CHAPTER III
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THE CONCEPT OF EXPROPRIATION

As already observed, framework of property relations constitutes an important segment of a country's social, economic and political life. It reflects the national aspirations of a country and affects trade and commerce relations with fellow countries. It is, therefore, natural that a State, in its sovereign power and as an entity responsible for the welfare of its citizens, should control these property relations. According to political scientists, all the economic institutions of a society are determined or defined by law and are subject to the sovereign authority of the State. Private property is one of these institutions. Being the creation of law, private property can be regulated, diminished or even destroyed by the State. State's power of eminent domain is far-reaching.

Nature of State's Right to Expropriate

The right of property exists by the will and at the discretion of the legislature. The legislature has the powers, almost like an autocrat, to tax,

2. G. Schwarzenberger, "Protection of British Property Abroad", *Current Legal Problems* (London, 1952), vol. 5, p. 308. Cf. Secretary Hull's statement: "My Government has frequently asserted the right of all countries freely to determine their own social, agrarian and industrial problems. This right includes the sovereign right of any government to expropriate private property within its borders in furtherance of public purpose". Text in *American Journal of International Law* (Supp.), vol. 32, p. 192.

It is not the label used for its exercise but the solid backing of power and state machinery that makes this right almost unchallengeable. Thus "under the flag of 'police power', 'eminent domain', 'public interest', or other devices, every modern state holds a reserve power of expropriation that enables it to discharge its growing responsibilities". This right continues to be recognized in the modern State practice and by various international organizations. The United Nations General Assembly has repeatedly recognised this right in various resolutions, the latest resolution bearing on the subject being Resolution 3171 (XXVIII), passed in 1973. Article 2 of Declaration on the Establishment of a New International Economic


Order, and Charter of Economic Rights and Duties of States, adopted by the General Assembly in 1974, also reiterated this right.

Wortley warns that the state's right to expropriate private property does not mean that it is owner thereof. The warning is against excessive use of sovereign power and its manifestations. He observes:

In its extreme form, the notion of eminent domain, whereby a State may seize any property for any public purposes on any terms, under its own law, confuses sovereignty with ownership and tends to see the sovereign not as an institution for the protection of its subjects' rights... but as the real owner of those rights, which, for such reasons as it thinks fit, it may concede or withdraw at will by virtue of its sovereignty. 6

True, one should not confuse sovereignty with 'ownership', but one cannot also overlook the potentiality of a sovereign itself becoming owner of

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privately-owned property. The sovereign might become the owner of the private property after duly expropriating it for purposes of the State. Exercise of its sovereign rights by the state may result in 'taking' of private property or any other kind of regulation thereof. The 'taking' may be direct or indirect.

Taking

'Taking' is a neutral expression and can be used to denote the exercise by the state of its

7. G. White, n. 5, p. 4. Christie has used 'taking' for expropriation interchangeably. Infra, n. 10, pp. 309, 337. Carleton has used 'nationalisation' as a general term. According to him, "Nationalisation may be said to include measures for the transfer to, or control by, the State, in the exercise of a public purpose, of a defined category of property. Whether any such taking is confiscatory or against partial or full compensation seems irrelevant as a definition of the term is concerned, though highly relevant as to the legal issues involved". K.C. Carleton, "Concession Agreements And Nationalization", American Journal of International Law, vol. 52 (1958), p. 272 (emphasis added). Article 10 of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) uses the expression "Taking and Deprivation of Use or Enjoyment of Property". In the United States law, a taking normally involves exercise of 'eminent domain' and non-taking involves exercise of police power. Seymour J. Rubin, Private Foreign Investment: Legal and Economic Realities (Baltimore, 1956), p. 33, P.N.L. Cf., however, J.F. Williams, "International Law and the Property of Aliens", British Yearbook of International Law (London), vol. 9 (1928), p. 25; R.D. Kellorigh, "Nationalisation without compensation and the transfer of property", Nederlands Tijdschrift Voor International Recht (Leiden), vol. 6 (1959), p. 141. See generally, Nichols, Eminent Domain (1950).
sovereign power to interfere with the private property, irrespective of the manner or form of such taking. Thus, 'taking' may include nationalization, expropriation, requisition or confiscation. These are only some of the modes of acquiring private property, whether national or alien. State interference with alien private property is now taking various forms. It is linked to the overall problem of the development of modern international law in the face of recent transformations in international life. The reality of growing inequalities among nations force them to devise new methods of dealing with private property rights. Stringent conditions of classical expropriation seem to have motivated the new States to embark on indirect interference


9 Bankruptcy proceedings against the Barcelona Traction, Light and Power Company, Limited, by Spain (majority of shareholders in the Company were alleged to be Belgian nationals) were described by Judge Fitzmaurice as having "had the character of a disguised expropriation of the undertaking" Ibid., p. 106.
with alien property. While simultaneously endeavouring to get the traditional international law modified to remove its overwhelming Western bias, they are equally desirous of avoiding the impression of being law-breakers.

The crux of the whole problem in considering 'taking', according to one writer, is to devise a test for distinguishing permissible restrictions on the use of private property from restrictions which amount to expropriation. For, as already observed, there are countless subtle ways in which a country, which refrains from outright seizure and which vigorously disavows any intention to expropriate, may nonetheless very seriously and perhaps irremediably interfere with the use of property. Harvard Draft of 1961 on responsibility of states gives a very far-reaching definition of 'taking'. It declares "wrongful" not only 'taking of property' but also 'taking of the use of property' even for a limited duration. Draft Article 10(3) reads as follows:


11 Ibid., p.318. Christie states that expropriation can be an unintended result of a State's action.
3. (a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A "taking of the use of property" includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

According to the above formulation, outright 'taking' and 'unreasonable interference' would involve identical responsibility for the taking State. The use of the expression "unreasonable" might, however, provide a safety valve to a state which has not indulged in outright expropriation or unreasonable interference but has justifiably interfered with alien property or rights. Thus reasonable interference with property may not be covered by the expression.


13 In the context of Article 3(b) of the Harvard Draft Convention we may refer to the Burmese Notification No. 277 of December 1973 which envisaged that legal titles to the buildings owned by foreigners which had been taken over years back would be returned. The Notification did not make any provision for paying compensation to the owners for the period during which the owners were dispossessed of the use of those buildings. To add to this, the Burmese Government did not guarantee vacant possession of these buildings thus burdening the owners with the task of having illegal occupants removed under local laws.
'taking'. If reasonable interference is not saved, then every interference, whether reasonable or unreasonable, would amount to a 'taking'.

According to some commentators, "wealth deprivation" is a more neutral expression than 'taking'. The former is preferred by Weston "principally to avoid the simultaneous and, hence, ambiguous reference to both facts and legal consequences which so often characterizes the more popular 'expropriation', 'confiscation', 'condemnation', 'taking', 'forfeiture', etc.

It is therefore conceived as a neutral expression which describes the public or publicly sanctioned compulsory imposition of a wealth loss (or blocking of a wealth gain), by whatever means, with whatever intensity and whatever claimed purpose, which, in the absence of some further act on the part of the depriving party, would involve the denial of a quid pro quo to the party who sustains the deprivation".

Takings managerial control of a foreign company or refusal to grant permission to transfer profits abroad for a certain period are also considered as constituting 'taking' by the editors of Netherlands International Law Review. See Christie, n.10, p.331. Temporary restriction on the use of property provided period of interference is not unreasonable, may be valid under the Harvard Draft. See American Journal of International Law, vol.55(1961), p.559.

Burns H. Weston, "International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry - Part I", Virginia Law Review (Charlottesville), vol.54(1968), p.1071, f.n.10. Weston further explains that the component 'wealth' is preferable over the more popular 'property' because it refers to all the relevant values of goods, services and income without sharing the latter's common emphasis upon physical attributes or the Civil Law's stress on 'ownership'.

property is confiscated there is complete absence of quid pro quo. But in case of expropriation, some compensation may have been paid. "Wealth deprivation" or "taking" seem to be one-sided expressions when accompanied by full or partial compensation. Perhaps a more neutral term might be "nationalization". The purpose of any 'taking' is not just to deprive an alien of his property (a negative approach), but to put the alien property at the disposal of the state concerned. This is truly the purport of nationalization of the property. Using the term "nationalization" of the property. Using the term "nationalization" as a neutral expression should, therefore, mean that it may be with or without compensation.

The existence of public purpose would, however, be essential in such takings.

Expropriation

Expropriation is not a new phenomenon. In

16 There is at least one writer who supports the view that "nationalization unlike expropriation, is in itself a neutral term; as often as not it may be accompanied by compensation." P. Adriaanse, Confiscation in Private International Law (The Hague, 1956), p.7. Carlston has similar approach (see n.7, p.272). Gillian White would term nationalization without compensation as confiscatory nationalization (n.7, p.41). In the present study, the terms "taking", "nationalization" and "expropriation" have been used interchangeably.
fact it is an old and traditional mode of acquiring

17 the property of foreigners. The States and writers
have often talked of rules relating to expropriation
and confiscation. Commercial and other treaties also
refer to expropriation. The term nationalization is
not found in them. Precisely when the term expro-
priation began to be used in international relations
is not clear. Mann points out that since about thirteenth
century it had been accepted that expropriation pre-
supposed the existence of a just cause. Under the
influence of Beldus, pretium (value) was considered
a further condition. The United States has been
the strongest advocate of classical compensation
formula. Its position on expropriation originated

(Copenhagen, 1957), p.15, also considers "nationali-
ization" as a special category of acquisition of
property as distinguished from "traditional" forms.

18 White, n.8, p.41. See also R.R. Wilson, "Property-
protection provisions in United States Commercial
Treaties", *American Journal of International Law*,
vol. 45 (1951), p.96.

19 Mann, n.3,p.201 (Grotius's view is reflected at
pp.252-203). Cf. F.G. Dawson and B.H. Weston,
"Prompt, Adequate and Effective: A Universal
standard of Compensation", *Fordham Law Review*
in the agrarian and oil expropriations in Mexico. To some expropriation is a kind of nationalization. To others nationalization is a special kind of expropriation. This looks like a "hen first or egg first" problem. The third view regards them as separate concepts.

According to an old definition of expropriation by Wagner:

The right of expropriation is the right of the state to seize a specific object of property without the consent of the owner in order to employ it in a manner

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21 For example, S. Friedman, Expropriation in International Law (London, 1953), pp. 5,12; Wortley, n.6, p.157; Kollewijn, n.7, p.141. Bin Cheng also uses "expropriation" as a general term (n.6, pp.268-269). Fatouros terms nationalizations as "modern expropriations" (n. 4, pp.700-701).

demanded by the public interest; or to limit the property right of the proprietor in order to place a servitude (easement) upon it; or to take the use of it in the public interest. 23

He further thinks that the proper economic and socio-political conception of expropriation regards it as the legal institution by means of which, when free contract fails, changes are compulsorily brought about. To Professor von Ihering

Expropriation contains the solution of the task of reconciling the interests of society with those of the individual. It makes property an institution fit to survive. Without expropriation property would become a curse of society. 24

Wagner associates himself with this idea when he says that expropriation is a "postulate of the social co-existence of individuals". Ely thinks


24 Quoted in Ely, Ibid., p. 496.

25 Ibid., p. 497.
that expropriation is part and parcel of the evolution of law and one reason why it is not better treated in the law books is because the idea of the evolution of law has so slowly made its way among legal authorities that many of them have not yet fully grasped it.

Conceptually, expropriation is taking of alien property for public purpose or purposes of state. The manner of taking is just a procedural question. Payment of compensation as a condition for expropriation has come about only by evolution of the practice among certain States. Recognition or acceptance of compensation as a necessary ingredient of expropriation is likely to distort the functional character of expropriation. However, the States affected by expropriation have gradually succeeded in obtaining certain procedural and other safeguards which have become embedded in the practice of most of the European States and are

26 Ibid., p. 496.

27 Katzarov thus observes: "At the outset the progress of the socialisation of law was limited to an extension of the concept of 'public interest', which justified the restriction or expropriation of property". (n.22, p. 116).
treated as part of international law. As we shall see later in chapter V, there is considerable disagreement among states as to the nature of limitations on a state's right to expropriate alien property. States consider national interests as paramount while expropriating alien property. Both in municipal and international law there seems to be difference of approach so far as the basic purpose of the expropriation is concerned. Norms of international law are, however, sometimes framed in a manner removed of their realistic bent in sharp contrast to municipal law. Unlike the latter, "international law has no economic content because inter-State life, unlike national life, has no economic basis. There does not as yet exist a common body of property whose division and distribution in one form or another could be guaranteed by international law".

28 Friedman, n. 21, p. 117.
In contrast to many writers who describe "expropriation" as a concept, Friedman defines it as "the procedure by which a State in time of peace and for reasons of public utility appropriates a private property right, with or without compensation, so as to place it at the disposal of its public services, or of the public generally". Public purpose, direct or indirect, as the basis of expropriation is common to all kinds of takings, such as "expropriation", "nationalization", "regulation", and even "confiscation". On this there seems to be little disagreement. However, various modes of 'taking' differ from each other in certain important respects which could be usefully considered to further clarify the concept of "expropriation".

29 See Gillian White's description of "nationalization" as a concept in chapter 3 of her book; and A.A. Fatouroua, *Government Guarantees to Foreign Investors* (New York, 1962), p. 61, where he refers to it as "Conception of expropriation". Also see, Poiguel, n. 17, pp. 15-16.

30 Friedman, n. 21, p. 3. He repeats this expression at p. 136: "Expropriation is a procedure regulated by law" and at p. 145: "Expropriation ... is a legal procedure".
Expropriation and Nationalization

It is generally acknowledged that it was Soviet Russia which for the first time used the term "nationalization" in its municipal law in 1917. This is not to say that the idea of nationalization was non-existent before 1917. Katzarov has given pre-legal foundations of nationalization. He has shown that social and political foundations of this idea existed even prior to 1917.

Friedman, who considers nationalization as a special kind of expropriation, thinks that expropriation is of two kinds: (i) general, and (ii) individual. In individual expropriation, both the person and property affected by the measure of dispossession are expressly mentioned. But in the case of general expropriation (i.e. nationalization), the property alone is referred to. "General expropriation may either be connected with changes in the economic or social structure in a particular

31 See Katzarov, n. 22, pp. 1-19.
country, or may be aimed at the exclusion of private capital from certain sectors of the national economy. Gillian White defines nationalization thus:

Nationalisation is the term used to describe the process whereby property, and rights and interests in property are transferred from private to public ownership ... If this process is not accompanied by the granting of compensation to the former owner, the term confiscation is employed, but it would be more accurate to speak of confiscatory nationalisation .... 33

In Friedman's definition element of compensation is missing. Carlston defines nationalization as follows:

Nationalization may be said to include measures for the transfer to, or control by, the state, in the exercise of a public purpose, of a defined category of property. Whether any such taking is confiscatory or against partial or full compensation seems irrelevant insofar

32 Friedman, n. 21, p. 6. The United States does not recognize the distinction between general expropriation and individual expropriation. See Rubin, n. 7, p. 15.

33 White, n. 5, p. 41.
as a definition of the term is concerned, though highly relevant as to the legal issues involved. 34

Here, we find an additional element of "public purpose" absent in the definitions of White and Friedman. According to Katzarov, nationalisation is a constitutional institution distinct from expropriation. He adds that "the compensation due on nationalisation is not the same as that due on ordinary expropriation ... the property subject to nationalisation is recognised to have a social function which is not recognised in the case of property subject to expropriation". 35 It is this proposition that is of particular importance because distinction between nationalisation and expropriation is often made on the ground that the latter has a limited purpose whereas the former involves comprehensive social

34 Carleton, n. 7, p. 272. Fawcett refers nationalisation "to mean confiscation or expropriation of private property and its transfer to the state in the carrying out of national economic policy" (n. 20, p. 356).

35 Katzarov, n. 22, p. 133.

36 Ibid., p. 122. Foignel considers "nationalisation as a co-ordinate term alongside expropriation" (n. 17, p. 20).
The view has got strengthened after the large-scale post-War II nationalizations that fundamental changes in the political system or economic structure of a state justify interference on a large scale with private property and may justify partial compensation. Bin Cheng, though himself disagreeing with this view, admits that "when the circle of persons affected by a measure of expropriation is widespread, a latent feeling can be detected even in international decisions that fair compensation need not necessarily be full compensation". Katzarov feels that "the moral element in nationalisation is considerable, and goes beyond what might appear at first sight\(^\text{38}\).

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37 Cf. Compagnie du Katanga v. The Colony of the Belgian Congo, 1931, where Congo contended that "an expropriation is a special act through which the public authority appropriates specific property; but that a general act through which the legislature determines the scope and extent of property right has not such a character". J. Gillis Wetter and Stephen M. Sche bene, "Some Little-Known Cases on Concessions", British Yearbook of International Law, vol. 40 (1969), p. 189.

38 Bin Cheng, n. 6, p. 301.
merely from the possession of assets by the State and their utilisation in the common interest".

There are quite a few others who, (whether for moral reasons or otherwise), support the view that in the case of nationalisation, partial compensation would be justified.

Re opposes the distinction between two types of takings and says that "the law would indeed be strange if compensation is required in the taking of particular property but none need be made if an entire industry is expropriated by the State". This


41 Re quoted in Rubin, n. 7, p. 18.
view is, of course, in accord with the view held by
the United States itself. Similarly, Schwarzenberger
does not admit of any such distinction. He observes that

the illegality of such acts is not healed
by their connection with any alleged
structural change in the economy of the
country concerned, nor does any otherwise
legal expropriation become illegal because
it does not form part of a nationalisation
programme. 42

42 Georg Schwarzenberger, Foreign Investments and
International Law (London, 1969), p. 41. Else-
where he states: "It is difficult to see why
the mere scale of expropriation measures, as
compared with individual acts of expropriation,
or the rise of new ideologies should by them-
selves exempt such policies of nationalisation
from the operation of the governing rules of
international customary law" (p. 3); Similarly
Bin Cheng, n. 6, p. 269; McNair: "There is no
reason to suppose that the rules of law govern-
ing the payment of compensation for the national-
ization of property differs [sic] from those
which govern the payment of compensation due in
respect of deprivations of property generally".
"The Seizure of Property and Enterprises in
Indonesia" (Rotterdam), vol. 6 (1959), p. 251.
Nederlands Tijdschrift Voor Internationaal Recht
(Leiden), vol. 6 (1959), p. 251.
According to him, the so-called revolutionary-legal concepts cannot give rise to a "new" rule of international law on the subject and he cites the Soviet Union "as the crown witness to contradict any suggestion" to that effect. Professor Seidl-Hohenveldern has pointed out a contradiction by the Soviet Union of its own attitude when it denied to Austria the right to nationalize the Soviet-held oil fields in 1946. He, however, does not seem to be against making some "allowances for the paying capacity of the capital investment countries" where nationalization has been carried out. To that extent, he is prepared to deviate from the classical formula of "due, prompt and effective" compensation. He further says that it may not indicate readiness of the investing country to abandon the principle of full compensation, but merely that the country concerned would not insist on the prompt payment of compensation but would be prepared to accept instalment payments.  

43 Ibid., p. 9.  
46 Ibid, p. 550 (italics in the original).
Harvard Draft of 1961, referred to earlier, does not make any distinction between "expropriation" or "nationalization", but, like Professor Seidl-Hovenfeldern, departs from the traditional formula of "prompt" compensation. Despite the non-existence of any distinction between the two acts of taking, in the Harvard Draft the wording, "general programme of economic and social reform" found therein, is generally used with reference to cases of only nationalization. One reason for not

47 According to Article 10(4) of the Draft: "If property is taken by a state in furtherance of general programme of economic and social reform, the just compensation required by this Article may be paid over a reasonable period of years ..." For text, see American Journal of International Law, vol. 55 (1961), p. 559.

48 See, however, ibid., p. 560. Friedman distinguishes between "general" expropriation i.e. nationalization and "individual" expropriation observes that "The first covers measures carried out in connection with a modification of the economic or social structure ... whilst the second comprises measures whose purpose is more limited ... leaving the general social and economic structure intact" (n. 21, p. 12).
making any distinction might be that the basic character of both acts is the same, i.e., they are carried out in furtherance of a public purpose. That being so, it seems logical that the concession of payment "over a reasonable period" be available in both kinds of takings.

From a random survey of position of jurists on the question of distinction between "nationalization" and "expropriation", the following alternative ideas seem to emerge, viz.:

(i) That there is no distinction between the two; (e.g., Bin Cheng);

(ii) That they are two different concepts; (e.g. Katzarov);

(iii) That they are different concepts but with certain common features involving exercise of the state territorial sovereignty and

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49 Bin Cheng, n. 6, pp. 269-270.

50 Katzarov, n. 22, pp. 122, 133, 147. Also Guggenheim cited by Katzarov, p. 147.
the compulsory transfer of property rights from private to public ownership (e.g. White).

The first two schools of thought are quite unequivocal, one declining to admit any distinction to the effect that in the case of nationalization less than full compensation may be payable (e.g., Schwarzenberger, McNair, Re, Bin Cheng). The other school clearly favours less compensation in case of general programmes of social and economic reforms in the form of nationalizations (e.g., La Fradelle, Baede, Rubin, Katzarov, Nafoli, Dawson and Weston). Perhaps Oppenheim-Lauterpacht might be clubbed with the latter group. Says Oppenheim:

modification must be recognised in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases neither the principle of absolute respect for alien private property nor rigid equality with the

51 White, n. 5, p. 43.
dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation. 52

To some others, the distinction between the two concepts is merely one of form, the nature and extent of property and persons affected by the two measures, etc. There are still others who would accept less-than-full compensation formula irrespective of the distinction between the two concepts. Another category of writers considers payment of full compensation as an unnecessary condition for a valid expropriation of alien property unless agreed to by a treaty. There is no such requirement, according


53 The bases of distinction include motive, purpose, extent, subject-matter and form. See Foighel, n. 17, pp. 14-15. His own view is at p. 23. Fitzmaurice sees only factual and no legal distinction. Annuaire, vol. 44 (II), 1952, p. 255; Wortley thinks that "nationalization differs in its scope and extent rather than in its juridical nature from other types of expropriation" (n. 6, p. 36, 157).

54 Comprehensive study on this aspect will be found in Chapter V on "Conditions for Expropriation in Traditional International Law".
to this view, in the customary international law. The Charter of Economic Rights and Duties of States (Article 2), adopted by the General Assembly in 1974, does not seem to make any distinction between the two concepts since it speaks of "appropriate" compensation in both the cases.

Expropriation and Requisition

Requisition was originally developed in France to meet military needs but was later extended to satisfy civilian needs. However, generally it takes place as a war-time measure. Several classical writers put it only in that category. its peace-time application being manifested in the general power of a state to expropriate alien property. It is, therefore, said to be closely

55 For example, Friedman, n. 21, p. 204; John Fischer Williams, "International Law and the Property of Aliens", British Yearbook of International Law, vol. 9 (1923), p. 2; Cavaglieri cited by Wortley, n. 6, p. 35.

56 Article 14 of the Treaty of Commerce, Establishment and Navigation between the United Kingdom and Japan (signed at London on 14 November 1962), however, refers to requisition whether "civil or military".
allied to the classical type of expropriation. Wortley defines it as follows:

It is intra-territorial; it involves a compulsory seizure, but it is made by a state to enable a sudden emergency to be dealt with in the general interest, by the due seizure of property in the state's territory; it is followed by payment of a full and fair indemnity. 58

Although he considers "requisition" close to the classical type of expropriation, he points out the following distinction between the two:

It differs from classical expropriation in that payment is often made after the seizure, and it is the urgency of the State's need that has been adduced to explain what is often the ex post facto nature of the payment. 59

57 Wortley, n. 6, p. 29; Friedman, n. 21, pp. 146-147, 200-201, 208.

58 Ibid. (italics in the original).

59 Ibid. (italics in the original). Similarly, Adissene, n. 16, p. 22. Cf. Article 52 of the Hague Regulations (1907). Contra Katzarova: "Requisition ... is founded on the possibility ... of limiting or expropriating property in the public interest in return for the prior payment of fair compensation" (n. 22, pp. 146-147, emphasis added).
Fawcett does not seem to consider compulsory the payment of compensation and defines requisition as follows:

The State may also take possession of private property for the time being, without or with compensation for its use, and this may be called requisition; but the margin between requisition and expropriation is often a narrow one in practice ... 60

If *ex post facto* payment of compensation is the only point of distinction between "requisition" and classical "expropriation", as Wortley points out, then that distinction would appear to have obliterated. "Prompt" payment of compensation at the time of expropriation is respected more in definition than in actual State practice. Article 10(4) of Harvard Draft (1961) has already taken a pragmatic approach in this regard and does not consider prompt payment of entire compensation necessary. Another notable feature of "requisition" is that it is not intended to take over ownership of the property, but the latter is required by

60 Fawcett, n. 20, pp. 355-356 (emphasis added).
the State for temporary use. "Taking" under Article 10(3) of the Harvard Draft covers both "taking of property" and "taking of the use of property". The Harvard Draft does not distinguish various kinds of State interferences but uses "taking" to include "requisition" also. Taking of temporary use is equally covered by the Harvard Draft. Wortley, on the other hand, (like Fawcett) does not visualize a "requisition" taking place without any compensation. Would a requisition without compensation amount to "confiscation"? This is unlikely, as ownership is left intact and only temporary use for emergency purposes alone is contemplated in a "requisition".

Although requisition is undoubtedly close to "expropriation", it is doubtful if that is true in case of nationalization also. One of the chapters in Wortley's monograph on the subject discusses

61 Cf. Adriance, n. 16, p. 22, who does not give any definite answer to this problem.

62 Gillian White does not discuss relationship, if any, between requisition and nationalization.
"Nationalization with Adequate Compensation: Its Analogy with Expropriation and Requisition".

At one place he uses the term "requisition on a large scale". But relationship between "requisition" and "nationalization" remains obscure because the former does not involve any economic or political changes of structural magnitude. It would be difficult to assimilate the two concepts.

Expropriation or Confiscation?

According to traditional international law, expropriation of alien property without full compensation amounts to confiscation giving rise to "state responsibility". A classical statement on the subject is the one made by the United States' Secretary of State, Mr. Hull:

63 Wortley, n.6, pp. 36-37.
64 Ibid., p. 37
65 According to Katzarov: "It is ... less permissible to confuse nationalization with requisitioning which is an obligation of an individual towards the administration resulting in a restriction of his activities or the dispossession of movable property (generally food or consumer goods) justified in the public interest". (Note 22, p. 146).
The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. 66

Compensation in this statement is supposed to mean "due, prompt and effective" compensation, or full compensation. This formula does not accord with the viewpoint of many developing countries.

An expropriation under identical circumstances may be valid as far as these states are concerned but would be, in the eyes of traditionalist writers, confiscation. As one writer says:

As soon as a general measure of nationalization, in its application to an alien, entails the expropriation of an item of property belonging to him without adequate compensation, that nationalization is to that extent (as far as the alien is concerned) a confiscation forbidden by international law. 67

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66 Quoted in A. Drucker, "The Nationalisation of United Nations Property in Europe", Transactions of the Grotius Society (London), vol. 35 (1951), p. 108. See, however, Davis & Co. v. Mexican Eagle Co. (Court of Rotterdam), Digest and Reports of Public International Law Cases (1938-1940); H. Lauterpacht, ed., (London, 1942), pp. 25-26, where the Rotterdam Court enunciated a counter-principle and held that inasmuch as compensation was contemplated by Mexico, confiscation did not occur even though payment was never made.

67 Kollewijn, n. 7, p. 143.
Confiscation, according to the above thinking, is expropriation not only without any compensation, but without "adequate" compensation. What happens where there is a doubt as to the adequacy of compensation? Says Adriaanse:

Confiscation begins where compensation becomes uncertain. Confiscation may be regarded as an overstepping of the boundaries set for expropriation, as the collapse of its strongest foundations. Therefore expropriation without compensation is called confiscation, regardless of the fact whether or not the requirement of public utility is met.

This view seems to be shared by Professor Kollevijn of Holland who writes:

... the courts will be well advised in doubtful cases to assume that the measure in question is confiscation and not nationalisation. Nationalisation is a unilateral act of appropriation by the government. It is surely not too much to ask of governments that by their acts they should leave no doubts about the payment of the compensation.

68 Ibid., p. 145.
69 Adriaanse, n. 16, p. 6.
70 Kollevijn, n. 7, p. 145.
It would undoubtedly be desirable that the states clearly indicate their intention of making the payment of compensation as well as the time thereof. Nevertheless, it might be dangerous to treat every doubtful case as that of confiscation. Rubin rightly points out: "The point at which regulation (or for that matter expropriation of alien property) becomes confiscation is, under normal circumstances, a fuzzy one". Katzarov, a noted jurist from a socialist country, discards the test of compensation as the sole basis for determining the character of a taking. Explaining the difference between nationalization and confiscation, he states:

a) Nationalisation is in principle an impersonal measure. It is the realisation of the idea that a given asset or activity should be utilised or exercised in the general interest. In consequence, the qualities or conduct of the owner of the property at the moment of nationalisation are generally irrelevant.

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In recent decades, however, nationalisations have been effected in times of crises. In such cases, quite apart from the reasons which led to the nationalisation in question, circumstances demanded that, in view of the personality of the proprietor, nationalisation should be effected by way of "confiscation". 72

This, according to Katsarov, is fusion of two simultaneous acts which is "external, mechanical and fortuitous". Referring to "ideological reasons" for nationalization and "social function" of the property, he points out that

It is equally possible to conceive of a measure of nationalisation which gave rise to no compensation, or to partial compensation only, without it being thereby accurate to describe the act as confiscation. 74

While describing confiscation as a penal measure, Katsarov says that "if private property is taken without any compensation, or on partial

72 Katsarov, n. 22, pp. 148-149.
73 Ibid.
74 Ibid.
compensation, the designation of the act of taking must depend on the circumstances, the actual social background and the laws of the country; account should also be taken of other elements, such as the personal or impersonal character of the expropriation, the personality of the owner, and the reasons relied upon for the requisition. But it is unacceptable in principle to assimilate nationalisation to confiscation on the sole ground of the absence of compensation".

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75 Ibid., p. 150 (emphasis added). A typical example of legitimate confiscation might be taken from Latin American practice where agreements between States and aliens included a "calvo clause" whereby the alien waived diplomatic protection of his State. The penalty provided in Mexico's Land Law of 1925 for failure to abide by the agreement was forfeiture by the alien to the government of the property acquired in the company in question. See Charles W. Hackett, The Mexican Revolution and the United States 1910-1926 (Boston, 1926), p. 415. Secretary Kellogg described this provision as amounting to "substantial confiscation". Senate Document No. 96, 62nd Congress, 1st Sess., dealing with "Rights of American Citizens in Certain Oil Lands in Mexico", p. 5. On concept of "substantial confiscation" see also A.P. Fashiri, "Expropriation and International Law", British Yearbook of International Law, vol.6 (1925), p. 171. In 1937 Bolivia had annulled a concession to the Standard Oil Co. alleging fraud by the company with regard to surface taxes and based its action on article 18 of the contract of 1920 "to declare the forfeiture of the contract by administrative declaration, upon any defrauding of the fiscal interests...". See J. Kunz, "The Mexican Expropriations", Contemporary Law Pamphlets (New York, 1930), Serv.5, p. 47.
According to this view the validity of expropriation in international law depends not on absence of partial or total compensation but on other factors. Katzarov is not alone in expressing this view. F.V. Garcia-Amador, the former special Rapporteur of the International Law Commission on "State Responsibility", also observed as follows:

Perhaps of greatest importance, however, is the fact that, in the modern world at least, the real difference between expropriation and confiscation lies not so much in the presence or absence of compensation as in the motive or purpose of the measure taken by the State. In view of the fact that expropriation without compensation may be lawful (even from the international point of view), the term "confiscation" should be applied only to measures which are punitive in character or taken on political grounds. 76

The act of taking of alien property might have been meant to show displeasure against foreigner's

home State for some political reasons or otherwise. Katzarov in fact seems to identify such an act of a state as confiscation which, he thinks, is a fusion of two acts viz. nationalization and confiscation.

From the above discussion, it would appear that designation of a particular 'taking' as confiscation should depend on its punitive character rather than on lack of compensation or inadequacy thereof.

**Indirect Expropriation**

Whether any one or a combination of governmental acts, at once or over time, constitute expropriation is a question which defies a precise answer.

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77 For example, Cuban Law No. 851 of 6 July 1960 provided for expropriation of American-owned property, the reason being "constant aggression for political purposes against the fundamental interests of the Cuban economy". See Whiteman, n. 5, p. 1169. Indonesian seizure of Western assets etc. was also in protest against their Malaysia policy. Morocco's nationalization of Spanish-owned mines according to La Monde was politically motivated as it came in the wake of territorial dispute between Madrid and Rabat (see *Africa Research Bulletin* (City of Exeter, England) March 15-April 15, 1967, p. 718). Algerian nationalizations of the United States' oil companies on 16 June 1970 are said to have been prompted by pro-Israeli attitude of the United States in the Arab-Israeli War (see Weston, n. 15, p. 1104, f.n. 114). These examples can be multiplied.
The various measures, such as forced loans, change in foreign exchange laws, devaluation or revaluation of currency (e.g., phased revaluations of Indonesia in 1965), foreclosure of profits or the amount of compensation excessive or arbitrary taxation, imposition of administrators, refusal of essential export or import licences or of access to raw materials etc. have at various times been held to constitute expropriation or confiscation of alien property. These measures do not indicate intention of a State to expropriate alien property and in many cases are said to be acts in the nature of "protective custody", "supervision", or "conservation". The real difficulty in regard to these measures, which are described as amounting to "surreptitious", "de facto", "disguised", "constructive" or "creeping", "expropriation", is to establish that loss to the alien was due to proximate cause of a State's action. Moreover, State's own description of its action may not always be a reliable guide to the real character of the measures in question.

The problem of creeping expropriation or de facto expropriation is not new. About fifty years back, Fischer Williams remarked that civilized states of the world had devised "elegant procedures" of taking alien property than directly "confiscating" it. He cited German example to say that a state was in a position to take action which in its practical and commercial effects was equivalent to a destruction of property owned by foreigners without compensation. A United States' note to Mexico in 1917 stated that the Government of the United States could not acquiesce in any direct or indirect confiscation of foreign-owned properties in Mexico. A note of April 2, 1918 also reiterated that the United States could not "acquiesce in any procedure ostensibly or nominally in the form of taxes or the exercise of eminent domain, but really resulting

79 Fischer Williams, n. 55, p. 12.

in confiscation of private property ...”. In 1937 the Bolivian government did not expropriate but declared the properties of Standard Oil Co. forfeited for fraud and non-compliance with the contract. Rumania and her sister States seized foreign enterprises and imposed a wide range of restrictions, each of them difficult to contest in principle, but resulting in effective loss of control by their formal owners. A labour law provided for participation of workers' committees in the management. Price controls could be enacted which would put the prices lower than the prices paid for raw materials and a ceiling on prices charged for the goods sold. In view of "national necessity" allocation controls were imposed, thus controlling purchases and sales. "Not all of these devices were used at the same time, but only because one or another, or the combination of some of them, was sufficient to achieve the clear purpose --

81 Quoted in McCarthy, ibid., p. 150 (emphasis added).

removal of control from the foreign owner without open and declared confiscation”.

Schwarzenberger has dealt with numerous measures affecting British interests, taken in recent years by Argentina, Burma, Ceylon, India, Indonesia, Iraq, El Salvador, Somalia, Tanzania, United Arab Republic, Venezuela and Zambia as cases of “creeping nationalization”. For example, taxation imposed by Burma on some of the British companies was as high as 99 per cent on profits exceeding £22,500. The Financial Secretary to the Treasury was of the view that it amounted to de facto confiscation. Burmese measures affected the property of Indians also. For example, higher currency notes were demonetized

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84 See G. Schwarzenberger, Foreign Investments and International Law (London, 1969), pp. 91-102. The term “creeping expropriation” can also be found in the Hickenlooper Amendment, Congressional Record (Washington), 21, 774 (1963), vol.109.

on April 18, 1962, and the measure was directed against the "foreigners" who were alleged to have withdrawn their money from the nationalized banks to indulge in speculative trading. Thus, some five hundred million kyats were collected. A rope factory owned by an Indian had not been taken over but production was stopped and still the owners were forced under law to pay salary to the workers, three-fourths of whom were Burmese. Repatriation of funds to home states was prohibited and people were asked to deposit their assets in the People's Bank of Burma. Dispossessed Indians affected by "nationalizations", who were coming back to India and numbered 117, were given a draft of rupees 75 (i.e., some $7) through the People's Bank of Burma. An Indian leaving Burma for good could take out of Burma roughly two gold sovereigns and kyats 50 in cash, an amount hardly sufficient for their rehabilitation. No agreement as to payment of

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86 Even small street stalls on which Indians and other Asians earned their livelihood were taken over and Burmese alone could get the licences for the same. So was the case with taxis, motor launches, bars etc. State agencies like the "People's Bank" and the "People's Stores Corporation" assumed control of almost everything, repatriates were given most inhuman treatment (falling short of minimum standards of international law) and their pillows and soaps were snatched by the airport authorities.
compensation has yet been reached but the Burmese Government issued a notification on 6 December 1973 making provision for payment of compensation in respect of certain assets of the repatriates.

Indonesian take over started with the Dutch firms' "supervision". It was feared that the government might declare a "temporary trusteeship" over the foreign property. "Supervision" or "protective supervision" of the firms was sometimes directly under ministries concerned and "supervisory commissions", "supervisory teams", etc. were appointed. Sometimes, the "supervision" was by labour unions such as KERI (Federation of Trade Unions). At times the Indonesian Government disclaimed responsibility for the seizure of firms by the labour unions and promised to order their handing back to their owners. Howard Jones,

The Guardian (London), 26 October 1963

In cases where "take-over" or "supervision" was by the labour unions, the latter declared their intention to hand over the control to the Indonesian government.

Overseas Foreign News Service no. 19605 (19 September 1963).
the United Kingdom Ambassador to Indonesia, was informed of this intended move by the Indonesian Government. The then British Foreign Secretary, Lord Home, was also told that Indonesia had no intention of nationalizing the British firms. In fact, on the pattern of Dutch seizures of 1957, a two-phased programme was followed. At first the firms were taken over by labour unions and then by the government itself under the pretext of protecting the properties. A diplomatic correspondent put the Indonesian practice as follows:

In practice, the unions act under government direction and then allow themselves to be dispossessed of their booty. In this way the Indonesian Government has been able to carry out its operation of expropriating British firms, while giving an outward appearance of reluctance to do so and readiness to keep plants


91 The Straits Times (Singapore), 4 December 1963. See British note to Indonesia alleging "de facto dispossession and expropriation" cited in Schwarzenberger, n. 84, p. 96.
working ... The British Government has been placed in a quandary by this method of expropriation. 92

It is this pattern and tactic of taking foreign property that led Professor Schwarzenberger to remark that during the Sukarno regime Indonesia had "developed the technique of creeping nationalisation of foreign investments into a fine art". Even when the firms had been returned, government supervisors were installed to act as "peace-makers" and to liaise between management and the workers. While putting several oil companies under "temporary supervision and control", the Government constantly assured that "the basic foreign ownership rights"


93 Schwarzenberger, n. 84, p. 95.

94 The Guardian (London), 25 January 1964. "The Indonesians have carefully avoided using any terms which might suggest the final expropriation of British property and thus provide a case for compensation. But it is understood that the United Kingdom is prepared if necessary to put the case to the International Court of Justice that the control measures constituted de facto expropriation". The Financial Times (London), 1 December 1964.
were not infringed. Significantly, socialization involved in these measures was not denied. After the overthrow of the Sukarno regime, the policy against foreign investments and that of "indirectly expropriating" alien property ceased. The case study of Indonesia reveals that Western countries were by no means sure of their legal remedies in the Indonesian type of "expropriations".

Statement of Mr. Saleh, Minister of Basic Industries and Mining reported in New York Times (4 April 1965). As to the meaning of "socialization" see generally, Katsarov, n. 22, and Friedman, n. 21. President Sukarno also promulgated a regulation (effective from 27 May 1965) to abolish law no. 78 of 1958 which encouraged foreign investment in Indonesia. The regulation did not apply to foreign loans concluded under agreements on production sharing (Haihau News Agency, 27 June 1965).

Indonesia has signed an investment guarantee agreement with the United States on 7 January 1967. Settlement of Claims Agreement has been signed with the Netherlands on 7 September 1966. Indonesia's earlier agreements with Conoco can be found in International Legal Materials (Washington, D.C.), vol. 3 (1964), p. 81. Also see, Decree promulgating petroleum working contracts, ibid., pp. 243-283; Decrees on control of foreign oil and rubber companies, ibid. (1965), pp. 435, 450 and an agreement for sale of Shell's remaining interests signed on 30 December 1965, ibid. (1966), p. 1136.
There is considerable controversy whether state administrative measures may be regarded as expropriations, engaging responsibility of the state to compensate. Recent examples of these measures are provided by Burma in 1960-63, Indonesia in 1957-58 and 1963-1965, as earlier noted, and by Cuba in 1959-1960, by Algeria in 1963 and by Chile in 1970-1971. According to Weston, "genuinely conservatory 'state administrations' are not to be regarded as deprivations such as will engage international responsibility". Weston's remarks, in particular, apply to measures which are not complicated by use of force, discrimination, or other factors vitiating their character as 'genuine' administrative measures. Weston does not agree with Christie, according


98 Ibid.
to whom "almost any outright seizure of property, if not initially an expropriation, will eventually ripen into an expropriation". In Christie's view, expropriation can be an "unintended result of a state's action. For example, when the use of certain property is so intimately connected with the control of other property which has been expropriated as to be useless without it, then the former property may itself be said to have been 'taken' or expropriated".

The decisions of the United States' Foreign Claims Settlement Commission and Mixed Claims Commission give an indication of the types of cases which may form the subject-matter of claims for indirect expropriation. In European Mortgage Series 3 Corporation Claim, it was

\[\text{99 Christie, n. 10, p. 337.}\]
\[\text{100 Ibid}\]

decided by the United States' Foreign Claims Settlement Commission that no principle of international law was shown which required the payment of compensation to a creditor when the debtor's property had been nationalized or otherwise taken. Such acts were considered too remote or indirect to sustain any award to the creditor. In Dickson Car Wheel Co., the General Claims Commission concluded that

A State does not incur international responsibility from the fact that a subject of the claimant State suffers damage as a corollary or result of an injury which the defendant State has inflicted upon one of its own nationals or upon an individual of a nationality other than that of the claimant country, with whom the claimant is united by ties of relationship.

The American Commissioner dissented from the majority view and held that injury was not remote.

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but was "a very specific loss directly consequent upon the action of the Mexican Government''.

Some recent decisions of the United States Foreign Claims Settlement Commission throw further light on the problem. The measures involving prohibition against continuing business, loss of property as a result of foreclosure of unpaid tax liens, currency reform resulting in devaluation, and deprivation of ability to earn wages, were not held to constitute expropriations. In Schey Claim, the claimant sought compensation in respect of "confiscation" by the Government of Hungary of his pension rights as a result of the nationalization in 1947 of the British-Hungarian Bank Limited. The claim was rightly rejected because loss of pension rights was too remote a cause of bank nationalization. Prevention of fulfilment of a contract due to some act unconnected with it does not stand in the

104 Ibid., p. 299.
107 Ibid., p. 276.
108 Ibid., p. 311.
category of "expropriation" of a contractual right.

Thus, Feller observes:

... the notion that the prevention of the fulfilment of a contract is a taking of property, goes beyond the existing limits of the law and opens up an unbounded and unexpected range of State responsibility. Even the constitutional law of the United States, with its meticulous conceptions of due process of law, has not gone that far. 110

Evidently, there has to be some sort of causal connection between the loss and the act of the State which is alleged to have resulted in the loss.

110 A.H. Feller, The Mexican Claims Commissions, 1923-1934 (Cambridge, M.A., 1935), p.124 (emphasis added). Also see, Motion Picture Export Association of America, Inc., Claim decided by the United States Foreign Claims Settlement Commission reported in International Law Reports, vol. 26 (1938-II), p. 310, where it was held: "There is no evidence to show that claimant's license to do business in Hungary was other than revocable pursuant to the laws of Hungary". Interference with contracts because of nationalization was, therefore, not held to constitute a taking. Oppenheim was quoted with approval for the view that the granting of a license to do business was a matter "essentially of Municipal, as distinguished from International Law", vol. 2, edn. 7, p. 319. Oppenheim's view, however, is in the context of belligerent rights and therefore somewhat out of context. Cf. Article 11 of the Harvard Draft, 1961, n. 14.
In recent attempts at codification of international law relating to expropriation of alien property, specific attention has been paid to the problem of indirect deprivation or expropriation. Thus, Article 3 of the Abs-Shawcross Draft Convention 1959, Article 10(3)(a) of Harvard Draft Convention, 1961, Article 3 of Organisation for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property, 1962 and Article 3 of the OECD Draft Convention of 1967, all deal with indirect means of deprivation. A number of jurists have also expressed views on this problem. Metzger thinks that it is virtually impossible to define with precision the meaning of "indirect" expropriation. To Schwarzenberger, "Indirect deprivation of property is largely a matter of conjecture regarding undeclared motives". According to


112 Schwarzenberger, n. 84, p. 162.
Fatouros, indirect measure of expropriation "would presumably include any regulatory government action which affects foreign investors but falls short of an outright taking". Explaining the meaning of indirect measures, Weston observes that their "distinguishing characteristic usually involves, at once or over time, the denial of access to, use of, or benefit from wealth processes and institutions (rather than the deprivation of wealth itself) and/or the spoilation of values other than wealth but upon which the production, conservation, distribution and consumption of wealth vitally depend". Whether a direct deprivation is involved, is, according to him, a matter which will depend on the purpose of the measure.

It is often stated that compensation is payable for expropriation and not for mere regulation of alien property. However, there is a genuine difficulty in determining where regulation

113 A.A. Fatouros, n. 29, p. 167.

114 Weston, n. 15, p. 1110. Also see, Weston, n. 97, pp. 103-175.
ends and taking begins. In this regard, the test of physical possession of assets may be helpful in distinguishing the actual act of expropriation of property from "creeping expropriation", or measures of genuine regulatory character. An act of the State will not generally amount to expropriation unless there is a physical taking of tangible property coupled with title. Any other loss resulting from unjust means without physical taking of the property, should be treated as an independent international tort which should not be confused with expropriation. The weakness of draft conventions, referred to earlier, lies in the fact that they illustrate a few cases of "creeping expropriations" without laying down a general rule or criteria for characterizing a state action as amounting to "expropriation", or an act falling short of expropriation.

There may be a number of situations which may

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Sax observes: "To be sure, the acquisition of title or the taking of physical possession will be present in the great majority of taking cases .... But ... the presence or absence of a formal title - acquisition and/or invasion will never be conclusive". (Note 111, p. 67).
qualify to be called "creeping expropriations".
The difficulty is acute in case of intangible rights.
Traditional international law is hopelessly inadequate in this respect and there are no guidelines available. Therefore, a test or a combination of tests as indicated below might be helpful:

(1) Character of the state interference.

(2) Nature of the subject-matter of rights or property affected.

(3) Extent of the gain to the state and/or loss to the affected individual.

(4) Proximity between state interference and individual's loss, i.e., causal connection between the state's action and individual's loss.

(5) What is more material — Loss of control or ownership or both?

(6) Duration of interference or control etc.

It is obvious that imperatives of a modern welfare state have led it to frequently interfere with private property of individuals, including aliens. But as earlier noticed, many times such interference
or action taken falls short of direct expropriation. In these situations, the traditional concept of expropriation seems inadequate and fails to cope up with the problems of emerging world society. Kenneth L. Karst, after alluding to the general difficulty of defining creeping expropriation, aptly remarks:

... the availability of measures short of admitted takings does cast doubt on the certainty of the traditional standard of full compensation. 116

Ironically, the abandonment of the orthodox Western standard of full compensation appears to be a prerequisite of the removal of the disability of international decision-makers to deal with the problem of creeping expropriation. 117

116 Kenneth L. Karst in Miller and Stanger, eds., n. 40, p. 67.

117 Ibid., p. 68. Council of Europe Opinion on Organization of Economic Cooperation and Development (O.E.C.D.) Draft Convention (opinion no. 39 of 1963) while discussing "creeping expropriation" stated that the progressive rise of taxation over years on one particular product cannot "simply be solved by referring to a general policy of law. Such heavy taxation may well be regarded by the investor as virtually expropriation; yet it is by no means certain that, in given circumstances relating to economic need or financial necessity, the recipient country's action need necessarily be regarded as confiscatory". International Legal Materials, vol. 3 (1964), pp. 136-137.
Article 2 of the Charter of Economic Rights and Duties of States provides that each State has the right to regulate and supervise the activities of transnational corporations within its jurisdiction. However, unlike nationalisation, expropriation, or transfer of ownership of foreign property, in which provision for appropriate compensation has been made, there is no indication that supervision or regulation of foreign property is tantamount to a 'taking' or involves corresponding duty on the part of state to compensate the foreign owner.

In the next chapter we shall endeavour to deal more particularly with practical, as distinguished from conceptual, aspects of expropriation of alien property. In that connection, special attention will be paid to concession contracts which are altered or terminated by the states before the expiry of their terms.
CONCLUSIONS

In dealing with problems of expropriation of foreign property, broadly three sets of questions require consideration. What is property? Who is a foreigner? What amounts to expropriation?

Property is a very wide term and, therefore, a variety of things can be treated as property.

Herz has suggested that an international definition of property could be derived from state practice and decisions of international tribunals. However, despite large state practice and several compensation agreements in existence, it is doubtful if an international definition of property which would be generally applicable to all situations, or acceptable to all states, could be devised.

Similarly, the nature and extent of property included within the scope of a compensation agreement will depend on actual negotiations between the concerned states. It is difficult to visualize a definition of property which will take into account all possible future actions by states in the nature of eminent domain or regulatory measures affecting rights, interests, property
or other assets of foreigners. However, identification of a person whose property, rights or interests are the subject-matter of State action, as a foreigner, should not be generally difficult. If a person is not a citizen of the expropriating State he will be a foreigner whether or not he is a national of any other State. Thus, a stateless person or a refugee would be a foreigner.

Whether a State action affecting property of foreigners does or does not amount to expropriation or nationalization would depend upon circumstances of each case. State interference with alien property may take place in a variety of circumstances. It would be wrong to equate every regulation or infringement of alien property with expropriation. Expropriation is a concept and not a mere procedure, as stated by Friedman. It is, therefore, essential that on each occasion conduct of a State affecting alien property be judged in terms of its obligations in international law. It will have to be found out whether a particular State action amounts to expropriation, nationalization or any other internationally or otherwise
wrongful act. There are several measures, such as exorbitant taxation, prohibition of dividend distribution, imposition of administrators etc., which are described as amounting to creeping or indirect expropriations and, as Doman observes, "against which the arsenal of international law has not yet found defences". Whether these measures amount to expropriation and give rise to compensable claims depends, inter alia, on the fact whether loss to the alien was due to proximate cause of a state's action and whether he was physically dispossessed of his property and title thereto. Traditional international law has proved inadequate to deal with such measure except by treating them on the same pedestal as expropriation. A more satisfactory solution would be to consider whether any of the measures in question falls in the category of an independent international tort.

The weight of opinion in the past has been in favour of making a distinction between expropriation and nationalization and therefore

168 Doman, n. 20, p. 1129.
admitting only partial compensation in cases involving general changes in economic or social structure of a State. However, this distinction may get obliterated in due course in view of the fact that Article 2 of the Charter of Economic Rights and Duties of States speaks of "appropriate compensation" both in respect of nationalization as well as expropriation. In any case, it would be difficult to agree with those who consider an expropriation or nationalization confiscatory to the extent compensation paid falls short of full value of the nationalized or expropriated property. As Katzarov says, there is considerable moral element in nationalization and it would be improper in principle to assimilate it to confiscation merely because of lack of compensation. Garcia Amador seems to share this view and considers that motive or purpose of the measure is an important deciding factor. These views, in our opinion, are not wholly without merit.