CHAPTER III
EXPROPRIATION AND REPATRIATION

INTERNATIONAL LAW

According to the International Chamber of Commerce, fear of expropriation has probably been one of the main impediments to the international flow of private capital.¹ The subject gives rise to three distinct questions. First, is there any rule of international law which casts a duty on a state not to expropriate or nationalize alien private property? Second, is there any obligation to pay compensation in the event of such expropriation or nationalization? Third, and most important, is there any accepted principle of customary international law as to the nature and quantum of such compensation?

In a series of resolutions, the General Assembly of the United Nations has endorsed the concept of permanent sovereignty over natural wealth and resources.² While discussing this subject in December 1952, the Second Committee of the General Assembly was in general agreement that the right of a state to nationalize these interests was an inalienable sovereign right recognized by the law of nations.³

Under the traditional international law also the principle affirmed by international decisions was that a state, 'in virtue

¹International Chamber of Commerce, Attracting Foreign Investment: Brochure 200 (March 1959).
of its sovereignty may freely regulate its domestic affairs'. 4

Since, however, some of the writers of international law, like
Schwarzenberger and Wortley have expressed views to the contrary
the question will still brook some examination.

According to Hackworth, international law recognizes the
right of a sovereign state to nationalize or expropriate foreign
owned property within its territory in public interest. 5 In
Friedman's view expropriation is "exercise of the jurisdiction
which a state is acknowledged to possess by international law." 6
The community law of the European Economic Community recognizes it
as an accepted principle of international law that states may
expropriate or nationalize private property within their respective
territories. 7 Foighel takes the view that nationalization affecting
aliens is a legitimate expression of the jurisdiction of the state.
In his view, even the existence of a specific contractual obligation,
would not make any difference:

The fact that nationalization normally is not a breach
of international law cannot be altered by the fact that
nationalization destroys contractual rights, for exam­
ple, a concession, which the nationalizing state has
granted to a foreign national or foreign company...
The breach of the contractual rights... cannot be a
breach of international law but, on the other hand, may
cause remedies to be employed on the grounds of breach
of municipal rules of contract... There is no rule in
international law that gives a greater degree of prote­
cion to rights secured by contract than to other rights
of property. 8

4 C. Calvo, *Dictionnaire de Droit International* (Berlin, 1885),
vol. 2, p.137.

5 G.H. Hackworth, *Digest of International Law* (Washington, 1942),
vol. 3, p.662.

6 S. Friedman, "Expropriation in International Law* (London, 1953),
p.220.

7 W.H. Balekjian, *Legal Aspects of Foreign Investment in the

8 Foighel, n. 3, pp. 71-74.
In an exhaustive analysis of post World War II claims practice, Lillich and Weston conclude that an act of nationalization cannot be questioned in international law, even on the basis of an explicit or implied assurance of uninterrupted operation in an express agreement or concession or on the ground that it is not for any public purpose: "... post war international claims practice accepts the fact that states have the legal competence to terminate contractual commitments just as they do any other 'acquired right' ...". The contention that foreign property rights and interests cannot be taken except for a public purpose "has found scant support in practice ... as a 'rule' of international law whose violation independently engages international responsibility ... No international legal decision ..., adjudicative or diplomatic, ever has turned expressly on the issue of 'public purpose' or 'public utility' alone". Akinsanya concludes that there is no disagreement among writers and states that a sovereign state has the right to expropriate alien property situated within its territory.

Schwarzenberger, who takes the opposite view, quotes the UK Act of 1949, nationalizing steel industry, which expressly excepted the American-owned Ford Works at Dagenham. The exception, according to him, was made on account of the recognition by Great Britain that expropriation of foreign property was not in accordance with the

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rules of international law. The British Minister of Supply had however stated in his address to the Standing Committee of the House of Commons during the passage of that Act, "We felt that it would be unwise to use the Bill for the nationalization of steel as a method of nationalization of a very important part of the car industry. One of these days a Government may want to nationalize the motor car industry but the right way will be to do it properly." The Minister had emphasized that this was the only reason for the exclusion of the American-owned Ford Works and had expressly denied that it had anything whatever to do with the American shareholders.

Wortley, arguing from first principles, says sovereignty is an institution for protection of its subjects' rights within the rule of law; it is not ownership of those rights. According to him there is no universal rule of international law that makes it obligatory in all cases for a title acquired by a territorial law of necessity to be recognized by other states within their own jurisdiction. He concedes, however, that the Anglo-American courts, in practice, tend to refuse to look behind the title to property acquired by the state of the situs by a confiscatory or expropriatory law of the situs. He refers, in that connection, to the Court of Appeal case of Luther v. Sagar, American State decision in Terrazas v.

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14 (1921) 3 KB 532 (CA).
Holmes\textsuperscript{15} and the decision of the Supreme Court of Louisiana in \textit{Monte Blanco Real Estate Corporation v. Wolvin}.\textsuperscript{16} Of recent history, Wortley quotes the case of \textit{Anglo Iranian Oil Company nationalized by Iran} in 1951. In that case the UK claimed declaration of nullity of Iranian legislation and restitution, but if that failed, compensation. Wortley concedes that the claim to compensation as an alternative to restitution may give rise to the view that the seizing state has the right to offer to pay compensation in lieu of restitution.\textsuperscript{17}

The Permanent Court of International Justice held in \textit{Lotus case} that restrictions upon the independence of states cannot be presumed.\textsuperscript{18} The question, therefore, is whether there is any rule of international law which puts a restriction on the right of a state to expropriate alien property situated within its jurisdiction, such as to give rise to a plea for a declaration of nullity of the expropriating legislation or of restitution of the expropriated property.

None of the precedents which are often quoted in support of the principle that private foreign property is inviolable in relation to the measures of expropriation are directly on the point. Friedman divides these precedents into three categories. In the first category

\textsuperscript{15}115 Tex. 32, 275 SW 396.

\textsuperscript{16}(1920) 147 La. 563 SO 242.

\textsuperscript{17}Wortley, n. 13, pp. 13, 17, 101.

\textsuperscript{18}P.C.I.J. series A, No. 10, p. 18.
there are cases like the Charlton case (1841),\(^1\) the Finlay case (1849)\(^2\) and the case of Jonas King (1853)\(^3\) in which there was no judicial determination at all; there was a solution through diplomatic or other measures. In the second category there are cases like the Delagoa Bay Railway case (1891),\(^4\) the Expropriated Religious Properties case (1920)\(^5\) and the case of the Norwegian Claims against the United States (1922),\(^6\) in which the question of law had already been settled in the compromis between the parties and the Tribunal was asked to decide only the quantum of compensation. In the third category there are cases like the case of Certain German Interests in Polish Upper Silesia (1926)\(^7\) and the case of the Hungarian Optants (1927)\(^8\) which are based on the provisions of Peace Treaties. These do not constitute true precedents for an interpretation of the general principles of international law. In Brierly's words, "the precedents are inconclusive".\(^9\)

Among the few post World War II cases, a reference may be made to the Libyan Nationalization cases. In 1971, the Government of Libyan Arab Republic nationalized all interests and properties in Libya of

\(^{1}\) BFSP (1842-43), pp. 1025-1032.
\(^{2}\) BFSP (1849-50), pp. 410-82.
\(^{3}\) Moore, Digest, pp. 262-264.
\(^{5}\) PCA Award No.16, UN, 1, RIAA, p. 7.
\(^{6}\) PCA Award No.18, UN, 1, RIAA, p. 307.
\(^{7}\) PCIJ series A, No. 7 and series C No.11.
\(^{9}\) See Friedman, n. 6, pp. 67-86.
BP Exploration Company (Libya) Limited, a subsidiary of British Petroleum Company Limited. In 1973-74 Libya nationalized all interests and properties in Libya of Texaco Overseas Petroleum Company (Topco), a subsidiary of Texaco Inc., California; Asiatic Oil Company (Calasiatic), a subsidiary of Standard Oil Company of California, and the Libyan American Oil Company (Liamco), a subsidiary of Atlantic Richfield Company. These nationalization measures led to three major international arbitrations, the BP arbitration, the Topco-Calasiatic arbitration and the Liamco arbitration. The oil companies asked for arbitration under the terms of concession agreements. Libya did not respond or said that there was no arbitrable dispute as nationalization was an act of sovereignty. The oil companies approached the President of the International Court of Justice who appointed sole arbitrators in all the three cases. The oil companies claimed restitution on the ground that the 'taking' was unlawful being in breach of the concession agreements. The plea was accepted only in one case, the Topco/Calasiatic case on the principle of pacta sunt servanda. Judge Lagergren, the sole arbitrator in the BP case, held that the action was in fundamental breach of the BP concession and a total repudiation of the agreement and the obligations of the Respondent thereunder but did not award restitution. According to his award, "The survey of cases and other relevant materials presented above demonstrates that there is no explicit support for the proposition that specific performance, and even less so restitutio in integrum are remedies of public international law available at the option of

28 53 ILR 297 (1979)
29 53 ILR 389 (1979)
30 62 ILR 140 (1982)
the party suffering a wrongful breach by a co-contracting party". In the *Liamco* case, the sole arbitrator preferred not to treat the action unlawful. All the three cases were subsequently settled on payment of compensation based on negotiated settlements. \(^{32}\)

As for treaty practice the Peace Treaties of World War I required Germany to restore/compensate all private property but permitted the Allies to adjust compensation by credit against their claims on Germany for reparations leaving it to Germany to compensate the private owners. At the time of the *Hungarian Optants* case (supra) the League of Nations rejected the view that the Treaties laid down a definite rule for the protection of private property. Friedman rightly argues that if the Allies and the Associated Powers had wished to establish the principle of expropriation on payment of compensation they would have said so expressly in the Treaty and would have taken practical steps to secure its observance. "In the absence of such an express stipulation it is only possible to see, as M. Scelle \(^{33}\) forcefully puts it, 'transparent hypocrisy' in the contradictory provisions of the Treaties but not the affirmation of a general rule of international law which a certain legal technique might seek to derive from them".\(^{34}\) The Peace Treaties of World War II were basically similar.

The special treaties have not followed any uniform principle. There have been treaties like the Lausanne Convention (1923)\(^{35}\) which

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\(^{31}\) At p. 347


\(^{34}\) Friedman, n. 6, p. 93.

\(^{35}\) Treaty series No.16 (1923) Cmd., 1929, p.139.
propounded it as a rule of international law that private foreign property should not be expropriated except for reasons of public interest. There have also been treaties like the Convention between Albania and Italy (1926)\(^{36}\) which stated, without invoking international law, that expropriation may be only on payment of just compensation. Some treaties like the commercial treaties between the United States of America and Sweden\(^{37}\) stipulated only fair and equitable treatment. Finally, treaties like the Treaty of Rapallo (1922)\(^{38}\) admitted legality of past expropriation even without any compensation.

The state practice has also not been quite consistent. After the October Revolution (1917) in the USSR the United States lodged a diplomatic protest on behalf of fourteen Allied Powers and six Neutrals. The US Note of 13 February 1918 on behalf of the aforesaid powers declared, "confiscation of property and other similar measures as null and void in so far as their nationals are concerned." In contrast, among the States invited to take part in the First London Conference in the wake of nationalization of the Suez Canal in 1956 - many of them being the same as those represented in the aforesaid US Note of 13 February 1918 - only a very few protested against nationalization as such whilst the over-whelming majority, on the other hand, declared that nationalization was the outcome of Egypt's legitimate rights.\(^{39}\) At the Hague Conference (1922) itself, contrary

\(^{36}\) 122 BFSP (1925), p. 16
\(^{37}\) 2 Hackworth, p. 67.
\(^{38}\) 118 BFSP (1923), p. 586.
\(^{39}\) Foighel, n. 3., pp. 11-12.
to the opinion of the French Delegation, the British Delegation decided against any obligation to make restitution in kind: "Will the Russian Government restore confiscated property to its former owners or will it grant the latter compensation? This is a question which it alone can answer. To impose a principle, whatever it may be, on the Russian Government, would be equivalent to a breach of the law which no state can ever accept." The Soviet Delegation consistently refused to recognize, as a principle of positive law, the duty of making restitution of foreign property which had been seized. At the time of Mexican expropriation of properties of oil companies in 1938, the US Secretary of State, Cordell Hull, stated on 30 March 1938, "This Government has not undertaken and does not undertake to question the right of the Mexican Government in exercise of its sovereign power to expropriate properties within its jurisdiction." The US Government, however, claimed fair compensation. The matter was finally settled by a Mixed Commission of Experts whose final report published on 17 April 1942 stated, "Expropriation and the exercise of the right of eminent domain under the respective constitutions and laws of Mexico and the US are a recognized feature of the sovereignty of all States." As for the post World War II state practice, a reference has already been made to the conclusion arrived at by Lillich and Weston.

Neither the international judicial decisions, nor international treaty or state practice, thus, prove any evidence of any restrictive


43 p. 30 supra
rule condemning expropriation of foreign private property as illegal \textit{per se}. That is not, however, to say that a state may pick and choose in its policy of expropriation. There is wide support for the view that alien property deserves equal treatment with national property in the matter of expropriation.

According to the national treatment standard embodied in the well known Calvo Doctrine, "aliens are not entitled to rights and privileges not accorded to nationals." It has, however, been argued, sometimes, that national treatment is not the maximum but the minimum required by international law. In other words, it is stated that non-discrimination is a necessary but not a sufficient condition for expropriation to be legal in international law. Schwarzenberger and Fachiri advance this view on the argument that the status of foreigners is independent of the condition of nationals. It is argued that in \textit{Certain German Interests in Polish Upper Silesia} (1926) and the Peter Pazmany University (1933), the Permanent Court of International Justice had taken the view that a measure prohibited by an international agreement cannot become lawful under that instrument simply because the state applied the same measure to its own nationals. In \textit{George W. Hopkins Claim} (1926) the General Claims Commission between the United States and Mexico also distinguished between the spheres of municipal and international law. Friedman, however, argues that these are cases based on interpretation of treaties and agreements and cannot, therefore, be taken to advance any general principle of international law, treaty and agreement apart. In the case of encroachment by Guatemala on land of a US company (United Fruit Company), the US note of 28 August 1923 to

\begin{enumerate}
\item \textit{PCIJ} series A/B No. 61, p. 243.
\item \textit{UN}, 4, \textit{RIAA}, p. 41.
\item Friedman, n. 6, pp. 131-132.
\end{enumerate}
Guatemala stated that non-discrimination is not sufficient, the act, in so far as aliens, must conform to at least minimum standard required by international law. Foighel aptly disputes this statement on the ground that, treaty apart, there is no evidence of any such minimum standard of international law. The Economic Committee of the League of Nations who prepared a Draft Convention for discussion at the diplomatic conference of forty six states (International Conference on the Treatment of Foreigners, Paris, 1926) decided that national treatment is the maximum that foreigners could claim. The Report of the Sub-Committee of Experts for the Progressive Codification of International Law of 9 February 1926 stated, "The maximum that may be claimed by a foreigner is civil equity with nationals... any pretension to the contrary would be inadmissible and unjust both morally and juridically." In Latin America the principle has been emphasized not only by authorities like Judge Alvarez, but also by the Congress of Jurists held in Rio-de-Janeiro in 1927 on the status of aliens, by the Sixth International Conference of American States held in Havana in 1928 and by numerous Conventions emanating from the Pan American Conferences. At the second meeting of the Inter American Committee of Experts for the Codification of International Law held in Lima in 1938 the Chilean delegate M. Cruchaga asserted

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47Foighel, n. 3, p.49

48League of Nations, Doc. C. 36, M.21 (1929).II


51Mexico (1901), Buenos Aires (1920), Havana (1928), Monte Video (1933).
that national treatment had already become a principle of positive law on the American continent. The principle was also accepted in the Cadenhead case (1914) and in the arbitration between the Reparation Commission and the United States to decide the Claim of the Standard Oil Company to Certain Tankers (1926). In the former case the Tribunal referred to the generally recognized rule of international law that a foreigner within the United States has no rights greater than the nationals of that country. In the latter case it was held that "an Allied or Associated national having invested capital in Germany has no ground for complaint if for this reason he incurs the same treatment as German nationals." The US Note of 7 September 1948 to Romania against the nationalization by Romania of US property, while leaving out Soviet property, stated, "While the United States Government has consistently recognized the right of a sovereign power to expropriate private property subject to its jurisdiction and belonging to American nationals, the United States has likewise refused to accept the validity of such expropriations in cases where they are discriminatory by nature and effect." At the time of the Anglo-Iranian Oil Company case the British Government, in its Memorial to the International Court of Justice stated, "The principle that it is unlawful to expropriate the property of foreigners by an act, which is openly or by implication directed exclusively against them is generally recognized."


54 UN, 2, RIAA, p. 781.


56 ICJ *Pleadings* (1951), pp. 94-95
the question from the human rights angle, Mc Dougal, Lasswell and Chen concede that the principal thrust of the contemporary human rights movement being the protection of essential rights of every human being, be he national or alien, this debate between national treatment and minimum standard has now become highly artificial.\textsuperscript{57} They note, in fact, certain differentiations which are not of the nature of discrimination. After referring to a "newly emerged general norm of non-discrimination which seeks to forbid all generic differentiations among people... for reasons irrelevant to individual capabilities and contribution", in the context of protection of aliens, they counsel thus, "Whether a particular differentiation of aliens and nationals has a reasonable basis in the common interests of the larger community must of course depend not only upon the value primarily at stake in the differentiation but also upon many particular, and varying, features of the context in which the differentiation is made."\textsuperscript{58} The most-favoured-nation clauses, so common in international and bilateral arrangements, can be quoted, in this context, as an example of a differentiation which cannot be called discrimination. According to Weston:

\begin{quote}
... one must start from the oft neglected truism that discrimination is not per se unlawful or bad; indeed no unqualified doctrine of non-discrimination could be constituted part of customary international law without sacrificing important community values... Whether the question is to determine which alien interest shall be subjected to deprivation, or to decide who shall receive what compensation therefor (if any), or to evaluate the procedures for reaching these determinations and decisions... it cannot - must not - be answered arbitrarily (i.e. capriciously or without reasons sanctioned by the common interest of an increasingly interdependent and interpenetrating world community).
\end{quote}


\textsuperscript{58}p.738 and p.758, n. 82.
Weston concludes that, in the context of foreign wealth deprivation, nondiscernment really means avoidance of arbitrariness: "... foreign wealth deprivation decisions (substantive and procedural) taken solely for reasons of racial, religious, cultural, ethnic or nationality aversion or preference should and do constitute unlawful discrimination for being arbitrary." 59

The question is sometimes over-simplified by mixing the two issues and arguing that expropriation is legal if it is accompanied by full compensation and not otherwise. Fachiri 60 argues for this view on the basis of the Jonas King, Delagoa Bay and Portugese Religious Properties cases. None of these cases, however, as already mentioned, contains a judicial determination on the crucial question of legality of expropriation of alien property. Gidel 61 cites the Chorzow Factory case 62 as conclusive on that point. Under the German-Polish Geneva Convention expropriation of German properties in Upper Silesia was permitted in conformity with the Treaty of Versailles. The Permanent Court had stated, in that case, "restitution in kind or if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear..." The basic question before the Court was whether certain Polish legislation did or did not amount to liquidation within the meaning of Geneva Convention so as to attract the relevant provisions of the


60 Alexandar P. Fachiri, "Expropriation and International Law", British Year Book of International Law (1925), p. 159.

61 G. Gidel, "Larret No.7 de la cour Permanente", 1, Revue de Droit International (Jan-Feb 1927), p.102.

Treaty of Versailles. Sir John Fisher Williams, therefore, aptly argues that the decision in that case was based on the interpretation of the German-Polish Convention and certain provisions of the Treaty of Versailles and the Court did not decide it as a general principle of international law that nondiscriminatory expropriation without compensation is wrong. In the EP case, already cited, Judge Lagergren took into account the Chorzow case in not awarding restitution. The Arbitration Tribunal in Eastern Extension, Australasia and China Telegraph Company Ltd. (1923) took the view that the grant of compensation alone justified expropriation; the right has no existence apart from the obligation to pay compensation. Friedman argues against this view with the comment that expropriation is exercise of jurisdiction and if expropriation were illegal per se, it could not become legal on payment of compensation. Foighel also points out that if expropriation were illegal the redress should lie only in a declaration of nullity or in restitution; no amount of compensation can be a substitute for that as the alien owner is still estopped from using his expertise in that particular sphere of business in the nationalizing state. Liability to pay compensation is not a pre-condition for the lawfulness of the expropriation, it may be only a result of that.

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63 Sir John Fisher Williams, "International Law and the Property of Aliens", British Year Book of International Law (1928), p. 1

64 n. 28 supra.


66 Friedman, n. 6, p. 204.

A reference may also be made, at this stage, to the codification of the law of state responsibility by the International Law Commission of the United Nations. In its very first session in 1949, the Commission provisionally listed the subject of 'the law of state responsibility' for codification. Between 1956 and 1961, Dr. Garcia Amador, the Special Rapporteur, submitted six reports focusing exclusively on state responsibility for injuries to aliens. In 1963, however, the Commission decided to broaden the scope of the subject to deal with international responsibility of states in general rather than in relation specifically to injuries to aliens.68 In its 32nd session in 1980 the Commission provisionally adopted Part I of draft articles on state responsibility (35 articles in 5 Chapters)69 concerned with determining on what grounds and under what circumstances a state may be held to have committed an internationally wrongful act, and decided to circulate these draft articles to member states for comments. In its 35th and 36th sessions (1983, 1984), the Commission considered draft articles 1-6 of Part II concerned with the content, form and degree of international responsibility. Draft article 6 says, inter alia:

Article 6

1. The injured State may require the State which has committed an internationally wrongful act to:
   a) ...
   b) ...
   c) provide appropriate guarantees against repetition of the act.

2. To the extent that it is materially impossible to act in conformity with paragraph 1(c), the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding

to the value which a re-establishment of the situation as it existed before the breach would bear. 70

While recognizing that draft article 6, paragraph 2 embodied the standard set out in the Chorzow Factory case, some members preferred a more flexible formula, allowing in particular cases, exemplary damages or, as the case may be, a lower standard of compensation. 71

The Commission referred draft article 6 to the Drafting Committee. Whatever shape the draft article 6 may ultimately take it has to be reiterated that the very basis of international responsibility under these draft articles is an internationally wrongful act. An internationally wrongful act is defined in Article 1 of Part I as a "breach of an international obligation." International responsibility is precluded, however, not only on the grounds of 'consent' (Article 29), 'force majeure' (Article 31) and 'distress' (Article 32) but also a 'state of necessity' (Article 33). In pursuance of the General Assembly Resolution No.3071 (1974), 72 the Commission did place the subject "International liability for injurious consequences arising out of acts not prohibited by international law" on its general programme of work as a separate topic 73 but has made no progress on that topic. The efforts of the International Law Commission do not, yet, provide any clear guidance on the subject.

On the first question, therefore, the conclusion is inescapable that there is no rule in international law which prevents a host country from nationalizing or expropriating private foreign property without unjustifiable discrimination.

71 Ibid, p. 103.
72 GA Res. 3071 (XXVIII) of 30 November 1973.
73 fn. 69.
On the second question whether nationalization that is lawful in itself involves a liability, in international law, for the nationalising state to pay compensation to the alien who is affected by it, the legal opinion is not unanimous. According to one school of thought the nationalising state must provide for compensation while taking alien property. According to the other school, the duty to compensate does not exist outside a treaty. Wortley gives a long list of names of writers in support of either view.\(^74\)

According to Fischer Williams the nationalising state's obligation to compensate "has never taken shape in any formulated rule of international law accepted by the international community." He goes on to say that such a supposed obligation is not imposed by any generally accepted maxim of conduct of such a nature as to form part of the international duties of states.\(^75\) In Friedman's view\(^76\) it is impossible to deduce from the practice of states a legally binding rule according to which owners of property, whether national or foreign, are to be compensated. In the opposite view of Schwarzenberger it is an accepted principle of international customary law that alien property may be expropriated only on payment of compensation.\(^77\) Friedman\(^78\) draws a distinction between general expropriation of the type involved in the French or Russian revolutions and individual

\(^74\)Wortley, n. 13, pp. 34-35.
\(^75\)Fischer Williams, n. 63, p. 28.
\(^76\)Friedman, n. 6, pp. 93, 206.
\(^78\)Friedman, n. 6, pp. 101, 221.
expropriation or nationalization. In respect of general expropria-
tion he takes a definite view that there is no evidence of any bind-
ing rule requiring payment of compensation. At the time of the
French Revolution (1789) feudal property was expropriated without
compensation. In the wake of the October Revolution in the USSR
(1917) no compensation was granted by any of the socialization laws
and in the Conferences held in 1922 at Cannes, Genoa and the Hague,
the Soviet Delegation consistently refused to recognize the liability
to compensate as a principle of positive international law. The
aggrieved states also ceased to press their claims arising from
Soviet socialization measures. In fact some of them actually
renounced their claims either expressly, as in the case of Germany,
or tacitly, as in the case of the United States of America and
France. At the time of the Mexican Agrarian Reforms, 1938, Mexico
in its Note of 3 August 1938 to the United States took the view,
"There does not exist in international law any principle universally
accepted by countries, nor by the writers of treaties on this subject,
that would render obligatory the giving of adequate compensation for
expropriation of a general and impersonal character." 79

The Economic Committee of the Paris Conference on the Treat-
ment of Foreigners (1926) contemplated national treatment for general
expropriation and "fair compensation" for individual expropriation.
The latter was opposed by many states. The question whether the
principle of equitable compensation was to be embodied in the Conven-
tions was put to vote and was rejected by 13 votes to 5. An amendment
according to which compensation had to be equal to that granted to
nationals was adopted by 13 votes to 8. An amendment suggested by
Netherlands adding, "This paragraph in no way prejudices the compen-

sation required by international law" was rejected by 10 votes to 5.  

On a review of large number of treaties, Foighel concludes that recent developments in the rules of international law in respect of nationalization seem to be tending towards a rule involving liability to pay compensation to the foreigners affected. The resolutions of the UN General Assembly on the question of permanent sovereignty over natural resources also invariably refer to the requirement of compensation. On a review of the post World War II state practice, Dolzer concludes, "By and large, uncompensated expropriations of aliens in no war situations have had no place in the post war period." Weston puts it more pithily, "... the principle of compensation as an international regulatory norm is yet alive, even if under attack."

The conclusion on the second question would, therefore, seem to be that in the matter of general expropriation there is no rule of international law requiring the payment of compensation in the sense of requiring any special treatment being meted out to aliens as compared with nationals, but in the matter of individual expropriation or nationalisation there is a division of opinion with the balance tilted, particularly in recent times, in favour of the view that customary international law requires payment of compensation.

As to the nature and quantum of compensation there is a continuing cleavage of opinion about the rule of international law as between the developed and the developing countries. The developed

82 Burns H. Weston, n. 59, p. 454.
countries have taken the view, expressed by Schwarzenberger, that customary international law requires the payment of full, or, prompt adequate, and effective compensation. Sometime referred to as Hull rule, this 'prompt, adequate, and effective' formula was propounded by the US Secretary of State Hull in his note to Mexico in 1938. The words "prompt", "adequate" and "effective" are meant to convey that the compensation should be paid without undue delay; it should be equal to the full market value of the property taken; and it should be paid in a transferable form. This view is advanced in the Abs-Shawcross Draft Convention on Investments Abroad (1959) as well as in the OECD Draft Convention on the Protection of Foreign Property (1967). It is also adopted in most of the bilateral treaties on protection of foreign investment entered into by the developed countries.

The view has, however, never received universal acceptance. There was a difference of opinion even under the League of Nations system. The Draft Convention prepared by the Economic Committee of the League of Nations on the Treatment of Foreigners was considered in a diplomatic conference in Paris in November - December, 1929. As already mentioned the question whether the principle of equitable compensation was to be embodied in the Convention was put to vote and was rejected by 13 votes to 5. The sub-chapter on International Investment for Economic Development of the Havana Charter (1947-48), the Economic Agreement of Bogota (1948) and the General Inter-American Economic Agreement (1957) all failed primarily on the question of compensation.

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over Natural Resources, considered a benchmark on the subject, "... the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures (nationalization, expropriation or requisitioning) in exercise of its sovereignty and in accordance with international law..." The Resolution contemplated payment of 'appropriate' compensation to be determined in accordance with the rules of the host state but in accordance with international law. This juxtaposition of municipal law and international law was a compromise to obtain affirmative votes of all states. The resultant formulation could be interpreted differently by different states. Some countries emphasized the right of states to take property and set their own conditions for compensation while others argued that what was to be stressed was the obligation to pay compensation in accordance with international law. In the subsequent resolutions, the General Assembly accepted the former view. The Charter of Economic Rights and Duties of States, adopted by the General Assembly in December 1974, stated in paragraph 2(c) of Article 2 thereof:

2386 (XXIII) 19 Nov. 1968.
2. Each State has the right:

... (c) to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.

Sixteen developed countries voted against this portion of the resolution in the General Assembly on the argument that the amount of compensation should be determined in accordance with the principles of customary international law which, in their view, required payment of prompt, adequate and effective compensation. A vast majority of countries, on the other hand, denied the existence of any such principle in international law and subscribed to the view that the expropriating state was obliged to pay "appropriate" compensation only taking into account its own relevant laws, regulations and pertinent circumstances. The Charter, as a whole, was adopted by 120 votes to 6 with 10 abstentions. In voting against the Charter, the United States delegate observed that the Economic Charter would be meaningless without the agreement of countries whose number might be small but whose significance in international economic relations and development could hardly be ignored.

The resolutions of the General Assembly are, of course, only recommendatory. It is, however, a widely held view now that, considering the universal representation in the United Nations, such resolutions passed by a preponderant majority may well be taken to be indicative of the emerging rules of customary international law. In Bowett's view such resolutions indirectly become a source of international law.

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89 A/c. 21/SR.1638, p. 5.
According to Bin Cheng such resolutions "serve as midwives for the delivery of nascent rules of international customary law". Brownlie says:

When they (resolutions of the General Assembly) are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of opinions of Governments in the widest forum for the expression of such opinions. Even when they are framed as general principles resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules.

According to Rosalyn Higgins, a resolution declaring general principles of law may not be "binding" on states, "but estoppel may arise in relation to votes in favour of it, the doctrine of acquiescence will operate in relation to it and it has an undoubted place in the law creating process." In Sloan's view such resolutions supported by an overwhelming majority or by unanimous votes do provide positive evidence of the belief of states concerning the existence or otherwise of certain rules of law. Falk assigns a quasi-judicial character to such resolutions. Rahmatullah Khan calls such resolutions "normative basis of the new international law". According to Anand, resolutions of the General Assembly, though not as authoritative or binding as treaties, do embody a consensus outlining some of the new

96Falk, n. 85, p. 782.
areas of international law. Resolutions framed as general principles, such as Resolution 1514 (XV) containing a declaration on the granting of independence to colonial countries, which are repeated again and again, acquire such added authority that states may ignore them only at their own risk.\textsuperscript{98} Talking specifically of the resolution on permanent sovereignty over natural wealth and resources and on the Charter of Economic Rights and Duties, Akinsanya says that these resolutions dealing with legal matters constitute evidence of state practice and may well, in time, acquire the character of customary international law.\textsuperscript{99}

The International Court of Justice confirmed in the Certain Expenses case that the resolutions of the General Assembly even in matters relating to international peace and security are not merely "hortatory".\textsuperscript{100} During discussion on the Declaration of Legal Principles concerning the Exploration and Use of Outer Space\textsuperscript{101} in the First Committee, the Indian delegate stated, "a resolution when adopted unanimously, we generally accept as part of international law".\textsuperscript{102} The US delegate also stated that a resolution proclaiming principles of international law and adopted unanimously, "represented the law as generally accepted in international community".\textsuperscript{103} The Canadian

\textsuperscript{98} R.P. Anand, \textit{New States and International Law} (Delhi, 1972), pp. 82–83.
\textsuperscript{99} Akinsanya, n. 10, p. 467.
\textsuperscript{100} ICJ Reports (1962), p. 163.
\textsuperscript{101} Res. 1962 (XVIII).
\textsuperscript{102} A/AC. 105/C.2/SR 17 (17 April 1963) p. 10.
\textsuperscript{103} A/AC. 105/C.2/SR 20 (22 April 1963) p. 10–11.
delegate concurred and stated that the legal principles contained in the draft resolution reflected international law as it was currently accepted by member states. 104

Article 2(2)(c) of the Charter of Economic Rights and Duties of States remains, nevertheless, a subject of controversy, particularly because of the votes cast against it. Weston criticizes it also on the ground that by omitting any reference to international law it has "domesticated" the international law principle of compensation. 105 Professor Dupuy, the sole arbitrator in Topco/Calasian arbitration 106 refused to give legal effect to it as evidencing the existence or emergence of customary international law. Jorge Castañeda, who was Chairman of the Working Group that drew up the Charter, however, explains that the reference to international law was omitted mainly to defeat the insistence on 'prompt, adequate and effective' formula. According to him, the Charter, through paragraph (j) of Chapter I which provides for the "fulfilment in good faith of international obligations" accepts that international law acts as a factor in limiting the freedom of the state in cases where foreign interests are affected, even though Article 2 does not so state explicitly. 107 As for the voting pattern, Rudolf Dolzer takes the view that votes cast for article 2(2) "reflect opinions about the present state of the law." 108 Weston himself concedes that Article 2(2)(c), "may be

104 A/AC. 1/SR 1346 (5 Dec. 1963), p. 89

105 Burns H. Weston, n. 59, p. 439.

106 n. 29 supra.


108 Rudolf Dolzer, n. 81, p. 565.
the start of a fresh practice whose impact on the law, although currently without immediate binding force, could be substantial in the future. As of the present, he concludes, "However, to ensure at least minimum sensitivity to the problematique of universal well-being, the international law principle of ("appropriate") compensation should be made to accommodate to the principle of "full permanent sovereignty" as responsibly defined. In its application it should be treated more as a rebuttable presumption than as an inflexible rule." 109

In their state practice even the developed countries have not always taken the requirement of paying 'prompt, adequate and effective' compensation as a positive rule of customary international law. When Italy nationalized life insurance in 1911, a substantial part of it was in the hands of foreign companies but the law provided no right to compensation. In terms of the Anglo-Soviet Trade Agreement of 1934, Lena Goldfields Ltd. whose concession had been rendered impracticable by the Soviet Union in 1929 was given compensation in transferable but non-interest bearing notes of three million pounds, which was substantially less than the arbitral award of nearly thirteen million pounds. At the time of expropriation of Mexican Oil Companies in 1938 the United States claimed fair compensation. Mexico in its Note of 3 August 1938 admitted "in obedience to her own laws" the obligation to indemnify in an adequate manner but maintained on the basis of "the most authoritative opinions of writers of treaties on international law" that the time and manner of payment must be determined by the Mexican national laws. 110

109 Burns H. Weston, n. 59, pp. 455-475.
110 Hackworth, n. 79, p. 658.
In the same case the UK, who initially refused to recognize the legality of expropriation, later arrived at a settlement on 29 August 1947 wherein the agreed amount of compensation amounted to only one-third of the actual value of the oil properties expropriated. The British-French Agreement of 11 April 1951 on the nationalization of gas and electricity industries in France provided for compensation which was equal to about 70 per cent of the real value of expropriated properties. In fact in almost all the French nationalization measures after the war, such as the nationalization of Renault, Gnome and Rhone Works and the Bank of France in 1945 or of mineral fuels in 1946 compensation was neither prompt, nor full.

According to Wortley, states may accept lower compensation out of political or humanitarian considerations and that fact should not be taken to mean establishing a right in the nationalizing state to pay less than full compensation. The argument is countered with equal force by Friedman by saying that in innumerable cases states, after affirming with all the rigour of a principle that they were not bound to pay any compensation agreed, in practice, to pay certain sums either by way of ex-gratia payments or for reasons of expediency, but that such conduct cannot, by itself, be taken to prove the existence of a positive rule of international law requiring the payment of any particular compensation.

The Fifth Amendment to the US Constitution (1787) mentions 'just compensation'. According to the US Supreme Court 'just

111 Friedman, n. 6, p.29
112 Wortley, n. 13, p. 157
113 Friedman, n. 6, p. 210
compensation' includes all elements of value that inhere in the property but it does not exceed market value fairly determined.\(^{115}\) This formulation puts the market value as a maximum and the market value itself, is not often objectively determinable. In the Norwegian Ship-Owners' Claim (Norway v. US)\(^{116}\), a tribunal of the Permanent Court of Arbitration held that "just compensation implies complete restitution of the status-ante". The US, in carrying out the award, stated that it did not consider it to possess the authority of a precedent and protested by means of an express declaration.\(^{117}\) In fact, while the ship-owner's claim in that case, based on the value of the building contracts at the time of requisition, was of the order of eighteen million dollars, the US offer of 'just compensation' amounted to 2.6 million dollars. Also, the rigour of the American constitutional provision is mitigated to a considerable extent by the rather liberal use by the courts of 'police power' as an exception enabling expropriation even without compensation. Thus expropriation of lotteries (State v. Dobard),\(^{118}\) abolition without compensation of the right to cheap transportation (Louisville and Nashville Railroad Co. v. Motley),\(^{119}\) suppressing without compensation a livery stable kept in a particular district (Reinman v. Little Rock),\(^{120}\) were all upheld under this doctrine. In 1926, when Mexico protested, the US replied that it was in exercise of police power.

\(^{115}\) Olson v. US 292 US 246

\(^{116}\) UN, 1, RIAA, p. 307.


\(^{118}\) (1893) 45, Louisiana Annual, 1412.

\(^{119}\) (1911) 219 US 467.

\(^{120}\) (1914) 237 US 171.
Lillich and Weston have made an exhaustive study of the post World War II state practice in claims settlement.\textsuperscript{121} According to this study 95 per cent of international claims practice after World War II is channelled through negotiated lump sum agreements; while in the 150 years before 1939 there were only about 26 lump sum settlements as against at least 249 adjudications. In the Barcelona Traction\textsuperscript{122} case the International Court of Justice, in a dictum, refused to accept these lump sum agreements as sources of general international law:

\begin{quote}
... specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation such arrangements are sui generis and provide no guide in the present case.

... To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as lex specialis and hence to court error.
\end{quote}

While conceding that lump sum agreements are, in general, very much the product of what some would call "extra legal" expediencies, Lillich and Weston hold strongly that these agreements are sources of international customary law. Apart from the fact that these agreements constitute 95 per cent of state practice after World War II, it is important to note, in their view, that lump sum agreements hammered out by duly authorised officials and reached and sustained by "expectations about reciprocal claim and mutual tolerance" clearly constitute (or embrace) legal decisions. "... the reciprocal impact has been and continues to be considerable."

\textsuperscript{121} n. 9 supra

\textsuperscript{122}(1970) ICJ 3 at 40.
Not only are the texts of the agreements remarkably alike in both content and organization, but often, even where wholly different set of High Contracting Parties are involved, they display identical or near identical language.\textsuperscript{123} In their view lump sum agreements fall squarely within the ambit of sub-paragraphs 1(a) and (b) of Article 38 of the Statute of the International Court of Justice. On a review of as many as 139 post World War II agreements, Weston and Lillich conclude that while these agreements underpin international obligation to pay compensation upon taking foreign property, they do not give any precise normative guideline on the quantum of compensation. They are clear, however, in their conclusion, that the lump sum agreements do not lend any support to the 'prompt, adequate and effective' formula, "... the general conclusion seems inescapable that the compensation paid under a substantial number of lump sum agreements has been inadequate by any test."\textsuperscript{124} Nor do these agreements prove the test of prompt payment. The study computes an average time span of 20 years between the act of nationalization and the payment and then again, "most states now accept the principle of payment by instalment". Though the authors wish that the \textit{sine qua non} of acceptance of payment by instalment, "should be, as required by the Harvard Convention, the payment of at least nominal interest", they are clear in their finding, "... since the Harvard Convention's publication only one of the many settlement agreements providing for payment by instalment has called for the payment of interest, and then only at the inadequate

\textsuperscript{123} at p. 19.

\textsuperscript{124} at p. 239. See also E. Lauterpacht, "The Contemporary Practice of the United Kingdom in the Field of International Law", International and Comparative Law Quarterly, vol. 6 (1957), p.151.
rate of 1 per cent (Dutch-Indonesian Agreement).\footnote{125} The lump sum agreements clearly do not support the first two parts of the so-called Hull rule; they support only the third part in that the payment is almost always stipulated in the currency of the claimant state or in a convertible currency.\footnote{126} The 1981 US-Czechoslovak Claims Settlement Agreement,\footnote{127} which came after the period covered by the above study, took over 30 years to negotiate. In 1963, the US was prepared to settle for less than 20 per cent of the principal amount of its claim. If the final agreement stipulated prompt and full payment it was not the result of any realized international obligation; it was a quid pro quo for the US promise to return to Czechoslovakia the remainder of its share of Nazi looted monetary gold recovered by the Allied armies at the close of World War II (18.4 metric tonnes), which had appreciated in value manifold in the intervening years (estimated value US $250 million in 1982 prices).\footnote{128}

As for judicial decisions, there is not one that supports the 'prompt, adequate and effective' formula as a principle of international law. As Oscar Schachter points out in an Editorial Comment in the American Journal of International Law,\footnote{129} traditional

\begin{enumerate}
\item \footnote{125} pp. 210 - 15
\item \footnote{126} pp. 242 - 44
\item \footnote{127} 21 ILM 371 (1982)
\end{enumerate}
decisions of international tribunals contain no reference to the 'prompt, adequate and effective' standard. The Chorzow Factory case refers only to a duty to "payment of fair compensation". The Norwegian Ship-owners' Claim refers to "just compensation". In the earlier cases, such as those collected by Ralston, there is not a single decision expressing the 'prompt, adequate and effective' formula. The position is no different in the few post World War II cases. In the Liamco case, the sole arbitrator preferred to employ the notion of 'equitable compensation'. In the Topco-Calasiatric arbitration, Prof. Dupuy accepted that the requirement of 'appropriate compensation' was the opinio juris communis that reflected the state of customary law existing in the field. He found support for this view in the UN Resolution 1803 supported by both the developed and the developing countries. In the Aminoil case (arbitration between the Government of the State of Kuwait and the American Independent Oil Company), the tribunal said that the standard of 'appropriate compensation' as set forth in UN Resolution 1803 "codifies positive principles". The tribunal declared that "the determination of the amount of an award of 'appropriate compensation' is better carried out by means of an inquiry into all the circumstances relevant to the particular


131 n. 30 supra at pp. 209-10

132 n. 29 supra

133 21 ILM 976 (1982) see paras 143-44.
concrete case than through abstract theoretical discussion". Nothing was said in the award about the claim that 'prompt, adequate and effective' compensation constituted customary international law. In the Congolese arbitration cases of AGIP Spa 134 and Berverutti and Bonfant, 135 compensation was awarded under the French Civil Code which was held to be the substantive law applicable. In the American International Group Inc., the American Life Insurance Company 136 and the ITT Industries Inc. cases, the Iran-US Claims Tribunal awarded compensation based on the market value of shares on the date of nationalization but in computing such value the Tribunal took into account the effect of the Islamic Revolution in Iran on the value of shares as on that date. That Iran might experience a revolution was "a risk assumed by investors in Iran, as in any other country" and "any reduction in value of investments as a result of revolution cannot be ignored", said the Tribunal. 137

The conclusion is inescapable that the existence of 'prompt, adequate and effective' formula as a rule of law is not sustained by the prevailing doctrinal opinion within the international community. As Dolzer says, "As far as currently applicable law is concerned close examination lends little support to the Hull rule; recent

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134 67 ILR 318
135 67 ILR 345
136 23 ILM 1 (1984)
practice, prevailing legal opinion and the development of national property orders, all speak against it.\textsuperscript{138} In his Editorial Comment already quoted,\textsuperscript{139} Professor Schachter also quotes several authorities like Hersch Lauterpacht, Charles De Visscher, Wolfgang Freedmann and Rousseau for the view that 'prompt, adequate and effective' formula has never won general acceptance in cases or in state practice and nationalization "hardly ever permits more than partial compensation calculated less by the extent of damage than by the capacity and goodwill of the nationalizing State". He too concludes, "the argument that 'prompt, adequate and effective' formula is traditional international law finds little support in state practice or authoritative treatises and monographs".

The conclusion on the third question is clear, 'prompt, adequate and effective' formula has never been an accepted rule of international law. The quantum of compensation is determined by the circumstances of each particular case.

The countries of South Asia, however, who are scrupulous adherents of international law, provide for compensation much beyond the call of duty under international law and are extremely liberal in the payment of such compensation. The following paragraphs give a brief account of law and practice of these countries.

\textsuperscript{138}Rudolf Dolzer, n. 81, p. 570.

\textsuperscript{139}n. 129 supra.
The Constitution of India as originally enacted treated the right to property as a fundamental right of citizens and non-citizens alike. Article 31 of the Constitution read:

(1) - No person shall be deprived of his property save by authority of law.

(2) - No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given.

According to this provision, private property of any person, including a non-citizen, could be acquired by the state only for public purposes and by due process of law, and such law must either fix the compensation or specify the principles on which and the manner in which the compensation was to be determined and given.\textsuperscript{140} The word 'compensation' in this provision was interpreted by the Supreme Court of India to mean "just equivalent or full indemnification".\textsuperscript{141} A provision


\textsuperscript{141} West Bengal v. Bela Banerji, 1954 SCR 558.
in a land reform law limiting compensation for acquisition of land to market value of the land on an anterior date (31 December, 1946) was struck down as inconsistent with the above interpretation in so far as the principle laid down for determining compensation denied to the owner the incremental value between 31 December 1946 and the date of expropriation. In the interest of agrarian reforms, the Fourth Amendment (1955) added the words "and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate" to the provision in Article 31 (2). In cases coming before the Supreme Court after this amendment it was held, however, that in retaining the word 'compensation' the Fourth Amendment had, in effect, accepted the interpretation put on that word by the Supreme Court in Bela Banerji's case. In a 1970 decision, the Supreme Court struck down the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, on the holding that after the Fourth Amendment also 'compensation' had to be just and equivalent. The

142 West Bengal Land (Development and Planning) Act, 1948.

143 See P. Vajravelu Mudaliar v. Special Deputy Collector, Madras (1965) SCR 614.

court stated, "the Constitution guarantees a right to compensation - an equivalent in money of the property compulsorily acquired. That is the basic guarantee". The Fourth Amendment, therefore, did not bring about any real change in the situation. The Twenty-fifth Amendment (1971) replaced the word 'compensation' with the word 'amount'. The Forty-fourth Amendment (1978) deleted Article 31 altogether and inserted Article 300A to the effect:

300A - No person shall be deprived of his property save by authority of law.

The right to property was reduced from a fundamental right to an ordinary legal right. The full import of this change has not yet come up for examination before the Supreme Court. A learned commentator has, however, taken the view that the very fact that expropriation has to be by the authority of law would, on a reading of the relevant Entries containing legislative powers of the Union and the States, indicate that the payment of compensation has necessarily to be read into the new provision. 145

Coming specifically to foreign capital, the Prime Minister of India made a Policy Statement in the Parliament in April 1949.

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145 Seervai, n. 140, p. 1748.
In this statement he held out an assurance that if foreign enterprises were compulsorily acquired, compensation would be paid on a fair and equitable basis. The assurance was repeated in the course of the debate on the Fourth Amendment when the Prime Minister said:

I am always surprised to hear the proposal being put forward repeatedly; confiscate or expropriate foreign capital. Anything which is more unthinkable, unthought of and unrealistice I cannot imagine; it has no relation to reality ... no country wants to break international relations or its credit in the world by doing this kind of thing, in order to save money ... a few crores or a few million.146

These words found their echo in the United Nations when, speaking on the draft resolution on Permanent Sovereignty Over Natural Resources (Resolution 1803) in the Second Committee of the UN General Assembly on 12 November 1962, the Indian delegate said:

... it was obvious that the right of adequate compensation went hand in hand with it (state's right to nationalize foreign property). The matter was not only one of principle but also one of expediency because a country which nationalized foreign investments could hardly expect to attract them.147

India has stood by this assurance. Nationalization of foreign enterprise has not been very common. Even while Nations—


147 UN General Assembly, Seventeenth Session Official Records - Second Committee, p. 235.
lizing domestic enterprises in certain sectors of the economy, such as nationalization in 1969 of all major Indian banks, the corresponding foreign enterprises were left alone. Whenever foreign enterprises have been nationalized it has been only on payment of full compensation. The earliest example was that of the Imperial Bank of India which was nationalized in 1951. The British shareholders were compensated on the average price of the shares during the preceding year which amounted to Rs.1,705 per share of the face value of Rs. 500; and compensation was paid in pound sterling in cash. In the following year, the Kolar Gold Mines, a wholly-owned foreign enterprise, was taken over by the state and life insurance was nationalized. In the former case compensation was based on the market value of the company's shares. In the latter case the foreign insurers were compensated at 20 times the annual average of the surplus allocated to the shareholders in the two actuarial years preceding January 1955, or 10 times such average plus paid-up capital, whichever was more favourable. If there was no surplus allocated in the base period compensation was determined with reference to the value of assets minus liabilities. In the next decade when the banks were nationalised foreign banks, as already stated, were not taken over. The foreign oil companies were nationalized


149 Esso, Caltex and Burmah Shell.
during the seventies. The amounts of compensation were decided by mutual agreement between the Government of India and the companies concerned and these amounts were paid in pound sterling in the case of Burmah Shell and in US dollars in respect of Caltex and Esso.  

The Policy Statement of April 1949 contained a further assurance that there would be no restriction on the remittance of profits or repatriation of capital. This assurance has also been honoured all along and no restriction has, at any stage, been imposed either on the repatriation of capital together with capital appreciation or on the remittance of investment incomes like profits, dividends or interest. The amount of investment income remitted abroad went up from Rs. 428 million in 1965-66 to Rs. 1485 million in 1977-78; dividends going up from Rs. 194 to Rs. 680 million, technical fees from Rs. 70 million to Rs. 281 million and royalty from Rs. 29 million to Rs. 195 million. During the years 1956-57 to 1976-77, a sum of Rs. 14,942 million was remitted abroad as investment incomes under the following heads while earnings of over Rs. 4,000 million were reinvested during that period:

150Sec. 8 and Second Schedule of the Esso (Acquisition of Undertakings in India) Act, 1974.

Sec. 10 and the Schedule of the Caltex (Acquisition of Shares of Caltex Oil Refining (India) Ltd. and of Undertakings in India of Caltex (India) Ltd.) Act, 1977.

Sec. 8 and Second Schedule of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976.

Profit
Dividends
Interest
Technical fees
Royalty
Rs. 3,314 million
5,223
3,328
2,028
1,049
Rs. 14,942 million

In the next five years, 1977-78 to 1981-82, remittances on account of profits/dividends, technical fees and royalty alone amounted to Rs. 4494 million.

India has signed bilateral agreements with the United States of America and the Federal Republic of Germany. The agreement with the USA provides for the payment of 'adequate compensation' to US investors in the event of expropriation of their assets in India. The agreement with the Federal Republic of Germany stipulates 'fair and equitable compensation'. India is not a party to the IHRD Convention on the Settlement of Investment Disputes between States and Nationals of other States. It has, however, ratified the UN Convention on Recognition and Enforcement of Arbitral Awards, 1958 and enacted the Foreign Awards (Recognition and Enforcement) Act, 1961 (as amended in 1973) to give effect to that convention overriding the provisions of the Indian Arbitration Act, 1940.


PAKISTAN

The first Constitution of Pakistan\textsuperscript{155} contained the following right to property in the fundamental rights chapter:

(i) No person shall be deprived of his property save in accordance with law.

(ii) No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given.\textsuperscript{156}

The formulation was similar to that contained in Article 31 of the Constitution of India.

The 1956 Constitution was abrogated in 1958. The industrial policy announced in November 1954 had, however, promised "if any undertaking is nationalized, just and equitable compensation would be paid and would be freely remittable to the country of residence." The Industrial Policy Resolution of 1959 reiterated the promise.

\textsuperscript{155}Constitution of the Islamic Republic of Pakistan, 29 February 1956.

\textsuperscript{156}Article 15.
The Peoples' Party Government that came into power in 1971 with a commitment to giving a socialist orientation to economic policies undertook a programme of nationalization of industries under the Economic Reforms Order, 1972. Even then the Economic Reforms (Amendment) Act, 1974 contained an express protection of agreements involving foreign capital in the event of change in management or nationalization of the Pakistani share of capital. The regulations framed under that Act promised compensation at market value payable in cash or in negotiable 15-year government bonds with interest at 1 per cent above the bank rate.\textsuperscript{157} Except for the nationalization of life insurance\textsuperscript{158} in 1972, the nationalization was not aimed at foreign investors. Even during the bank nationalization of 1974 the foreign share holdings and foreign-owned companies were not taken over. The 1976 budget announced a new compensation formula based on the higher of the market value or the break-up value of shares of the company taken over and payable in 15-year government bonds.

\textsuperscript{157} UN Centre on Transnational Corporations, National Legislations and Regulations Relating to Trans-Corporations, (New York, 1978), p. 126.

\textsuperscript{158} Nationalised companies were given the option of recovering their paid-up capital or receiving capitalised value of their average annual earnings based on the operations for six years before 1969.
In 1976 the Foreign Private Investment (Promotion and Protection) Ordinance also was issued which laid down that there would be no nationalization except by due process of law which provided for adequate compensation to be settled in the currency of the country of origin and specified the principles on and the manner in which compensation was to be determined and given. The Ordinance also guaranteed repatriation of capital (original, reinvested or appreciated) and earnings, non-discriminatory treatment in the application of laws, rules and regulations relating to imports and exports and national treatment in the matter of taxation. The Protection of Rights in Industrial Property Ordinance issued in 1979 affords a general assurance that no industrial property would be compulsorily acquired without authority of law which provides for adequate compensation being given within a reasonable time. The adequacy or otherwise of the compensation can be challenged in a court of law.

Repatriation of capital and earnings has always been assured. The Industrial Policy Statement of 1948, the amended policy of 1954, the Industrial Policy Resolution of 1959, all

\[159 \text{Sec. 5 of the Ordinance.}\]

\[160 \text{Sec. 6, 8, 9 ibid.}\]
assured repatriation of capital as well as earnings. The Foreign Private Investment (Promotion and Protection) Ordinance, 1976, guarantees repatriation of original and reinvested capital as well as capital appreciation. Pakistan is a signatory to the Convention on the Settlement of Investment Disputes Between Countries and Nationals of Other Countries. Pakistan has also signed Investment Protection Agreements with the Federal Republic of Germany, the United States of America and Sweden. These agreements provide for non-discriminatory treatment, prompt, adequate and effective compensation in the event of expropriation, freedom of remittance of capital and earnings, and arbitration procedures.

SRI LANKA

There are no legislative provisions in Sri Lanka for any guarantees of compensation on nationalization. 161

In the earlier phase of nationalization during the late fifties, the Government did not take over foreign owned estates and banks. Later, however, when exploration, refining and distribution of oil were nationalized, the Ceylon Petroleum Corporation set up under the Ceylon Petroleum Corporation Act of 1961, took over 25 per cent of the assets of Shell, Caltex and ESSO. Compensation offered in local bonds was not acceptable to these companies or to the United States Government. The problem was not sorted out till 1965. In 1972, the Government of Sri Lanka issued a White-paper giving a general assurance of 'full and prompt compensation' in the event of nationalization of any foreign enterprise.

The Government that came to power in 1977 introduced a very liberal policy. There are no restrictions on transfer of shares or repatriation of capital and earnings. The new

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163 Ibid., pp. 45, 53.
164 UN, No. 123, p. 66.
Constitution promulgated on 7 September, 1978 includes, in Article 157, a special provision giving overriding effect over national laws to investment protection agreements:

Where Parliament by resolution passed by not less than two-thirds of the whole number of members of Parliament (including those not present) voting in its favour, approves as being essential for the development of the economy, any Treaty or Agreement between the Government of Sri Lanka and the Government of any foreign State for the promotion and protection of the investments in Sri Lanka of such foreign State, its nationals or of corporations, companies and other associations incorporated or constituted under its laws, such Treaty or Agreement shall have the force of law in Sri Lanka, and otherwise than in the interests of national security no written law shall be enacted or made and no written executive or administrative action shall be taken, in contravention of the provisions of such Treaty or Agreement.

Sri Lanka has entered into Investment Protection Agreements with the United States of America, the Federal Republic of Germany, the United Kingdom, Hong Kong, Republic of Korea, Singapore, France, Romania, Japan, Switzerland, Netherlands, Sweden and Malaysia. She is also negotiating such agreements with other
countries. These agreements are all controlled by the constitutional guarantee already quoted. The agreements provide for non-discriminatory treatment, prompt, adequate and effective compensation in the event of expropriation, freedom of repatriation of capital earnings and recourse to the World Bank's International Centre for the Settlement of Investment Disputes between States and Nationals of other States in the event of investment disputes. The agreements are usually for ten-year periods with provision for automatic extension unless terminated by either party. On termination of agreement the protection would continue for ten years in respect of investments that were covered by the agreement. Sri Lanka is a signatory to the Convention on the Settlement of Investment Disputes.166

The Constitution of Bangladesh framed in 1972 did not provide for any fundamental right in private property. The Constitution provided for three types of property, state ownership, co-operative ownership and, 'private ownership, that is, ownership by individuals within such limits as may be prescribed by law'. According to Nurul Islam, the phraseology was wide enough to set the limits by law at zero so that legally and logically the provision was consistent with total abolition of private property.\(^{167}\)

The industrial policy statement of 1972, however, guaranteed that no nationalization would take place within a period of 10 years and that fair and equitable compensation would be paid in the event of nationalization. The statement also guaranteed freedom of repatriation of capital as well as earnings. The revised industrial policy of 1974 extended the moratorium on nationalization from ten to fifteen years. After the change-over of 1975, to remove any misgivings, the provision regarding moratorium on nationalization was abolished altogether; it was reiterated instead that in the event of any nationalization fair and equitable compensation would be paid.\(^ {168}\)

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\(^{168}\) Ibid, pp. 222-249.
and Protection) Act, 1980, holds out the following guarantees:

a. Terms of sanction, permission or licence of an undertaking having foreign private investment shall not be unilaterally changed to its disadvantage.

b. National treatment, viz. treatment at par with investments of citizens of Bangladesh will be accorded in the application of relevant rules and regulations.

c. There will be no discrimination with regard to indemnification, compensation, restitution or other settlement in the event of loss owing to civil commotion, insurrection or riot.

d. Foreign capital shall not be expropriated or nationalized except for a public purpose against adequate compensation which shall be paid expeditiously and which shall be freely transferable.

e. Repatriation of capital (including capital appreciation and earnings) is guaranteed, except in circumstances of exceptional financial and economic difficulties.

f. The appointment of foreign nationals would be allowed where necessary and they would be permitted to remit upto 50 per cent of their earnings abroad.
g. Payment of royalties and technical fees would be allowed and these would be freely remittable. 169

In practice there has been no major nationalization of foreign enterprise in Bangladesh. At the time of bank nationalization in 1972, foreign banking companies were specifically excluded. 170 Only one important foreign investment, a jute manufacturing unit, was affected by the Nationalization Order of 1972. The owners were fully compensated. 171

169 Sec. 4-8 of the Act.

170 Emajuddin Ahmed, Bureaucratic Elites - Bangladesh and Pakistan (Dhaka, 1980), p. 183

171 M. Matiul Islam, "Foreign Private Investment - Bangladesh Experience" - Paper presented in the Round Table on Information of the UN Centre on Transnational Corporations, p. 4.
CONCLUSIONS

The above analysis of the position in international law vis-a-vis the pronounced policies and state practices of the countries under discussion brings out some very interesting points. Firstly, as to the norms of international law, it seems to be primarily under the UN system that the developed and the developing countries have taken up rather rigid postures on the question of compensation in the event of expropriation or nationalization of alien property. The state practices, the agreements and treaties signed among the Western countries as well as the writings of jurists bring out clearly that there was, at no point of time, a universal acceptance for the principle of 'prompt, effective and adequate compensation'. This was all along one of the views just as there were others like 'just compensation', 'adequate compensation', or even 'no compensation'. In the post-war period the capital exporting countries have not merely put forth this to be their view but have rather doggedly insisted on this being an accepted principle of international law. The developing countries have also tended to assume equally unrealistic positions. It must be conceded that general expropriations of the type involved in French or
Russian revolutions are a thing apart and cases of individual nationalization have to be distinguished. It may also be agreed that in such cases of individual nationalization the requirement of compensation has been generally accepted. Any formulation, therefore, which implies that permanent sovereignty over natural resources includes a total negation of compensation may be difficult to sustain. There were, no doubt, lots of unequal agreements left in the developing world as relics of the colonial past. After the passage of three decades and more, however, such agreements are not that pervasive and the developing countries could take a more pragmatic view – a view which could, in fact, accord with their own pronounced policies and state practices as indicated in their actual treatment of alien property in their jurisdictions. It must be appreciated that the introduction of private foreign capital is never a matter of charity or philanthropy; it is strictly a business proposition, the foreign capital coming in search of abundant natural resources, plenty of cheap labour, and large untapped markets; and the host country looking for capital as well as technological and managerial skills. Viewed in this light of the common interests involved, the only general principle that can reasonably be advanced is that the foreign investor should not be discriminated against and that he should get as good a
treatment as the nationals of the host country themselves. In other words, expropriation of foreign capital or enterprise should be accompanied with compensation which should not be less favourable than that payable to similarly placed national capital or enterprise. This could be called 'non-discriminatory compensation'. It must, however, be added that the argument about the foreign investor being treated at par with the national investor even in the matter of transferability of compensation would be hard to find acceptance. In the matter of transferability the national and the foreign investors are not similarly situated. Unlike the national investor, to a foreign investor, compensation that cannot be transferred has much less value. In situations of serious balance of payments problems the transferability may be postponed for a reasonable length of time subject to the payment of at least nominal interest but the basic principle of transferability should not be questioned. The full formulation that can, therefore, be reasonably put forth is that in the event of nationalization of foreign enterprise compensation should be "non-discriminatory and transferable."

The second point that comes out is that the countries of South Asia who are all votaries of the principle of permanent
sovereignty in the United Nations have, in practice, gone along with the developed countries' view not only in their pronounced policies relating to safety and protection of foreign capital but also in their state practice as indicated by the treatment accorded by them to the foreign enterprises over the last three decades or more. If anything, they have discriminated in favour of, and not against, foreign capital. There are clear examples in all these countries of national enterprises in certain sectors of economy being nationalised, while at the same time leaving foreign enterprises untouched. Nor has any of them, at any time, placed any unreasonable restriction on the repatriation of capital or earnings even in situations where the outflow of foreign exchange on account of investment earnings has been criticized as being much too excessive. In the matter of compensation too these countries have, in all cases of nationalization of foreign enterprise, of which there have not been too many, provided for compensation which is not only mutually acceptable in terms of its amount but also freely transferable to the country of the exporter. Yet the adverse impression about the safety of capital in these countries seems to persist as one of the reasons for the very meagre flow of private foreign capital into these countries. With regard to India, for example, the 1983 OECD Survey admits candidly, "...
the nationalization of foreign enterprise has apparently affected the overall stock of foreign investment in the country less than is often claimed by the investment community."\textsuperscript{172}

The official and trade agencies in these countries dealing with the promotion of foreign capital should be concerned about this communication gap.

The capital exporting countries and the private entrepreneurs in those countries also seem to continue to suffer from some sort of a mental block in relation to these countries. Soon after independence all these countries embarked on socioeconomic policies of a welfare state. The words, 'socialist' or 'socialistic pattern' used in policy statements in these countries seem to have stuck more deeply in the western psyche than the real physical happenings in these countries over the last three decades and more. Since, as already pointed out, capital export is not a matter of charity but a question of mutual interest the removal of these continuing mis-understandings

\textsuperscript{172}OECD, n. 166 pp. 21-22.
in relation to these countries should also be a matter of concern to the regional and international institutions, as well as to the concerned agencies in the capital exporting countries themselves.

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