaties

Most of the remaining treaties also require full compensation in the event that one of signatory nations expropriates property owned by citizens of the other. The majority of these remaining treaties state that the compensation shall be equal to to value of of nationalized

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Gabon, art. 4, 1968 INVESTMENT TREATIES, *supra* note 181, at 29, 30; Accord en vue de proteger et de favoriser les investissements de capitaux, June 11, 1969, Italy-Chad, art. 4, 1969 INVESTMENT TREATIES, *supra* note 181, at 27, 28-29; Accord pour proteger et favoriser les investissements de capitaux, July 23, 1969, Italy-Ivory Coast, art. 4(2), 1969 INVESTMENT TREATIES, *supra* note 181, at 32, 33; Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Apr. 29, 1975, Italy-Egypt, art. 3(2), 1975 INVESTMENT TREATIES, *supra* note 181, at 13, 13-14.

215. Agreement on the Mutual Protection of Investments of Capital, Mar. 19, 1976, Romania-United Kingdom, art. 4(1), 1977 Gr. Brit. T.S. No. 15 (Cmd. 6722), 1976 INVESTMENT TREATIES, *supra* note 181, at 17, 19; Agreement on the Promotion and Mutual Guarantee of Capital Investments, May 10, 1976, Romania-Egypt, art. 3(1), 1976 INVESTMENT TREATIES, *supra* note 181, at 37, 37-38; Convention sur l'encouragement, la protection et la garantie réciproques des investissements, Dec. 16, 1976, Romania-France, art. 6(2), 1978 J.O. 3594, 1976 INVESTMENT TREATIES, *supra* note 181, at 92, 95; Accord relatif à la promotion, la protection et la garantie réciproques des investissements, May 8, 1978, Romania-Belgo-Luxembourg Economic Union, art. 3(1)(c), 1978 INVESTMENT TREATIES, *supra* note 181, at 17, 19; Accord sur l'encouragement, la promotion et la garantie des investissements, Apr. 11, 1979, Romania-Gabon, art. 5(1)(c), 1979 INVESTMENT TREATIES, *supra* note 181, at 15, 18; Agreement Concerning Reciprocal Capital Investment Promotion and Guarantees, June 19, 1980, Romania-Senegal, art. 4(1)(c), 1980 INVESTMENT TREATIES, *supra* note 181, at 81, 84; Agreement on the Reciprocal Guarantee of Investments, Aug. 30, 1980, Romania-Cameroon, art. 4(c), 1980 INVESTMENT TREATIES, *supra* note 181, at 90, 92; Agreement on the Mutual Promotion and Guarantee of Investments, Nov. 12, 1980, Romania-Denmark, art. 4(1), 1980 INVESTMENT TREATIES, *supra* note 181, at 105, 108; Agreement on the Mutual Promotion and Guarantee of Investments, Feb. 9, 1981, Romania-Sri Lanka, art. 6(1), 1981 INVESTMENT TREATIES, *supra* note 181, at 1, 4.

216. Traité pour la promotion, la garantie et la protection réciproques des investissements, Sept. 30, 1976, Romania-Austria, art. 4(1), 1976 INVESTMENT TREATIES, *supra* note 181, at 65, 67.

217. *See supra* notes 187-88 and accompanying text.

investment.[218] In addition, a 1981 treaty between Austria and Bulgaria mandates "full" compensation[219] and a 1980 agreement between Finland and Egypt provides for "prompt, adequate and effective" compensation.[220] Three conventions merely call for "effective and adequate compensation."[221] Finally, a 1977 investment agreement between Egypt and Yugoslavia allows the taking state to determine the amount of compensation.[222]

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218. Agreement on Economic Co-operation, Oct. 25, 1964, Iraq-Kuwait, Protocol on the Promotion of the Movement of Capital and Investments, art. 4, 1964 INVESTMENT TREATIES, *supra* note 181, at 67, 68-69 (compensation equal to the value of the investment); Agreement Concerning the Encouragement and the Reciprocal Protection of Investments, Jan. 30, 1968, Denmark-Indonesia, art. 4(3), 720 U.N.T.S. 223, 226, 1968 INVESTMENT TREATIES, *supra* note 181, at 1, 2 (compensation equal to the commercial value of the investment); Agreement Concerning the Encouragement and the Reciprocal Protection of Investments, Nov. 24, 1969, Indonesia-Norway, art. 4(3), 1969 INVESTMENT TREATIES, *supra* note 181, at 39, 40 (compensation equal to the commercial value of the investments); Agreement on the Encouragement and Reciprocal Protection of Investments, Jan. 15, 1970, Belgium-Indonesia, art. 5(c), 1970 INVESTMENT TREATIES, *supra* note 181, at 1, 3 (compensation equal to the actual value of the property); Protocole relatif à l'encouragement réciproque des investissements, Mar. 28, 1976, Belguim-Zaire, art. 3, 1976 INVESTMENT TREATIES, *supra* note 181, at 25, 26 (an indemnity corresponding to the value of the expropriated property); Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Jan. 28, 1977, Egypt-Japan, art. 5(3), 18 I.L.M. 44, 45, 1977 INVESTMENT TREATIES, *supra* note 181, at 1, 2 (compensation representing the equivalent of the normal market value of the investment); Agreement for the Promotion and Protection of Investments, Mar. 28, 1980, Republic of Korea-Sri Lanka, art. 7(1), 1980 INVESTMENT TREATIES, *supra* note 181, at 33, 37 (prompt, adequate and effective compensation amounting to the market value of the investment): Agreement on the Promotion and Protection of Investments, May 9, 1980, Singapore-Sri Lanka, art. 6(1)-(2), 1980 INVESTMENT TREATIES, *supra* note 181, at 63, 66 (adequate, effective and prompt compensation equal to the market value of the property); Agreement Concerning the Promotion and Protection of Investments, Mar. 1, 1982, Japan-Sri Lanka, art. 5(2)-(3), 1982 INVESTMENT TREATIES, *supra* note 181, at 7, 10 (prompt, adequate and effective compensation equal to the market value of the investment).

219. Treaty Relating to Mutual Cooperation and Investment Protection, May 15, 1981, Austria-Bulgaria, art. 4(2), 1981 INVESTMENT TREATIES, *supra* note 181, at 45, 47-48.

220. Agreement on Mutual Protection of Investments, May 5, 1980, Egypt-Finland, art. 3(1)(c), 1980 INVESTMENT TREATIES, *supra* note 181, at 49, 50-51.

221. Trade Agreement, Dec. 10, 1965, Denmark-Madagascar, art. 6, 735 U.N.T.S. 105, 111, 1965 INVESTMENT TREATIES, *supra* note 181, at 109, 111-12; Trade Agreement, Nov. 23, 1966, Denmark-Ivory Coast, art. 7, 735 U.N.T.S. 119, 125, 1966 INVESTMENT TREATIES, *supra* note 181, at 21, 23; Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Apr. 1, 1975, art. 6, 1975 INVESTMENT TREATIES, *supra* note 181, at 1, 2.

222. "The measure with which the right[s] of nationals . . . of the other Contracting Party [i.e., nationals of the non-taking state] [are] deprived or restricted simultaneously determine[s] and pay[s] off the compensation." Agreement on Protection of Investments, June 3, 1977, Egypt-Yugoslavia, art. 4, 1977 INVESTMENT TREATIES, *supra* note 181, at 15, 16.

### D. The Impact of Recent Treaties on International Law

Over seventy percent of the investment treaties and agreements concluded since the early 1960's provide for full compensation.[223] With only two exceptions,[224] the remaining conventions specify a standard that is somewhat ambiguous. These treaties either call for the degree of compensation required by international law or declare that just or adequate compensation must be tendered.[225] Thus, it would appear that recent treaty practice provides strong support for the position that customary international law requires full compensation when an alien's property is nationalized. While this indeed may now be the rule, there are at least two countervailing arguments.

First, as shown above,[226] treaties prior to the 1960's evidence an international custom which allowed the taking state to determine the amount of compensation. As long as the taking treated foreingers the same as its own nationals and provided them with *some* compensation, no violation of international law would occur. It is with this previous custom in mind that the treaties of the past two decades must be analyzed. In order to alter a prior customary norm, these recent agreements must be universally subscribed to.[227] Although most nations in Europe, Africa, the Middle East, South Asia and East Asia concluded treaties which established a duty to pay full compensation, the assent of Latin American nations, not to mention most socialist countries, to such a principle is conspicuously absent. Only seven Latin American countries have entered into recent treaties with European nations which mandate full compensation.[228] While it has

223. *See supra* notes 181-83, 191-94, 198, 202, 207-12, 214-16, 218-20 and accompanying text. In total, 126 of the 173 treaties reviewed above provided, in one form or another, for full remuneration.

224. *See supra* notes 187-88, 217, 222 and accompanying text. Only two treaties, one between West Germany and Romania and the other between Egypt and Yugoslavia, allowed the taking state to determine the amount of compensation.

225. *See supra* notes 184-86, 189-90, 195-97, 199-201, 203-06, 213, 221 and accompanying text.

226. *See supra* notes 135-80 and accompanying text.

227. "'Common consent' can therefore only mean the express or tacit consent of such an overwhelming majority of the members [of the international community] that those who dissent are of no importance as compared with the community viewed as an entity in contradistinction to the wills of its single members." 1 OPPENHEIM, *supra* note 10, §, at 17.

228. These nations were the Caribbean nation of Haiti (with West Germany), see *infra* Appendix B; the Central American states of Costa Rica (with the U.K.), see *infra* Appendix D; Belize (with the U.K.), see *infra* Appendix D; and El Salvador (with France), see *supra* note 198; and the South American countries of Ecuador (with West Germany), see *infra*

been asserted that "[s]ilence may . . . denote tacit agreement" with respect to an international practice,[229] in this case such logic does not follow. Most Latin American states not only reject the full compensation principle but also maintain that foreigners are entitled to no greater protection than that accorded to nationals.[230] Although unanimous consensus is not required to establish a rule of customary law, substantial uniformity is.[231] Accordingly, a significant bloc of nations, even if not a majority, can prevent the creation of a norm.[232] The continued rejection of a full compensation principle by socialist and Latin American states has therefore impeded its establishment as a universally binding rule of customary international law.

Consequently, what remains is either (1) the continuation of the previous custom of national treatment[233] or (2) the existence of two equally valid expropriation rules. However, the effect of both of these possibilities is the same: the taking state may decide how much compensation to grant expropriated aliens. If the second alternative is the current standard, then a nation's compliance with either the national treatment or the full compensation position would mean that no international wrong has been committed. Thus, the ability to decide which standard to abide by, provided that no specific treaty is in force, allows a nation to indirectly determine the amount of indemnification it will pay foreigners.

Finally, it is noteworthy that, while most European nations insist that full compensation is the international rule, many of their constitutions do not require them to provide their own nationals with full compensation. For example, the Austrian Supreme Court, in a decision of November 22, 1961, declared that "[a]ccording to the constant jurisprudence of the Constitutional Court . . . compensation is

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Appendix B; Colombia (with West Germany), see *infra* Appendix B; and Paraguay (with the U.K. and with France), see *infra* Appendix D and *supra* note 198.

229. BROWNLIE, *supra* note 34, at 7.

230. *See supra* notes 22-23, 167 and accompanying text.

231. BROWNLIE, *supra* note 34, at 6.

232. *Id.* *See also* 1 OPPENHEIM, *supra* note 10, § 11, at 17 (an overwhelming majority of nations is required); Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 114, 131 (Judgment of Dec. 18); Texaco Overseas Petroleum Co. v. Libya, 53 I.L.R. 389, 489-92, 17 I.L.M. 1, 28-30 (1978).

233. *See Texaco Overseas Petroleum Co*, 53 I.L.R. at 491-92, 17 I.L.M. at 30 (insufficient support for a new principle of international law leaves the previous principle intact).

not guaranteed by constitutional law."[234]

The constitution (Basic Law) of the Federal Republic of Germany specifically declares that "compensation shall be determined by an equitable balance between the public interest and the interests of those affected."[235] This provision "has not been interpreted in such a way as to entitle the authorities to make substantial subtractions from the amount of compensation to be paid to the land owner"[236] and the amount of compensation actually paid has often come close to the market value.[237] However, various commentators have noted that the balancing of interests criterion "may lead to a different result in individual cases: in one case it may produce a mere token compensation, in others a just or even full and complete compensation."[238]

Although the Italian constitution demands compensation upon a property taking,[239] the amount need not be full. In a decision of May 25, 1957 the Italian Constitutional Court (*Corte costituzionale*) held that the amount of compensation must be determined by a balancing of the public and private interests.[240] The Court further held that as long as the remuneration is not merely symbolic, the legislature may determine the precise amount.[241] The reason for this is that a coordination of the public and private interests requires "a complex and varied examination of economic, financial and political elements that only a legislator can discharge."[242] However, in a decision of June 8, 1965, the high constitutional court qualified this legislative dis-

234. Austrian State Treaty (Individual Claim to Compensation) Case, Nov. 22, 1961, Supreme Court, Austria, 40 I.L.R. 184, 186. *Accord* Seidl-Hohenveldern, *Austria* in INDIVIDUAL RIGHTS AND THE STATE IN FOREIGN AFFAIRS 26, 32 (E. Lauterpacht & J.G. Collier eds. 1977) ("All that Austrian law requires as a protection against expropriation is that property may only be taken by virtue of a law. The payment of any compensation is not required").

235. GRUNDGESETZ [GG] art. 14 (W. Ger.), *translated in* 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A.P. Blaustein & G.H. Flanz eds.) [hereinafter cited as Blaustein & Flanz].

236. Kimminich, *Compensation for Expropriation of Land and for "Worsenment" in the Federal Republic of Germany* in COMPENSATION FOR COMPULSORY PURCHASE: A COMPARATIVE STUDY 190, 206 (J.F. Garner ed. 1975).

237. *Id.*

238. Schubert, *Compensation Under New German Legislation on Expropriation*, 9 AM. J. COMP. L. 84, 87 (1960).

239. COSTITUZIONE [COST.] art. 42 (Italy), *translated in* 8 Blaustein & Flanz, *supra* note 235.

240. Judgment Number 61, May 25, 1957, Corte costituzionale [Corte cost.], *cited in* Tesauro, *Compensation for Expropriation in Italy*, in COMPENSATION FOR COMPULSORY PURCHASE: A COMPARATIVE STUDY 211, 218 (J.F. Garner ed. 1975).

241. *Id.*

242. *Id.*

cretion. There the Court held that "compensation, in whatever mode it is shaped, must always represent a serious reparation of an economic inconvenience resulting from expropriation."[243] Thus, while the Italian Constitution does not compel full market value, the amount of compensation must bear a reasonable relation to the loss sustained by the previous owner.[244]

Swedish constitutional law affords only a weak protection of property. Chapter 8, article 1, paragraph 4 of the Instrument of Government declares:

> Any private subject shall be guaranteed the right to obtain compensation, *according to principles to be determined by law*, in case his property is requisitioned by way of expropriation or other such means of disposition.[245]

Thus, while this provision calls for compensation, it has been noted that it "amount[s] only to a declaration in principle that the [right] in question shall exist, but the details are left entirely to the legislator . . . ."[246]

Because there is no written constitution in Great Britain, the Parliament is a sovereign body.[247] It therefore enjoys the power to determine how much, if any, compensation to provide to an expropriated owner.[248] Although market value is typically paid in the United Kingdom,[249] the fact remains that it is not constitutionally guaranteed.

French jurisprudence concerning the level of compensation constitutionally due upon a property taking is still rather unsettled. In 1981 and 1982, following the election of François Mitterand to the Presidency and the capture of the National Assembly by a Socialist

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243. Judgment Number 91, June 8, 1965, Corte cost., *quoted in* Tesauro, *supra* note 240, at 218.

244. *See* Tesauro, *supra* note 240, at 218.

245. REGERINGSFORMEN [RF] (Instrument of Government) ch. 8, art. 8, ¶ 4 (Swed.), *translated in* 15 Blaustein & Flanz, *supra* note 235 (emphasis added).

246. Nyman, *The New Swedish Constitution*, 26 SCANDINAVIAN STUD. L. 171, 193 (1982).

247. *See, e.g.*, Nathan, *English Law and the Nationalized Industries*, 5 REC. A.B. CITY N.Y. 219, 222-23 (1950).

248. Mann, *Outlines of a History of Expropriation*, 75 LAW Q. REV. 188, 199 (1950). The courts, however, have adopted a principle of construction in which they will not impute an intent to withhold compensation absent an unequivocal statement in the expropriatory legislation. *Id.* at 199.

249. Acquisition of Land (Assessment of Compensation) Act. 1919, 9 & 10 Geo. 5, ch. 57, § 2(ii).

majority, France implemented wide scale nationalizations.[250] The first measure, however, was declared unconstitutional by the *Conseil Constitutionel* (Constitutional Council) for, inter alia, failing to provide adequate indemnification.[251] Immediately after this setback the government went to work on reforming the bill. A new decree, which substantially increased the amount of compensation, was very quickly enacted.[252] This revised measure was subsequently approved by the *Conseil*.[253]

Nevertheless, it has been argued that "[e]ven though the compensation received by shareholders under [the revised] system generally is greater than under the previous system, the compensation still remains below, and in certain cases far below, the compensation which might have been awarded had the shares been evaluated in accordance with widely recognized international accounting practices."[254] This argument is apparently based on the fact that the nationalizations were accomplished indirectly, that is, though forced purchase of the target companies' stock, rather than directly.[255] Had the companies been taken over directly, the normal system of valuation would have been the so-called "going concern" approach, which takes future profits into account. It is normally accomplished by capitalization of profits from past years.[256] Therefore, although the 1982 revised version of the nationalization act provided for an indemnity substantially related to the value of the companies, it cannot be said that full compensation was granted.

Several European nations, however, do constitutionally require full compensation when the government expropriates property of nationals. The constitutions of Denmark,[257] Finland,[258] Norway,[259] and

250. *See* Borde & Eggleston, *The French Nationalizations*, 68 A.B.A. J. 422, 424 (1982). For two very good in-depth reviews of these nationalizations, see Loyrette & Gaillot, *The French Nationalizations: The Decisions of the French Constitutional Council and their Aftermath*, 17 GEO. WASH. J. INT'L L. & ECON. 17 (1982) and Note, *Constitutional Law: French Nationalizations*, 23 HARV. INT'L L.J. 381 (1983).

251. Loyrette & Gaillot, *supra* note 250, at 53-54; Borde & Eggleston, *supra* note 250, at 426; Note, *supra* note 250, at 385.

252. The total amount of compensation to be paid was raised from $6 billion to approximately $7.4 billion, an increase of 23%. *See* Borde & Eggleston, *supra* note 250, at 426.

253. Loyrette & Gaillot, *supra* note 250, at 57-58.

254. *Id.* at 55 (footnotes omitted).

255. *Cf. id.* at 46, 51.

256. Capitalization essentially predicts future earnings on the basis of past profits.

257. Article 73 of the Danish Constitution Act provides:

(1) The right of property shall be inviolable. No person shall be ordered to cede his property except where required by the public weal. It can be done only as provided by statute and against full compensation.

CONST. ACT art. 73, ¶ 1 (Den.), *translated in* 5 Blaustein & Flanz, *supra* note 235.

Switzerland[260] expressly mandate a full indemnity. In addition, although the Belgian[261] and Dutch[262] constitutions do not specifically require full compensation, they have been so interpreted.

This digression into the domestic law of various European states is relevant for two reasons. First, because many European countries, and indeed the most important ones, do not constitutionally guarantee their own citizens full compensation, they are arguably estopped from asserting that international law requires such a standard.[263] Second, municipal laws can also be a source of international law. In addition to being evidence of custom,[264] the Statute of the International Court of Justice states that "general principles of law" may be used as a basis of decision.[265] Thus, the fact that many European nations do not guarantee full compensation to their own nationals may have influenced international law on the subject.

On the balance, therefore, it would appear that although most

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258. "Expropriation of property for the general need with full compensation shall be regulated by law." CONST. ACT art. VI, ¶ 4 (Fin.), *translated in* 6 Blaustein & Flanz, *supra* note 235.

259. "If the welfare of the State requires that any person surrender his movable or immovable property for the public use, he shall receive full compensation from the public treasury." GRUNNLOV [Constitution] § 105 (Nor.), *translated in* 11 Blaustein & Flanz, *supra* note 235.

260. "[T]he Confederation may, against full compensation, make use of the right of expropriation." BUNDESVERFASSUNG [B. VERF.], CONSTITUTION FÉDÉRALE [CONST.], COSTITUZIONE FEDERALE [COST. FED.] art. 23(2) (Switz.), *translated in* 15 Blaustein & Flanz, *supra* note 235.

261. The Belgian constitution call for "just compensation." CONSTITUTION [CONST.] art. 11 (Belg.), *translated in* 2 Blaustein & Flanz, *supra* note 235. This article dates back to the original Constitution of 1831. Thus, the intent of the original framers, who considered property an absolute and inviolable right, is important. Based on this theory, the state may only alter the form of ownership through an expropriation; however, "the overall fortune of the owner [must remain] unchanged in terms of value." THE BELGIAN CONSTITUTION, COMMENTARY at 29 (1974) commentary by R. Senelle. Therefore, the owner must be paid the full market value of the expropriated property. *Id.*

262. The Dutch constitution only calls for "compensation." *See* GRONDWET [GRW. NED.] art. 165, (Neth.), *translated in* 11 Blaustein & Flanz, *supra* note 235. Yet, it has been interpreted to require full indemnification. *See* Bergamin & van Maarseveen, *Constitutional and Administrative Law* in INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 381, 402 (1978).

263. It seems relatively clear that estoppel has been accepted as a general principle of international law. *See* BROWNLIE, *supra* note 34, at 18, 164-65, 637-38. *See also* Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 191, 209, 213 (Judgment of Nov. 18); Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 23, 32 (Judgment of June 15).

264. *See* BROWNLIE, *supra* note 34, at 5.

265. I.C.J. STATUTE art. 38(1)(c).

of the treaties concluded since the early 1960's require full compensation, they have not established an international full compensation rule. A combination of the previous treaty practice which allowed the taking state to determine the amount of indemnification, the refusal of socialist and Latin American nations to accede to a full compensation standard, United Nations General Assembly resolutions and the constitutional provisions of many European states has prevented the Hull Doctrine from becoming an international legal principle.

## VI. Cases and Arbitrations

Both international tribunals and municipal courts sitting in an international capacity universally state that international law compels the payment of compensation upon nationalization of an alien's property. What is much less clear, however, is *how much* compensation is required.

### *A. International Tribunals*

In the *Chorzów Factory* case[266] the Permanent Court of International Justice enunciated what was thereafter generally accepted as the requisite degree of compensation. The Court held that compensation required "[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear . . . ."[267] This definition refers to fair market value. An examination of the facts of the case, however, reveals a rather interesting complication. In *Chorzów Factory*, Poland violated an explicit provision of the Geneva Convention in which it had agreed not to nationalize the property of German nationals in Upper Silesia.[268] Thus, the case did not concern the amount of indemnity due from an expropriation, but rather the remedies available for an expropriation in violation of a specific agreement. Indeed, at least two different tribunals have suggested that the *Chorzów Factory* case

266. The Chorzów Factory Case (Ger. v. Pol.), 1928 P.C.I.J., ser. A., No. 13 (Judgment of Sept. 13).

267. *Id.* at 47.

268. The Court stated that the expropriation was "a seizure of property rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention." *Id.* at 46. The Court did assert that if there had been no such treaty provision the measure of compensation would have been "limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment." *Id.* at 47. These remarks, however, are dictum. Morevoer, the Court failed to cite authority or otherwise reveal the derivation of this "standard."

should be limited to its facts.[269]

In the *Norwegian Shipowners' Claims*,[270] a case in which the United States had requisitioned Norwegian ships being built in the United States during the First World War, the Permanent Court of Arbitration declared that "[j]ust compensation implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners . . . ."[271] The similarity between this statement and the current approach of the United States government toward compensation should be noted.[272] However, in the *Norwegian Shipowners'* case the court was unclear as to whether it based its award of compensation on international law or American constitutional law.[273]

In the *De Sabla Claim*,[274] the land of the claimant, an American citizen, had been ceded to others by the Panamanian government. On reaching the merits, the arbitral tribunal held that "[i]t is axiomatic that acts of a government in depriving an alien of his property without compensation imposes international responsibility."[275] The court held that the fair market value of the property taken was the proper measure of damages.[276]

However, in *Standard Oil Company Tankers*[277] the international arbitral tribunal did not require full compensation. The German gov-

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269. British Petroleum Exploration Co. v. Libya, 53 I.L.R. 297, 339-40 (1974) (Lagergren, Arb.); Czechoslovak Agrarian Reform (Swiss Subjects) Case, Apr. 8, 1927, Sup. Ct. of Justice, Czech., 4 Ann. Dig. 147, 149-50.

270. Norwegian Shipowners' Claims (U.S. v. Nor.), 1 R. Int'l Arb. Awards 307 (Perm. Ct. Arb. 1921).

271. *Id.* at 338.

272. The United States regards the "going concern" approach, which attempts to measure loss of future profits, as the best approximation of market value and hence, just compensation. *See* Smith, *supra* note 9, at 519.

273. "In order to justify the Tribunal's opinion, it seems not necessary . . . to touch upon the question of whether consequential damages ought to be awarded in international law. . . . It is common ground that . . . the Norwegian owners of these contracts were protected by the fifth amendment of the Constitution of the United States against any expropriation . . . and that they are entitled to just compensation if expropriation occurs." 1 R. Int'l Arb. Awards at 334.

274. De Sabla Claim (U.S. v. Pan.), 6 R. Int'l Arb. Awards 358, 359 (1933), *reprinted in* 28 AM. J. INT'L L. 602 (1934).

275. *Id.* at 366, 28 AM. J. INT'L L. at 611.

276. "[T]he Commission holds that the proper measure of damages arising from adjudications is . . . to award to the claimant the full value of the number of hectares of her property which have been adjudicated." *Id.* at 367, 28 AM. J. INT'L L. at 612.

277. Standard Oil Co. Tankers case (Reparations Comm'n v. U.S.), 3 Ann. Dig. 231, 463, 22 AM. J. INT'L L. 404 (1928).

ernment, as part of the reparations following the Great War, had awarded the victorious powers all German merchant ships over a certain weight. Yet some of the vessels had belonged to a German company in which the Standard Oil Company had an interest.[278] The court rejected Standard's claim for full compensation on the grounds that it had received the same treatment as German nationals.[279] The tribunal further noted that it is a generally accepted principle that "any person . . . investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country . . . ."[280]

Thus, the international tribunals that have considered the issue of expropriation have tended to declare that the full value of the nationalized property is the proper amount of remuneration. However, as the *Standard Oil Company Tankers* arbitration illustrates, full compensation has not been universally accepted as an international minimum standard by international courts. Moreover, the decisions that granted full compensation are subject to criticism. These cases merely assert that the fair market value of the property must be tendered, yet, fail to declare the basis for this "requirement."[281] Whereas, in *Standard Oil Company Tankers* the principle that foreign investors must submit to the laws of the host country was significant in the arbitration's outcome.[282] Indeed, this logic is supported by the treaty law of that era.[283]

### *B. Municipal Courts*

Although the decisions of international tribunals regarding the measure of compensation are inconclusive, the situation is quite different when the focus shifts to national courts. These courts have generally recognized an international obligation on the expropriating nation to pay compensation, but have been reluctant to declare that full compensation must be rendered. Most instances in which mu-

278. *Id.* at 463-64, 22 AM. J. INT'L L. at 405.

279. *Id.* at 231, 22 AM. J. INT'L L. at 419.

280. *Id.* at 231-32, 22 AM. J. INT'L L. at 419. The tribunal also held that Standard's ownership of the German corporation did not mean that it owned the tankers. Thus, as a shareholder Standard was only entitled to a percentage of the German company's assets upon wind up and not to any compensation for the seized tankers. *See* 3 Ann. Dig. at 464, 22 AM. J. INT'L L. at 405-16.

281. *See, e.g., supra* notes 268 & 276.

282. *See supra* text accompanying notes 279-80.

283. *See supra* text accompanying notes 91-107, 135-74, 187-88, 217, 222.

nicipal courts have reviewed the propriety of foreign nationalizations have involved situations in which the goods were exported by the taking state to the country of the municipal court whereupon the injured party sought their recovery. Accordingly, many of these courts have refused to recognize the validity of uncompensated foreign nationalizations. However, these results have been based as much on domestic *ordre public* as on international law. For example, in *Hahn Röhren-Walzwerk v. Stokvis*,[284] a Dutch appellate court (*Gerechtshof*) refused to give effect to a Czechoslovakian expropriation because it was made without indemnification. The court stated, "[a]s there was no right to compensation, the nationalization was contrary to Netherlands *ordre public* . . . ."[285] The domestic public policy basis for these invalidations, as opposed to an international basis, is an important distinction. It reveals an implicit unwillingness to recognize an international minimum standard. Still, several municipal courts have declared that an expropriation without compen-

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284. Mar. 11, 1952, Gerechtshof, Arnhem, 1952 Nederlandse Jurisprudentie [N.J.] No. 554, 19 I.L.R. 16.

285. 19 I.L.R. at 17-18. Similar rulings have been issued by virtually every major West European nation and Japan. *See, e.g., Austria*: Lederer-Ponzer v. Rautenstrauch, May 31, 1951, Sup. Ct., Aus., 18 I.L.R. 204, 205. *Federal Republic of Germany*: Sociedad Minera el Teniente, S.A. v. The Aktiengesellschaft Norddeutsche Affinerie, Jan. 22, 1973, Landgericht, Hamgurg, 12 I.L.M. 251, 275; Expropriation of Insurance Companies Case, Dec. 15, 1950, Oberlandesgericht, West Berlin, 18 I.L.R. 197, 198; Expropriation (Soviet Zone of Germany) Case, Sept. 19, 1949, Oberlandesgericht, Nuremberg, 3 Neue Juristiche Wochenschrift [NJW] 228, 16 Ann. Dig. 19, 20. *France*: Société Potasas Ibericas v. Bloch, Mar. 14, 1939, Cass. civ., Fr., 34 REVUE CRITIQUE DE DROIT INTERNATIONAL 280, 9 Ann. Dig. 150, 151-52; Union des Républiques Socialistes Soviétiques v. Intendant Général Bourgeois ès-qualité et Socieété la Ropit, Mar. 5, 1928, Cass., Fr., 1929 Recueil Général de Lois et des Arrêts [S. Jur.] I 217, 4 Ann. Dig. 67, 67-68; Cie Nord de Moscou v. Phenix Espagnol, June 13, 1928, Cour d'appel, Paris, 1928 S. Jur. II 161, 4 Ann. Dig. 66; Volatron v. Moulin, Mar. 25, 1939, Cour d'appel, Aix, 1939 Dalloz Hebdomadaire 329, 9 Ann. Dig. 24, 25; Entreprise Nationale L. et C. Hardtmuth, Fabrique de Crayons Koh-i-noor v. Fabrique de Crayons Koh-i-noor, L. et C. Hardtmuth, June 25, 1958, Cour d'appel, Paris, 1959 Journal du Droit International 1098, 26 I.L.R. 50, 51. *Denmark*: Bánská À Hutní Společnost v. Hahn, May 12, 1952, Western Provincial Ct., Den., 1952 Ugeskrift for Retsvaesen 856, 19 I.L.R. 18, 19. *Italy*: Koh-i-noor Tužkárna L. & C. Hardtmuth Narodni Podnik v. Fabrique de Crayons Hardtmuth L. & C., S.r.l., June 17, 1958, Corte app., Turin, 41 RIVISTA DI DIRITTO INTERNAZIONALE 597, 16 I.L.R. 44, 46. *Japan*: Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 1953, High Ct., Tokyo, 20 I.L.R. 305, 312. *The Netherlands*: N.V. Trust-Maatschappij "Helvetia" v. N.V. Assurantie-Maatschappij "De Nederlanden van 1845," Mar. 9, 1933, Arondissementsrechtbank, The Hague, 1933 N.J. 1662, 7 Ann. Dig. 80, 81. *Romania*: In re a Russian Co., Dec. 5, 1932, Ct. of Cassation, Rom., 62 Clunet 718, 7 Ann. Dig. 82, 82. *British Territories*: Anglo-Iranian Oil Co. v. Jaffrate (*The Rose Mary*), [1953] I W.L.R. 246, 251-62, 20 I.L.R. 316, 320-28 (Sup. Ct., Aden 1953).

sation violates international law.[286]

When some compensation has been paid, national courts have approached the issue much more warily. In *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*[287] the High Court of Tokyo held:

> [I]n view of the fact that the Nationalization Law is not a completely confiscatory law [i.e., it has provided some compensation], contrary to the rights and interests of foreign nationals, but a law of expropriation subject to payment of compensation, the Court feels bound to hold that it cannot try the validity or invalidity of such a law by examining the compensation . . . .[288]

In this case, the Iranian government provided for compensation up to twenty-five percent of the value of the expropriated enterprises.[289]

In *Sociedad Minera el Teniente, S.A. v. The Aktiengesellschaft Norddentsche Affinerie*,[290] a case arising out of nationalizations by the Allende government in Chile, a West German superior court (*Landgericht*) ruled that international law merely requires that an expropriation provide a "reasonable indemnification."[291] Although the court did not attempt to define "reasonable indemnification," several points are noteworthy. First, the court held that because the expropriation was "effected for all practical purposes without indem-

286. V.E.B. Carl Zeiss Jena v. Firm Carl Zeiss, Apr. 2, 1963, Cour d'appel, Paris, *excerpt reprinted in* Committee Report, *The Compensation Requirement in the Taking of Alien Property*, 22 REC. A.B. CITY N.Y. 195, 214 (1967) (an uncompensated expropriation violates international public order order); P.T. Escomptobank v. N.V. Assurantie Maatschappij de Nederlanden, June 6, 1963, Gerechtshof, The Hague, *excerpt reprinted in* Committee Report, *supra*, at 215 (same); Bank of Indonesia v. Senembah Maatschappij N.V., June 4, 1959, Gerechtshof, Amsterdam, 1959 N.J. 855, *portions reprinted in* 7 NETH. INT'L L. REV. 400, 402 (1960) (an uncompensated expropriation violates international law and Netherlands public order); Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 1953, High Ct., Tokyo, 20 I.L.R. 305, 313 (international law requires compensation for an expropriation); In re Rhein-Main-Donau Ag., June 24, 1954, Const. Ct., Aus., 21 I.L.R. 212, 213 (an expropriation without compensation is contrary to international law) (dictum); Lederer-Ponzer v. Rautenstrauch, May 31, 1952, Sup. Ct., Aus., 18 I.L.R. 204, 205 (an expropriation without compensation is contrary to international law and Austrian public order); Anglo-Iranina Oil Co. v. Jaffrate, [1953] I W.L.R. 246, 253, 259, 20 I.L.R. 316, 322-23, 328 (an expropriation without compensation violates international law and British public policy); Koh-i-noor Tužkárna L. & C. Hardtmuth Narodni Podnik v. Frabrique de Crayons Hardtmuth L. & C., S.r.l., June 17, 1958, Corte app., Turin, 41 RIVISTA DI DIRITTO INTERNAZIONALE 597, 26 I.L.R. 44, 46 (an expropriation without compensation violates international law and Italian public policy).

287. 1953, High Ct., Tokyo, 20 I.L.R. 305.

288. *Id.* at 313.

289. *Id.* at 306. The exact amount of compensation actually received by the claimant was not revealed in the court's opinion.

290. Jan. 22, 1973, Landgericht, Hamburg, 12 I.L.M. 251.

291. *Id.* at 276.

nification," international law had been violated.[292] However, it qualified this rule by declaring that property situated in a state is normally subject to the sovereignty of that state. Accordingly, acts of expropriation are internal matters of the expropriating state and must generally be recognized as valid.[293]

In *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*,[294] an Italian court held:

> [I]t is not required . . . by the generally accepted provisions of international law that the *quantum* of the compensation must appear actually equivalent to the value of the property forming the subject of the expropriation, that is to say, it is enough that there is *some* compensation for the expropriation to be lawful.[295]

Indeed, the court declared that international law is not violated if the compensation is "not illusory."[296] The court, in upholding the Iranian oil nationalization, noted that provision for the payment of compensation had been made.[297] Moreover, it emphasized that a definition of fair compensation must take "into account the circumstances of each individual case and, therefore, [take] into consideration also the public interest" of the nationalizing state.[298]

In a very similar vein, in the late 1950's the high court (*Oberlandesgericht*) of Bremen, West Germany considered Indonesian measures which had nationalized Dutch tobacco plantations, the harvest of which had been exported to Germany.[299] Since no compensation had actually been paid, the Dutch companies sought to recover the tobacco on the grounds that the expropriation violated

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292. *Id.* at 275-76. The Chilean expropriation law had provided for compensation. However, a constitutional amendment was enacted which empowered President Allende to retroactively deduct excess profits allegedly derived by foreign copper companies. After these deductions, the nationalized Sociedad Minera El Teniente, S.A. was liable to Chile for over $300 million. *See* Lillich, *International Law and the Chilean Nationalizations—The Valuation of the Copper Companies*, 7 INT'L LAW 124, 130 (1973).

293. 12 I.L.M. at 273.

294. Sept. 13, 1954, Trib., Roma, 1955 Foro Italiano [Foro It.] I 256, 22 I.L.R. 23.

295. 22 I.L.R. at 36 (emphasis in original).

296. *Id.* at 36, 41.

297. *Id.* at 34, 37. The Iranian nationalization law provided compensation up to 25% of the value of the expropriated oil. An appeals procedure was also created if the nationalized company disagreed with the amount of compensation. *See* Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., (*The Miriella*), Mar. 11, 1953, Trib., Venice, 1953 Foro. It. 719, 22 I.L.R. 19, 23.

298. 22 I.L.R. at 37.

299. N.V. Verenigde Deli-Maatschapijen v. Deutsch-Indonesische Tabak-Handelsgesellschaft, Aug. 21, 1959, Oberlandesgericht, Bremen, *portions reprinted in* Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305 (1960).

German public order as well as international law.[300] The court, however, ruled that the expropriation did not violate international law. In reaching this conclusion it reasoned that the Indonesian nationalization law expressly provided for compensation and that the Dutch companies had not succeeded in showing that Indonesia was in fact unwilling to pay compensation or intended to defer such payment indefinitely.[301] Noting that the expropriations were part of a broad policy of social reform rather than isolated instances, the court held that "[c]ompensation as to time and amount must . . . be made in accordance with the conditions in the expropriating state."[302] Recognizing the importance of a nation's ability to pay, the court also declared that compensation may "be made out of the proceeds of the nationalized enterprises."[303]

During the inter-War period, the Supreme Court of Justice of Czechoslovakia considered the question of expropriation on three occasions.[304] Although these decisions may be suspect because the Court was reviewing the legality of nationalizations performed by the Czech government, it must also be remembered that inter-War Czechoslovakia was a capitalist nation and essentially a French client state.[305] All three of the decisions held that international law did not require full compensation for a property taking.[306] The Court reasoned in the *Swiss Subjects* case:

> A provision of international law which prohibits expropriation of alien property without full compensation cannot be traced in any source of that law. There is no general or particular international convention containing such a stipulation. . . . As regards the general principles of law recognized by civilized nations, it appears that the legislation of all countries recognizes the permissibility

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300. Domke, *supra* note 299, at 306.

301. *Id.* at 316. The Indonesian nationalization act created a committee which was to determine the amount of compensation. It also provided for appeals to the Indonesian Supreme Court from decisions of this committee. *Id.* at 317-18.

302. *Cited in id.* at 317.

303. *Cited in id.* at 317.

304. Czechoslovak Agrarian Reform (Swiss Subjects) Case, Apr. 8, 1927, Sup. Ct. of Justice, Czech., 4 Ann. Dig. 147; Czechoslovak Agrarian Reform (Expropriation) Case, Dec. 7, 1926, Sup. Ct. of Justice, Czech., 3 Ann. Dig. 135; Czechoslovak Agrarian Reform (German Subjects) Case, Apr. 28, 1925, Sup. Ct. of Justice, Czech., 3 Ann. Dig. 133.

305. *See* A.J.P. TAYLOR, THE ORIGINS OF THE SECOND WORLD WAR at 42 (2d ed. 1961); J.M. ROBERTS, A GENERAL HISTORY OF EUROPE: 1880-1945 at 417, 454, 510 (1977).

306. Swiss Subjects Case, 4 Ann. Dig. at 149; Expropriation Case, 3 Ann. Dig. at 135; German Subjects Case, 3 Ann. Dig. at 134.

> of expropriation with an express or tacit reservation that, should it be prescribed by law for reasons of public welfare, the expropriation is admissible even with partial compensation only or without any compensation at all.[307]

Moreover, all three opinions held that because of the well settled principle that immovable property is subject to the laws of the state in which it is situated, as long as foreigners are accorded the same treatment as nationals, international law is not violated.[308] As illustrated above,[309] treaty practice supports this reasoning.

In at least two cases, however, municipal courts have refused to recognize expropriation decrees enacted by other nations. In one case, the Supreme Court of Austria concluded that payment of one-twelfth of the value of the nationalized property was insufficient compensation.[310]

In *Laane v. Estonian State Cargo & Passenger Steamship Line, (The Elise)*,[311] the Canadian Supreme Court reversed the trial court's ruling that twenty-five percent compensation was not inadequate. However, the persuasiveness of this decision is diminished by a careful review of the case. The case involved the purported nationalization by the Estonian Soviet Socialist Republic of all Estonian merchant ships. However, as the trial court found, the Estonian registered *S.S. Elise* was in Canadian territorial waters at the time the nationalization decree was issued.[312] In this regard, it is well-settled that the nationalization decrees of one state have no effect on property situated within the territory of another country.[313] Indeed, the Supreme Court

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307. Swiss Subjects Case, 4 Ann. Dig. at 149.

308. German Subjects Case, 3 Ann. Dig. at 134. Expropriation Case, 3 Ann. Dig. at 135-36. Swiss Subjects Case, 4 Ann. Dig. at 147-48.

309. *See supra* text accompanying notes 91-107, 135-74, 187-88, 217, 222.

310. Koh-i-noor, L. & C. Hardtmuth v. Koh-i-noor, Tužkárna L. & C. Hardtmuth, June 2, 1958, Sup. Ct., Aus., 26 I.L.R. 40, 41. This ruling, however, is arguably dictum because the Court also found that the taking was discriminatory against aliens. *Id.*

311. 1949 S.C.R. 530 (Can.).

312. [1948] 4 D.L.R. 247, 262, 1948 Can. Exch. 435, 449, *rev'd*, 1949 S.C.R. 530 (Can.).

313. This principle of extraterritoriality has been widely recognized as a limitation on the sovereignty of a state. *See, e.g., Austria*: Danuvia Feinmechanische und Werkzeugfabrik Nationalunternehmen v. Seiberth, Feb. 3, 1954, Sup. Ct., Aus., 21 I.L.R. 38, 38-39. *Belgium*: Lowit v. Banque de Société Générale de Beligique, May 4, 1939, Commercial Trib., Brussels, 9 Ann. Dig. 25. *Federal Republic of Germany*: Expropriation (Soviet Zone of Germany) Case, Sept. 19, 1949, Oberlandesgericht, Nuremberg, 3 N.J.W. 228, 16 Ann. Dig. 19, 20. *Great Britain*: *The Jupiter* (No. 3), 1927 P. 122, 144 (Adm. D.), *aff'd*, 1927 P. 250, 254-55 (C.A.). *Italy*: Svit Narodni Podnik, July 21, 1956, Corte app., Bologna, *summarized in* 5 INT'L & COMP. L.Q. 606 (1956). *The Netherlands*: Bank of Indonesia v. Senembah Maatschappij, June 4, 1959, Gerechtshof, Amsterdam, *portions*

of Canada recognized this norm as the primary reason for its refusal to give effect to the Estonian expropriation.[314] Relying on various English cases, it held that foreign extraterritorial expropriations will be recognized only when they comply with Canadian public policy, i.e., when they provide full compensation.[315] Therefore, although the Court subsequently held that the Estonian nationalization violated international law because it failed to provide adequate compensation,[316] to the extent that municipal courts generally prefer to invalidate foreign expropriations on the basis of extraterritoriality, this conclusion may be considered *obiter dictum*.[317]

### C. *United States Courts*

In the United States, the courts have traditionally held that international law requires prompt, adequate and effective compensation.[318] In *Sabbatino*, the district court held that full compensation is required by international law.[319] Despite its subsequent reversal by the United States Supreme Court on the basis of the act of state doctrine, the lower court's interpretation of international law has generally been regarded as good authority. In *Banco Nacional de Cuba v. Farr*,[320] the court of appeals concluded that the Supreme Court in *Sabbatino* only reversed the district court with respect to its ruling on the act of state doctrine[321] and not on its construction of international

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*reprinted in* 7 NETH. INT'L L. REV. 400, 403 (1960). *Switzerland*: Vereinigte Carborundum und Elecktritwerke v. Fed. Dep't for Intellectual Property, Sept. 25, 1956, Bundesgericht (Tribunal fédéral, Tribunale federale), Switz., 82 Recueil officiel des Arrêts du Tribunal fédéral Suisse [ATF] II 196, 23 I.L.R. 24, 24-25. *United States*: Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965) (per Friendly, J.), *cert. denied*, 382 U.S. 1027 (1966).

314. 1949 S.C.R. at 536-37.

315. *Id.* at 536-37.

316. *Id.* at 538.

317. It is arguable that the dictum/holding distinction is meaningless in international law since stare decisis, as applied in common law countries, is essentially non-existent in international law. *Cf.* I.C.J. STATUTE arts. 38(1)(d) & 59; 1 OPPENHEIM, *supra* note 10, § 19a, at 31.

318. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 385 (S.D.N.Y. 1961), *rev'd on other grounds*, 376 U.S. 398 (1964). *See generally* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 187 (1965).

319. 193 F. Supp. at 385.

320. 383 F.2d 166 (2d Cir. 1967).

321. In *Sabbatino* the district court held the act of state doctrine to be inapplicable. 193 F. Supp. at 380-83.

law.[322] This analysis, however, is questionable.

Although the Supreme Court did not specifically rule on the merits of the amount of compensation due under international law, the tenor of its opinion suggests a disapproval of the district court's ruling that full compensation is required. Mr. Justice Harlan, writing for the Court, noted that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[323] Later, in response to a claim that even if there is no consensus on the issue of compensation, a taking without any indemnity is certainly contrary to international law, the Court held: "If this view is accurate, it would still be unwise for the courts so to determine. Such a decision now would require the drawing of more difficult lines in subsequent cases . . . ."[324] It is clear that the Court implicitly recognized that international law does not mandate full compensation. Moreover, the Court declared that one of the bases for its invocation of the act of state doctrine was the immense controversy over the expropriation issue.[325]

In the 1981 case of *Banco Nacional de Cuba v. Chase Manhattan Bank*,[326] the Second Circuit became the first United States court to rule that international law does not compel the payment of full compensation.[327] The court declared that there are four alternatives concerning the amount of compensation required: (1) no compensation, (2) partial compensation, (3) appropriate compensation, and (4) full compensation.[328] After rejecting the first two alternatives, the court held that "[i]t may well be the consensus of nations that full compensation need not be paid 'in all circumstances,' . . . and that requiring an expropriating state to pay 'appropriate compensation,' — even considering the lack of precise definition of that term—would come closest to reflecting what international law requires."[329] The

322. 383 F.2d 166, 183 (2d Cir. 1967). The act of state doctrine did not bar the adjudication of this case because, after *Sabbatino*, Congress enacted the so-called Hickenlooper Amendment which purported to overrule the *Sabbatino* decision. *See* 22 U.S.C. § 2370(e)(2) (West 1979).

323. 376 U.S. at 429 (footnote omitted).

324. *Id.* at 433.

325. "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430 (footnote omitted).

326. 658 F.2d 875 (2d Cir. 1981).

327. *Id.* at 892.

328. *Id.* at 891.

329. *Id.* at 892.

court thus recognized that in reality the norm is not full compensation.

Although the court did not attempt to define "appropriate compensation," two factors indicate that it is greater in amount than deemed necessary by other nations' courts. First, the court reasoned that in the instant case, appropriate compensation and full compensation were equivalent.[330] Second, the court's recognition of appropriate compensation must be considered in light of its refusal to declare that partial compensation was sufficient. The court considered "appropriate" compensation to be greater in amount than "partial" compensation. Thus, the term "appropriate compensation," as used by the court in *Chase Manhattan Bank*, must be taken to mean a degree of compensation that comes close to representing full market value.

Several principles, of decreasing clarity, may be extracted from the aggregate of these municipal court decisions. First, and most obvious, is the conclusion that international law does require that *some* indemnity be paid upon a property taking. However, as even United States courts have begun to realize, *full* compensation is not mandated. The precise amount of requisite compensation poses a more difficult problem; yet several factors provide some guidance on this issue. It should be noted that municipal courts have been very reluctant to review the legality of nationalizations by foreign governments. Unless the amount of compensation paid was clearly unreasonable, these municipal courts have deferred to the sovereignty of the expropriating country. While it is arguable that these decisions are based more on principles of international comity, i.e., respect for another nation's sovereignty, than on substantive expropriation law, this distinction is more theoretical than real. The right to expropriate is a principle flowing directly from the notion of sovereignty. Accordingly, many nations have argued that, because of their sovereignty, they possess the sole power to establish the amount of compensation. The practical effect of the decisions of municipal courts has been to recognize foreign expropriations as long as the amount of remuneration was not illusory. This practice has been so prevalent that a customary norm may have evolved from judicial proceedings alone. Therefore, it may be fairly said that international law, as evidenced by court decisions, relegates to the taking nation the predominant role in setting the amount of compensation. If the indemnification paid bears a reasonable semblance, depending on the circumstances and equities of each individual case, to the value of the

330. *Id.* at 892-93.

expropriated enterprise or property, an "injured" foreigner has no cause for complaint under international law.

## VII. DISPUTE SETTLEMENTS

In most recent cases, expropriation disputes have been resolved by negotiated settlements.[331] These so-called lump sum agreements developed out of the post-War nationalizations undertaken by various Eastern and Western European nations as part of broad programs of socio-economic reform.[332] Today, however, settlement by lump sum agreement has been characterized as the norm rather than the exception.[333] Moreover, the total amount of negotiated compensation, as a rule, has been less than full market value. Occasionally it has been as low as one-third of the total value of the enterprise.[334] Therefore, it has been suggested that due to the frequent resort to negotiated, partial compensation agreements, such practice has become a customary international rule.[335] This contention was rejected by both the trial court and the Second Circuit Court of Appeals in *Banco Nacional de Cuba v. Chase Manhattan Bank.* The district court reasoned that the fact that

> only a small percentage of claims are recovered as a result of lump-sum settlement diplomatic agreements does not allow us to derive a principle of international law from that practice. In our domestic litigation we do not regard the terms of tort or contract damage settlements as establishing a rule of law. Over 90% of the private civil litigation in this country is probably settled by compromise prior to trial. . . . We would not look to the percentage settlements in such cases to determine the law of torts or contracts; similarly, lump-sum settlement practice between nations . . . is an inappropriate source for deriving principles of inter-

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331. Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412, 432 (S.D.N.Y. 1980), *aff'd as modified*, 658 F.2d 875 (2d Cir. 1981). *See generally* R. LILLICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS (1975).

332. García-Amador, *supra* note 23, at 44.

333. *Cf. id.* at 44 (referring to negotiated lump sum agreements as an "inter-State practice").

334. *Id.* at 45-46. *See also* Dawson & Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727, 740 (1962) (noting that prompt, adequate and effective compensation has not generally been afforded).

335. In *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. at 432 (S.D.N.Y. 1980), *aff'd as modified*, 658 F.2d 875 (2d Cir. 1981) Cuba made such an argument. *Also cf.* García-Amador, *supra* note 23, at 44-50 (suggesting that there has been a *de facto* abandonment of classical expropriation principles).

> national law concerning the compensation due for expropriated property.[336]

Similarly, the court of appeals declared that the argument

> simply confuses adjudication with compromise. Partial compensation inheres in the process of negotiation and compromise; we should no more look to the outcome of such a process to determine the rights and duties of the parties in expropriation matters than we would look to the results of settlements in ordinary tort or contract cases to determine the rules of damages to be applied.[337]

Although this logic appears persuasive, it is not compelling. Both courts failed to note that in international law, unlike domestic law, custom and practice are primary modes of legal development. In this context it has been argued that while the Soviet Union and other Communist-Bloc nations contend that no compensation is required by international law, in practice they have tacitly recognized an obligation to make reparations.[338] For example, *ex post facto* agreements by socialist nations to compensate foreigners whose property has been taken aids in the establishment of a customary norm: at minumum, some compensation must be paid. If this is true, it must follow that agreements by Western states to accept partial compensation also contributes to the creation of a norm that full market value is not required.[339]

The remainder of this section will be devoted to a case study of a recent settlement agreement between the United States and Peru. It should be noted from the outset, however, that the purpose of the following discussion is not intended to belabor the point of whether compromise settlement agreements have created a new customary rule. Rather, it is to show that flexible and creative expropriation

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336. 505 F. Supp. at 433.

337. 658 F.2d at 892.

338. *See* Doman, *New Developments in the Field of Nationalization*, 3 N.Y.U. J. INT'L L. & POL. 306, 314 (1970); Committee Report, *The Compensation Requirement in the Taking of Alien Property*, 22 REC. A.B. CITY N.Y. 195, 202-03 (1967); Orrego Vicuña, *supra* note 22, at 721; Landau, *Compensation Upon the Taking of an Alien's Property*, 12 AM. BUS. L.J. 31, 33-34 (1974). *See generally* Drucker, *Compensation Treaties Between Communist States*, 10 INT'L & COMP. L.Q. 238 (1961).

339. Nevertheless, this author believes that both courts resolved the issue correctly, albeit for the wrong reasons. First, while it is true that custom is a mechanism through which international law is developed, such custom must reflect "a general practice accepted as law . . . ." I.C.J. STATUTE art. 38(1)(c). Moreover, a contrary holding would encourage bootstrapping. That is, once settled that only partial compensation is required, the new rule would serve as a basis to seek an even further reduction in any compromise settlement.

settlements are available, and indeed, may have possibly rendered moot the entire question of an international minimum standard. In July, 1975, the government of Peru, due to a desire to control its natural resources, particularly its iron ore deposits, nationalized the holdings of the Marcona Mining Company, a Peruvian subsidiary of the American-owned Marcona Corporation.[340]

> The Government charged that Marcona had minimized its tax base by siphoning off profits through transferring part of the iron ore price to the shipping cost [the mining company's shipper was another subsidiary of Marcona Corporation]. It further alleged that Marcona had claimed an illegal depletion allowance, extracted disproportionately rich ore, and stripped its assets.[341]

Therefore, the Peruvian government announced that the expropriation would be without compensation.[342]

However, David Ganz, the legal advisor for the Inter-American Affairs Office of the State Department, stated:

> In retrospect it is clear that by August 1975 a negative reaction against the expropriation had begun in the Peruvian Government itself; internal critics viewed it as a poorly timed, almost irrational act. . . . [I]t came at a time when Peru was already experiencing serious balance of payments problems and iron ore prices were at their lowest levels in a decade . . . .[343]

Moreover, because "[m]any foreign companies were unenthusiastic about pruchasing ore from an expropriated facility in view of the likelihood of a law suit by Marcona," the Peruvian export of iron ore was brought to a virtual halt.[344] As a result Peru lost between eight and ten million dollars per month[345] and the government of President Velasco was replaced in a coup d'état by a more moderate regime.[346] The new government, headed by President Morales Bermudez soon indicated its willingness to negotiate a settlement,[347] and by October, 1975, negotiations with representatives of the United

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340. Ganz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474, 476 (1977).

341. Huerta, *Peruvian Nationalization and the Peruvian-American Compensation Agreements*, 10 N.Y.U. J. INT'L L. & POL. 1, 42 (1977).

342. *Id.* at 42; *see also* Muller, *supra* note 18, at 58.

343. Ganz, *supra* note 340, at 478.

344. *Id.* at 479-80.

345. *Id.* at 480; Huerta, *supra* note 341, at 43.

346. Muller, *supra* note 18, at 59; Ganz, *supra* note 340, at 478.

347. Muller, *supra* note 18, at 59.

States government had commenced.[348]

By December, 1975, an interim agreement had been reached. Peru signed a contract with the Marcona shipping subsidiary, Marcona Carriers, in which it was agreed that the latter would have the right to transport all Peruvian ore to Japan, Europe and the United States.[349] In return, Marcona "agreed to cease threatening legal action against ore customers."[350] However, complete accord was still far off. The United States was seeking compensation of nearly $100 million but this amount was much higher than what the Morales government was willing to pay.[351]

With the negotiations in an apparent deadlock, both sides began to re-evaluate their positions. Ganz characterized the American position:

> U.S. negotiators were well aware that Peru's financial problems were worsening and that it would be virtually impossible to obtain a cash settlement from Peru consistent with the amounts that Marcona was prepared to accept and with what the United States believed could be characterized as prompt, adequate, and effective compensation.[352]

Thus, the United States began to search for a solution which would both take into account the Peruvian economic situation as well as provide Marcona with an equitable indemnity.[353] In September, 1976, an agreement was finally reached. The settlement included $37 million in cash, a shipping contract with Marcona Carriers estimated to be worth over $2 million, an ore sales contract with Marcona worth over $22 million, and the discharge of almost $4 million owed by Marcona to its nationalized subsidiary.[354] It has been estimated that the entire settlement will ultimately be worth between $62 and $75

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348. Ganz, *supra* note 340, at 479. Peru was unwilling to negotiate with Marcona directly. Mr. Ganz has speculated that the reason for this was because Peru believed "that negotiations with a foreign government would be less damaging politically for the regime than negotiations directly with a foreign company." *Id.* at 478. It must be remembered that in 1968, Peru had undergone a revolution and was attempting to implement social reforms. Therefore, negotiations with a foreign multi-national corporation could be perceived as submission to foreign capital.

349. *Id.* at 481.

350. Muller, *supra* note 18, at 59.

351. Ganz, *supra* note 340, at 482. Marcona originally demanded $140 million in compensation. Huerta, *supra* note 341, at 42. However, Ganz indicates that the United States believed this demand was unreasonable. Ganz, *supra* note 340, at 479.

352. Ganz, *supra* note 340, at 483.

353. *Id.*

354. *Id.* at 485; Huerta, *supra* note 341, at 43-44.

million to Marcona.[355]

Mr. Ganz has championed the Marcona settlement as "precedent setting."[356] It was an agreement that was favorable to both sides. Because it was not strictly a cash settlement and compensation was tendered over a long period of time, it enabled Peru to nationalize an industry without the effective impediment of having to pay prompt and full compensation. In other words, Peru's ability to pay was an essential element of the agreement. Moreover, through the sales contract with Marcona, Peru attained "improved access to U.S. markets, which it has heretofore been unable to penetrate, and should generate over a period of time more than enough foreign exchange to pay the entire cost of the settlement."[357] From the United States' point of view, the agreement was also important. It has reinforced the conclusion that "just" compensation is attainable and the best means to such an end is through negotiation and a continuing relationship between the nation and the injured corporation rather than via an adversary judicial proceeding.[358] Furthermore, Ganz contends that "[t]he Marcona settlement, once its terms become known, may also have an impact on the conduct of other developing nations' governments."[359] That is, it illustrates the advantages in negotiation and therefore encourages cooperation.

Because of the success of the Marcona settlement, the question of whether an international minimum standard is even necessary, arises. It is arguable that Mr. Ganz's conclusions are overly optimistic. For example, at times there will be nations which expropriate the property of foreigners without the payment of compensation and thereafter refuse to negotiate. However, these situations are likely to be the exception rather than the rule. First, the United States Congress has given the President various economic measures to employ against nations which have taken the property of American citizens or corporations without full compensation.[360] The Hickenlooper Amend-

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355. Ganz, *supra* note 340, at 486-87.

356. *Id.* at 488.

357. *Id.*

358. *Id.* at 488-89. Ganz emphasizes the value of the continuing relationship to Marcona. Indeed, he alleges that the ore sales contract was "worth considerably more to Marcona because of that company's access to and expertise in selling in the U.S. market than it was to the Government of Peru which, because of market structures, had little chance of selling directly to U.S. ore consumers." *Id.* at 489.

359. *Id.* at 489.

360. *See generally* Neville, *supra* note 10, at 69-73 for a discussion of these economic measures.

ment to the Foreign Assistance Act of 1961 requires the President to suspend aid to any country whose government has expropriated the property of American citizens or corporations without prompt and full compensation.[361] Under the terms of the Trade Act of 1974, the President must terminate the duty-free entry of merchandise privilege for which developing countries may be eligible.[362] Similarly, under various other statutes the President must instruct the United States' representatives to certain international development banks to vote against any proposed loan to nations which have taken the property of American citizens or corporations without the payment of prompt, adequate and effective compensation.[363] In view of the importance of economic assistance and loans to the Third World nations, the significance of these statutes cannot be underestimated.[364] Moreover, if a state continually expropriates the property of foreigners without adequate compensation,[365] it will create an unfavorable investment climate and discourage the future inflow of badly needed foreign capital.[366] Thus, these economic forces will exert pressure on developing nations to refrain from unilaterally nationalizing the property of aliens and thereafter refusing to negotiate a settlement.

A more difficult problem, however, is posed by the terms of the settlement itself. Although the Marcona settlement was favorable to both sides, the fact remains that it was only one of many agreements. In most agreements the terms have not been so acceptable to both sides. It is true that the Marcona settlement may represent a model for the future, yet it must be remembered that not all expropriations lend themselves to a continuing relationship. For example, it is difficult to conceive of how a nationalization of banks or public utilities could be remedied by a mutually profitable continuing relationship. Accordingly, the Marcona settlement should not be viewed as a pan-

361. 22 U.S.C. § 2370(e)(1) (West 1979).

362. 19 U.S.C. § 2461 (West 1980).

363. 22 U.S.C. §§ 283r (West 1979) (Inter-American Development Bank), 284j (International Bank for Reconstruction and Development), 285o (Asian Development Bank), and 290g-8 (African Development Fund).

364. Indeed, one commentator has argued that these statutes provide "direct and immediate coercion to comply with the United States standard." Neville, *supra* note 10, at 73 (footnote omitted).

365. The adequacy of this compensation is to be defined by the subjective standard of foreign investors, since they determine whether or not to invest in a particular country.

366. The chilling effect on future investment in nations which fail to adequately compensate aliens has been widely recognized. *See, e.g.*, Smith, *supra* note 9, at 517.

acea to the problems posed by nationalization. Nevertheless, it is important in the sense that it illustrates that creative solutions are available. Although an international minimum standard exists, as judicial practice has shown, it is a truly *minimum* standard.[367] That is, as long as the compensation is not illusory, international law is satisfied. Hence, the adequacy of negotiated settlements must be analyzed in light of their alternatives. With this in mind, negotiation is far more likely to achieve a better solution for injured corporations than resort to judicial proceedings.[368] Yet, it cannot be conclusively said that there is no need for an international minimum standard; non-judicial solutions, as preferable as they may be, simply cannot resolve every expropriation case.

## VIII. CONCLUSION

It was stated above that the purpose of this note is twofold: (1) to determine whether full compensation ever was the international standard and (2) to determine what is the present compensation standard. The first of these questions must be answered in the negative. As treaties and judicial practice prior to the Second World War illustrate, there was never sufficient consensus to sustain such a conclusion. Indeed, they suggest that traditional international law allowed the taking state, subject to a duty to provide national and/or most-favored nation treatment, to determine the amount of compensation to be paid to expropriated foreigners.

The present status of international expropriation law is more problematical. A review of judicial and arbitral decisions, recent treaties and UN General Assembly resolutions illustrates that there is a duty to pay at least some compensation. This norm, however, is not coterminous with a requirement to pay full compensation. Although most recent bilateral commercial treaties compel an indemnity equal to the value of the expropriated property, the refusal of socialist

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367. *Cf.* Dolzer, *supra* note 62, at 569 ("the Hull rule is today a 'maximum standard'").

368. This view is echoed by the United States government. *Cf.* Smith, *supra* note 9, at 520 ("We believe that issues concerning valuation of expropriated property are best resolved by the parties themselves through negotiation, and we stand ready to facilitate discussions between the parties aimed at achieving a mutually acceptable outcome").

Other mechanisms designed to reduce the likelihood of a nationalization have also been suggested. These include joint ventures with the host country, gradual takeover by the host nation, and a certain amount of reinvestment in the country by the foreign corporation. *See generally* SWEENEY, OLIVER & LEECH, *supra* note 17, at 1184-94. However, similar to negotiation, these arrangements cannot be viewed as a cure-all solution to the problems posed by expropriation.

and Latin American nations to accept this standard, as well as most Europen nations' failure to constitutionally guarantee full remuneration, have prevented the incorporation of the Hull Doctrine as a rule of customary international law. Moreover, other sources of international law also dictate a conclusion that market value need not be paid when a foreigner is deprived of his or her property. Most municipal courts, while acknowledging that international law mandates indemnification, are extremely loath to adjudicate the legality of a foreign expropriation unless the amount of the indemnity is clearly unreasonable. Similarly, to the extent that it is either reflective of or has affected international law, the Charter of Economic Rights and Duties of States declares that the measure of compensation is to be determined by the law of the expropriating nation. Indeed, even UN General Assembly Resolution 1803 accords to the taking state a certain degree of consideration in establishing the degree of remuneration. Consequently, there is substantial support for the proposition that international expropriation law merely requires that the compensation, in light of all the surrounding circumstances, be *reasonably related* to the value of the property taken. Since this is truly a minimum standard, it must be concluded that its value in the present world is likewise minimal.

*Lee A. O'Connor*

## APPENDIX A

The following is a list of treaties concluded by the United States in which a foreign investor is allowed to invest in the host country on condition of submission to the laws of the host country.

| COUNTRY[1] | DATE[2] | TREATY[3] | ARTICLE[4] | CITATION[5] |
|---|---|---|---|---|
| Prussia | Sept. 10, 1785 | A&C | 3 | 18(2):641, 642 |
| Prussia | July 11, 1799 | A&C | 3 | 18(2):648, 649 |
| Great Britain | July 3, 1815 | Regulation of Commerce | 1 | 18(2):292, 293 |
| Sweden/Norway | Sept. 4, 1816 | A&C | 1 | 18(2):731, 731 |
| Colombia | Oct. 3, 1824 | PAN&C | 3-4 & 10 | 18(2):150, 150-52 |
| Central American Federation | Dec. 5, 1825 | PAC&N | 3, 12 | 18(2):95, 95-98 |
| Denmark | Apr. 26, 1826 | FC&N | 2 | 18(2):167, 167 |
| Sweden/Norway | July 4, 1827 | C&N | 1 | 18(2):736, 737 |
| Hanseatic Republics | Dec. 20, 1827 | FC&N | 6 | 18(2):400, 401-02 |
| Prussia | May 1, 1828 | C&N | 1 | 18(2):656, 656 |
| Brazil | Dec. 12, 1828 | PAC&N | 3 | 18(2):81, 82 |
| Austria | Aug. 27, 1829 | C&N | 1 | 18(2):21, 21 |
| Mexico | Apr. 5, 1831 | AC&N | 3 | 18(2):476, 477 |
| Chili | May 16, 1832 | PAC&N | 3 | 18(2):104, 105 |
| Russia | Dec. 18, 1832 | C&N | 1 | 18(2):666, 666 |
| Chili | Sept. 1, 1833 | Additional & Explanatory Convention to Treaty of PAC&N of May 16, 1832 | 2 | 18(2):112, 113 |
| Venezuela | Jan. 20, 1836 | PFN&C | 3 | 18(2):787, 787-88 |
| Peru-Bolivian Confederation | Nov. 30, 1836 | PFC&N | 3 | 18(2):602, 602-03 |
| Greece | Dec. 22, 1837 | C&N | 1 | 18(2):373, 373 |
| Sardinia | Nov. 26, 1838 | C&N | 1 | 18(2):684, 684 |

1. The country with which the United States has entered into a treaty.
2. The date of signature.
3. The type of treaty. Abbreviations: A = Amity, C = Commerce, E = Extradition, F = Friendship, P = Peace.
4. The provision of the treaty which contains the requirement of submission to the host country's laws.
5. All citations are to the United States *Statutes at Large*. The number to the left of the colon refers to the volume. The numbers to the right of the colon refer to the page on which the treaty begins and the page on which the specific article may be found.

| COUNTRY | DATE | TREATY | ARTICLE | CITATION |
|---|---|---|---|---|
| Ecuador | June 13, 1839 | PFN&C | 3 | 18(2):187, 187-88 |
| Hanover | May 20, 1840 | C&N | 1 | 18(2):387, 387-88 |
| Portugal | Aug. 26, 1840 | C&N | 1 | 18(2):634, 634 |
| Hanover | June 10, 1846 | C&N | 10 | 18(2):391, 394-95 |
| New Granada | Dec. 12, 1846 | PAN&C | 3 | 18(2):550, 550-51 |
| Mecklenburg/Schwerin | Dec. 9, 1847 | C&N | 10 | 18(2):467, 470-71 |
| Guatemala | Mar. 3, 1849 | PAC&N | 3 | 18(2):378, 378-79 |
| Hawaiian Islands | Dec. 20, 1849 | FC&N | 8 | 18(2):406, 408 |
| San Salvador | Jan. 2, 1850 | AN&C | 3 | 18(2):675, 675-76 |
| Costa Rica | July 10, 1851 | FC&N | 2 | 18(2):159, 159 |
| Argentine Confederation | July 27, 1853 | FC&N | 2 | 18(2):16, 17 |
| Persia | Dec. 13, 1856 | F&C | 3 | 18(2):599, 599-600 |
| Bolivia | May 13, 1858 | PFC&N | 3 | 18(2):68, 69 |
| Paraguay | Feb. 4, 1859 | FC&N | 2 | 18(2):594, 594-95 |
| Venezuela | Aug. 27, 1860 | ACN&E | 3 | 18(2):797, 798 |
| Honduras | July 4, 1864 | FC&N | 2 | 18(2):426, 426-27 |
| Hayti | Nov. 3, 1864 | ACN&E | 6 | 18(2):412, 413 |
| Dominican Republic | Feb. 8, 1867 | ACN&E | 3 | 18(2)178, 179 |
| Republic of Salvador | Dec. 6, 1870 | AC & Consular Privileges | 3 | 18(3):725, 726 |
| Italy | Feb. 26, 1871 | C&N | 3 | 18(2):439, 439-40 |
| Madagascar | May 13, 1881 | F&C | 2-3 | 22:952, 953-55 |
| Tonga | Oct. 2, 1886 | AC&N | 3 | 25:1440, 1441 |
| Peru | Aug. 3, 1887 | FC&N | 2 | 25:1444, 1445 |
| Japan | Nov. 22, 1849 | C&N | 2 | 29:848, 849 |
| Spain | July 3, 1902 | F & General Relations | 2 | 33:2105, 2106-07 |
| Japan | Feb. 21, 1911 | C&N | 1 | 37:1504, 1504-05 |
| Italy | Feb. 25, 1913 | Treaty Amending Art. 3 of Treaty of C&N of Feb. 26, 1871 | 1 | 38:1669, 1670 |
| Siam | Dec. 16, 1920 | Treaty Revising Former Treaties | 1 | 42:1928, 1929 |

## APPENDIX B

West German treaties with provisions specifying that, in the event of an expropriation of foreign-owned property, compensation representing the equivalent of the investment affected must be paid.

| COUNTRY[1] | DATE[2] | ARTICLE[3] | BGB1 CITE[4] | OTHER CITE[5] |
|---|---|---|---|---|
| Pakistan | Nov. 25, 1959 | 3(2) | — | 457 U.N.T.S. 23, 26 |
| Morocco | Aug. 31, 1961 | 3(2) | 1967:1641 | 1961:1, 1-2 |
| Liberia | Dec. 12, 1961 | 3(2) | 1967:1537 | 1961:11, 12 |
| Guinea | Apr. 19, 1962 | 3(2) | 1964:145 | 1962:1, 2 |
| Sudan | Feb. 7, 1963 | 3(2) | 1966:889 | 1963:9, 10 |
| Ceylon [Sri Lanka] | Nov. 8, 1963 | 3(2) | 1966:909 | 1963:25, 26 |
| Senegal | Jan. 24, 1964 | 3(2) | 1965:1391 | 1964:1, 2 |
| South Korea | Feb. 4, 1964 | 3(2) | 1966:841 | 1964:17, 17 |
| Philippines | Mar. 3, 1964 | 3(2) | — | 1964:27, 28 |
| Ethiopia | Apr. 21, 1964 | 3(2) | — | 1964:49, 50 |
| Kenya | Dec. 4, 1964 | 3(2) | 1966:899 | 1964:71, 72 |
| Tanzania | Jan. 30, 1965 | 3(2) | 1966:873 | 1965:5, 6 |
| Sierra Leona | Apr. 8, 1965 | 3(2) | 1966:861 | 1965:21, 22 |
| Colombia | June 11, 1965 | 3(2) | 1967:1552 | 1965:31, 32 |
| Ecuador | June 28, 1965 | 3(2) | 1966:825 | 1965:45, 46 |
| Central African Republic | Aug. 23, 1965 | 3(2) | 1967:1657 | 1965:61, 62 |
| Congo | Sept. 13, 1965 | 3(2) | 1967:1733 | 1965:85, 86 |
| Iran | Nov. 11, 1965 | 3(2) | 1967:2549 | 1965:95, 95-96 |
| Ivory Coast | Oct. 27, 1966 | 3(2) | 1968:61 | 1966:11, 12 |
| Uganda | Nov. 29, 1966 | 3(2) | 1968:449 | 1966:29, 30 |
| Zambia | Dec. 10, 1966 | 3(2) | 1968:33 | 1966:41, 42 |
| Chad | Apr. 11, 1967 | 3(2) | 1968:221 | 1967:13, 14 |
| Rwanda | May 18, 1967 | 3(2) | 1968:1260 | 1967:23, 24-25 |
| Ghana | May 19, 1967 | 3(2) | 1968:1251 | 1967:31, 32 |
| Indonesia | Nov. 8, 1968 | 3(2) | 1970:492 | 1968:21, 22 |
| Congo [Zaire] | Mar. 18, 1969 | 3(2) | 1970:509 | 1969:1, 2 |

1. The country with which West Germany has entered into a treaty.
2. The date of signature.
3. The article of the treaty which requires compensation representing the equivalent of the investment affected.
4. The official citation. The citations are to *Bundesgesetzblatt, Teil I* [BGB1]. The date to the left of the colon refers to the voluem. The number to the right of the colon refers to the page on which the treaty begins.
5. Other citations. Unless otherwise noted the cites are to INVESTMENT TREATIES, *supra* note 181. The date before the colon refers to the volume. The numbers after the colon refer to the page on which the treaty begins and the page on which the specific article may be found.

| COUNTRY | DATE | ARTICLE | BGBl CIT | OTHER CITE |
|---|---|---|---|---|
| Gabon | May 6, 1969 | 3(2) | 1970:657 | 1969:17, 18 |
| Mauritius | May 25, 1971 | 3(2) | 1973:615 | 1971:17, 18 |
| Haiti | Aug. 14, 1973 | 3(2) | 1975:101 | 1973:45, 46 |
| Singapore | Oct. 3, 1973 | 4(1) | 1975:49 | 1973:57, 59 |
| North Yemen | June 21, 1974 | 3(2) | 1975:1246 | 1974:17, 18 |
| Egypt | July 5, 1974 | 3(2) | 1977:1145 | 1974:25, 26 |
| Jordan | July 15, 1974 | 3(2) | 1975:1254 | 1974:37, 38 |
| Malta | Sept. 17, 1974 | 3(1) | 1975:1237 | 1974:47, 48 |
| Israel | June 24, 1976 | 4(2) | 1978:209 | 1976:43, 45 |
| Mali | June 28, 1977 | 4(2) | 1979:77 | 1977:23, 24 |
| Syria | Aug. 2, 1977 | 4(2) | 1979:422 | 1977:33, 35 |
| Oman | June 25, 1979 | 4(2) | — | 1979:23, 25 |
| Papua New Guinea | Nov. 12, 1980 | 5(2) | — | 1980:113, 115 |
| Bangladesh | May 6, 1981 | 3(2) | — | 1981:27, 28 |
| Somalia | Nov. 27, 1981 | 4(2) | — | 1981:89, 91 |

## APPENDIX C

The following is a list of Swiss treaties which require "effective and adequate compensation, in accordance with international law."

| COUNTRY[1] | DATE[2] | ARTICLE[3] | OFFICIAL CITE[4] | OTHER CITE[5] |
|---|---|---|---|---|
| Niger | Mar. 28, 1962 | 7 | — | 2 I.L.M. 144, 147-48 |
| Ivory Coast | June 26, 1962 | 7 | 1963 ROLF 53 | 1962:35, 37 |
| Senegal | Aug. 16, 1962 | 7 | 1964 ROLF 717 | 2 I.L.M. 144, 147-48; 1962:55, 58 |
| Congo | Oct. 18, 1962 | 7 | 1964 ROLF 633 | 1962:79, 82 |
| Cameroon | Jan. 28, 1963 | 7(4) | 1964 ROLF 399 | 1963:1, 3-4 |
| Liberia | July 23, 1963 | 6 | 1965 ROLF 389 | 1963:21, 23 |
| Togo | Jan. 17, 1964 | 7 | 1966 ROLF 1443 | 1964:13, 14 |
| Madagascar | Mar. 17, 1964 | 7 | 1966 ROLF 1455 | 1964:41, 43 |
| Malta | Jan. 20, 1965 | 5 | 1965 ROLF 225 | 548 U.N.T.S. 193, 196; 1965:1, 2 |
| Costa Rica | Sept. 1, 1965 | 4 | 1965 ROLF 1351 | 1965:79, 81 |
| Dahomey [Benin] | Apr. 20, 1966 | 8 | 1973 ROLF 1540 | 1966:1, 3 |
| Chad | Feb. 21, 1967 | 10 | 1968 ROLF 9 | 1967:1, 3 |
| Ecuador | May 2, 1968 | 3 | 1969 ROLF 1089 | 1968:7, 9 |
| Upper Volta | May 6, 1969 | 7 | 1969 ROLF 1084 | 1969:11, 12 |
| Gabon | Jan. 28, 1972 | 11 | 1972 ROLF 2787 | 1972:1, 3 |
| Zaire | Mar. 10, 1972 | 4 | 1973 ROLF 983 | 1972:7, 8 |

1. The country with which Switzerland has entered into a treaty.
2. The date of signature.
3. The article of the treaty which requires "effective and adequate compensation, in accordance with international law."
4. The official citation. The citations are to *Recueil officiel des lois et ordonnances de la Confédération suisse* [ROLF]. The date before the the colon refers to the volume. The number after the colon refers to the page on which the treaty begins.
5. Other citations. Unless otherwise noted the cites are to INVESTMENT TREATIES, *supra* note 181. The date before the colon refers to the volume. The numbers after the colon refer to the page on which the treaty begins and the page on which the specific article may be found.

| COUNTRY | DATE | ARTICLE | OFFICIAL CITE | OTHER CITE |
|---|---|---|---|---|
| Central African Republic | Feb. 28, 1973 | 6 | 1973 ROLF 1275 | 1973:1, 2 |
| Jordan | Nov. 11, 1976 | 4 | 1977 ROLF 579 | 1976:85, 86 |
| Syria | June 22, 1977 | 4 | 1979 ROLF 1352 | 1977:19, 20 |

## APPENDIX D

The following is a list of British treaties which require compensation equal to the market value of the nationalized property.

| COUNTRY[1] | DATE[2] | ARTICLE[3] | OFFICIAL CITE[4] | OTHER CITE[5] |
|---|---|---|---|---|
| Egypt | June 11, 1975 | 5(1) | 1976:97 (6638) | 14 I.L.M. 1470, 1471-72; 1975:25 |
| Singapore | July 22, 1975 | 5(1) | 1975:151 (6300) | 15 I.L.M. 591, 592-93; 1975:41, 43 |
| South Korea | Mar. 4, 1976 | 5(1) | 1975:45 (6510) | 1976:9, 11 |
| Romania | Mar. 19, 1976 | 4(1) | 1977:15 (6722) | 1976:17, 19 |
| Indonesia | Apr. 27, 1976 | 5(1) | 1977:62 (6858) | 1976:31, 33 |
| Jordan | Oct. 10, 1979 | 4(1)-(2) | 1980:52 (7945) | 1979:49, 51 |
| Sri Lanka | Feb. 13, 1980 | 5(1) | 1981:14 (8186) | 19 I.L.M. 886, 887-88; 1980:1, 3 |
| Senegal | May 7, 1980 | 5(1) | — | 1980:55, 57 |
| Bangladesh | June 19, 1980 | 5(1) | 1980:73 (8013) | 1980:71, 73 |
| Philippines | Dec. 3, 1980 | 5(1) | 1981:7 (8148) | 20 I.L.M. 326, 327; 1980:125, 127 |
| Lesotho | Feb. 18, 1981 | 5(1) | 1981:31 (8246) | 1981:11, 13 |
| Papua New Guinea | May 14, 1981 | 5(1) | 1982:15 (8506) | 1981:37, 39-40 |
| Malaysia | May 21, 1981 | 4(1) | — | 1981:55, 57 |
| Paraguay | June 4, 1981 | 5(1) | — | 1981:71, 73 |
| Sierra Leone | Dec. 8, 1981 | 5(1) | — | 1981:97, 99 |
| North Yemen | Feb. 25, 1982 | 5(1) | — | 1982:1, 3 |
| Belize | Apr. 30, 1982 | 5(1) | 1982:33 (8631) | 1982:33, 35 |
| Cameroon | June 4, 1982 | 5(1) | — | 1982:41, 43 |
| Costa Rica | Sept. 7, 1982 | 5(1) | — | 1982:45, 52 |

1. The country with which Great Britain has entered into a treaty.
2. The date of signature.
3. The article of the treaty which requires compensation equal to the market value of the nationalized property.
4. The official citation. The citations are to the *Great Britain Treaty Series*. The date before the colon refers to the volume. The number after the colon refers to the treaty number. The number in the parenthesis refers to the command number.
5. Other citations. Unless otherwise noted the cites are to INVESTMENT TREATIES, *supra* note 181. The date before the colon refers to the volume. The numbers after the colon refer to the page on which the treaty begins and the page on which the specific article may be found.