CHAPTER V
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CONDITIONS PRECEDENT TO EXPROPRIATION IN TRADITIONAL INTERNATIONAL LAW

In most of the areas in which international law operates, uncertainty looms large. But uncertainty in respect of principles governing the expropriation of alien property is unique. This prompted the United States Supreme Court to declare in the Sabbatino case:

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens (emphasis added).

It was further held that

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations .... 1

Even where the rules of international law are pretty clear the States tend to twist them to suit their ends. But when the law is uncertain it is idle to expect them

to abide by it. It is too much to expect that states should consider themselves bound by standards which do not have the sanction of law. States may set certain standards for themselves by which they voluntarily abide, but these standards cannot be said to have emanated from international law. Similarly, if certain states join together to safeguard their common interests and create certain rules of behaviour among themselves which they treat as law, they cannot be said to affect the position of other members of international community. They may have different interests. No section of the international community can impose its own views or laws on the other. They must agree on a certain set of common norms to be applicable to each other. In the absence of these common norms uncertainty prevails. Judge Lauterpacht observes:

It is probably a fact that the absence of agreed rules partaking of a reasonable degree of certainty is a serious

challenge to the legal nature of what goes by the name of international law. 3

He emphasizes the importance of this aspect further and states that:

Clarity and certainty are not mere embellishments of the law. They are, particularly in the international sphere, of its essence. Within the state obscurity and uncertainty of the law are a drawback, but it is a drawback which is provisional inasmuch as the uncertainty can be removed with regard to a particular controversy by the decision of a court endowed with compulsory jurisdiction. This is not the position among states. 4

Moreover, in the international sphere the World Court cannot use extensive judicial powers which are sometimes available to the municipal courts. Even if there is compulsory jurisdiction (wider than the one used in the sense of the Statute of the International Court of Justice) it will not solve the problem. More uncertain the principles of international law are, the less the parties


are prepared to go before the Court. Even if they choose to go before it the possibility of the court being able to render justice to them is doubtful. Some very significant areas of international law e.g., State Responsibility for injuries to aliens, State succession in respect of matters other than treaties etc., are already under consideration of the International Law Commission which has a mandate not only to codify existing laws but to help in their progressive development. Certain other forums in the United Nations are also playing a very active role in the reformulation of the existing principles of international law. The General Assembly and its various committees are directly or indirectly engaged in this task. Under these circumstances, it would be unreasonable to expect all the States to submit their disputes to be settled according to traditional international law which has become to a great extent outmoded. It is, however, not to suggest that there should be complete anarchy and that no law and order is to prevail till the whole lot of international law is codified.

In the Sabbatine case, Judge Dimock said that "the effective method to promote adherence to
the standards imposed by international law is to enforce these standards in municipal courts, particularly in view of the poverty and inadequacy of international remedies. If one may be permitted to stretch this argument a little further, poverty of traditional rules of international law in the present-day context is no less acute. The inadequacy of substantive principles of applicable law, coupled with lack of proper judicial machinery, makes the situation worse. Therefore, the ideal solution in the existing circumstances would be to stop being unduly skeptical about the good sense of the states and let them act in a way which will preserve both their national interests and the world order. Looking at the past record of the domestic courts generally, there is every possibility that norms of a world order will not be flouted. For example, President Arturo Illia of Argentina revoked oil contracts with the companies by a Decree in 1964

5 Quoted in Richard Falk, Role of the Domestic Courts in International Legal Order (Syracuse, 1964), p. 82.
without making provision for payment of compensation. The companies filed an appeal against the Government in a local court. The court of second instance which decided the appeal held that the contractual rights of the oil companies were constitutionally protected, and that in the absence of a regular expropriation proceeding, the company's possession of its physical property will be protected by court order.

Richard Falk is perhaps not unduly optimistic, therefore, when he states that

Domestic courts are agents of a developing international legal order, as well as servants of various national interests; this double role helps to overcome the institutional deficiencies on a supra-national level. 7


7 Ibid., p. 65. Lapres observes: "The advantage of applying local law is that the difficulty of obtaining a universal consensus on the content of the standards would be circumvented". ("Principles of Compensation for Nationalised Property"). International and Comparative Law quarterly (London), vol.26 (1977), p. 103.
In the "absence of an acceptable supra-national norm" and due to non-availability of objective norms especially in the expropriation area, there would be justification for thinking that it is the States themselves, which within four corners of their Constitutions, determine the conditions of a valid expropriation or nationalization. Conditions thus imposed have a better likelihood of being observed. In the normal course of things their defiance will be contested in the domestic courts. From a practical point of view it is difficult to conceive of any international limitations in the sphere of expropriation. Visualising the difficulty of applying international standards to the act of expropriation or nationalisation, De Visscher observes that

Nationalization is an internal measure often dictated by reasons that are more political than economic. In principle, its legality is not to be determined by any international criterion. 9

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8 Ibid., p. 111.

Even if nationalization or an expropriation is prompted by economic reasons, which is most likely, it does not ease the problem. Due to differing economic concepts, it is becoming increasingly difficult to test State actions unless there are commonly agreed legal norms.

A vocal section of the international community remains unconvinced that the traditional rules of international law alone can serve the community interests. Therefore, not unjustifiably they wish to retain their freedom of action till progressive development of international law has taken place.

It is worthwhile quoting the remarks of John Fischer Williams:

It is true that few international lawyers nowadays accept the Hegelian conception of national sovereignty ... which it has sometimes been stated is incompatible with the development of international law. But it is another thing to go to the opposite extreme and deny the existence of a sphere where as a matter of law national sovereignty is supreme; national sovereignty has its own domain in international law just as individual liberty has its own sphere in municipal law. The onus is on those who would limit the exercise of national liberty, to point
to some superior interest of international society in whose name it is so clearly right to override it ...". 10

Thus it can be seen that there are certain principles of international law regarding laws of war, diplomatic immunities etc. which command almost universal recognition and acceptance. But expropriation of aliens' property does not fall in that category. It may, however, be subject to some domestic limitations which in effect are the real and actual limitations on a state's right to expropriate alien property having the sanctions of constitutional and other statutory laws of the concerned State. John Fischer Williams does not see much justification in importing legal limitations of municipal law into the field of international law. He asks

... by what process of reasoning are we justified in transferring a legal limitation of municipal law affecting the power of a state in relation to those directly subject to its authority into a duty of a state in relation to other states? The limitations, of which an imposing list can be composed, are in the nature of

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constitutional limitations or arrangements .... But it is a long step to convert a constitutional obligation into a duty of international law.

Legal limitations or conditions subject to which alien property may be expropriated under traditional international law are: (1) public purpose; (2) payment of "full, prompt and effective compensation" and (3) non-discrimination.

MEANING AND CONTENT OF THE 'PUBLIC PURPOSE' DOCTRINE

Blackstone's dictum that "So great ... is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the community", is clearly a relic of the past. Law has changed with

11 Ibid., p. 17.

the times as indeed it should. There is overwhelming concern in the Constitutions of the world for the welfare of the people as a collectivity and sacrosanct character of the property has been relegated to the background. There may be a difference of degree but most of the Constitutions recognize the social function of property.

This function is well expressed in the application of 'public purpose' doctrine whenever expropriation of property takes place. It is the public purpose behind expropriation which has led to socialization of property. It is said that public or social purpose is "like geological force; it sweeps majestically on, overriding all obstacles, and shaping all institutions to its ends".


Several publicists have emphasised that expropriation finds its juridical basis in the general welfare of the community. The very basis of an expropriatory measure is said to reside in public purpose. Classical writers like Grotius and Pufendorf seem to support the public purpose doctrine but do not define it. The doctrine can be found in most of the municipal legal systems but international law does not have any definition of its own. It is, however, a common ground both in municipal as well as international law that expropriation of property for public purpose must be for the common good of community rather than


any private individual. In this view overwhelming collective interest of the people alone could justify expropriation.

For example, assigning reason for inserting "public purpose" in Sec. 299 of the Govt. of India Act, 1935, the then Attorney-General explained: "I should have been very glad if the words 'for public purposes' could have been left out, and my first impression was that they could safely be omitted, but then we are brought face to face with this difficulty. Suppose under a writ of execution to enforce a judgement in an action between A and B, they came along and took a man's property to satisfy the judgement. That could not be taking 'for public purposes' but if we left out the words 'for public purposes' the clause as drawn would make it illegal to take a man's property in satisfaction of a judgment unless he were compensated for it, and that is nonsense. That is the sole reason why the words 'for public purposes' are in. There was no intention in any way of limiting the operation of the Clause. It might in theory have a little limiting effect, but in practice I do not think one could contemplate any legislation of the character my hon. Friend envisaged, namely, taking a person's or a company's property for the purpose of handing it over to some other person. In theory it is possible, but in practice, I should not think any Legislature would do it". Quoted in N.M. Seervai Constitutional Law of India (Bombay, 1967), p. 512. C.F. R.M. Cooley, A Treatise on Constitutional Limitations (Boston, 1907) (7th Ed.) pp. 755-75; W.W. Willoughby, The Constitutional Law of the United States (N.Y., 1929), vol. 2, p. 795; Nichols, eminent domain (1953), vol. 1, p. 2.
By its very nature the concept of public purpose or public utility does not lend itself to any precise meaning. For instance, nowhere in the juristic writing or judicial decision-making there seems to be any indication as to exact point of time when the requirement of public purpose would be satisfied. It is possible that a particular expropriatory measure may not serve any immediate public purpose but it may do so in the long run. It has never been contended that expropriation must be for immediate public purpose. However, the magnitude of the controversy it may lead to, does not seem to be have been visualized. It is possible that controversy regarding public purpose may centre on point of time when it should exist. Whereas one side may contend lack of immediate public purpose as its total absence, thus challenging the legality of the expropriation,

19 Roscoe B. Gaither, Expropriation in Mexico: The Facts and the Law (McClendon, 1949), p. 164, points out, however, that "except in the oil decision, all of the cases have held that a reason of public utility must really exist in fact, and not be merely prospective; and that in all cases it must be proved".
another side may oppose this contention and take the view that even ultimate public good of the community is enough. What is actually involved here is a question of good faith. If the measure has been taken in good faith it cannot but be valid. But there may be cases in which evidence of good faith of the expropriating State may not be forthcoming immediately and concrete action in this regard may follow only at a later stage.

This doctrine is capable of absorbing very wide range of purposes but they could possibly be more precisely elaborated with reference to the Constitutions of particular countries. For example, taking the Constitution of India, anything to further the Directive Principles of the State Policy would apparently be for a public purpose. Thus, anything done by the State in furtherance of the socio-economic development or in securing a social order for the promotion or welfare of the people would obviously be for a public purpose. Two pertinent provisions

of the Directive Principles of State Policy may be quoted to illustrate the point:

Article 39 - The State shall, in particular, direct ... its policy towards securing

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The above Article is not all exhaustive. In fact, the concept of public purpose cannot be attributed any fixed meaning. It must "keep pace with the realities of the social and political evolution of the country as reflected in the 21 Constitution". Whether there is a genuine public purpose in a given case would depend on the aims and objectives of the particular legislation and circumstances consequent upon which legislation was enacted. In the light of this, it is for the judiciary

to determine the proper scope of the public purpose. While it is admitted that the concept of public purpose is wide enough, it should not be stretched to a vanishing point.

Expropriations affecting interests and property of citizens are likely to be understood in the Constitutional context of the State concerned. However, where aliens are affected by such measures, the national state of aliens may not show the same understanding, may take a different view of the expropriation and may not consider the expropriation being in public interest. Various terms may be used by the State to denote the same purpose such as 'public purpose', 'public utility', 'public necessity', 'public use', 'common good', 'general interest', 'public benefit', or even 'vital necessity'. Difficulty is likely to result in the interpretation of these terms in the context of international law.

Some distinctions may be found in the municipal law of the State concerned itself. For example, the Italian Code of July 16, 1942 (Book III) draws distinction between "expropriation in the public interest" and "expropriation in the interests of production". Apparently, the latter expropriation would appear to be equally in the public interest. The problem would arise whether this municipal law distinction is to be upheld or ignored in international law if a concrete situation arises. Since international law has no definition of its own (except perhaps in a negative sense), will it not be proper to follow such a distinction prevalent in the expropriating State?

Proper scope of the 'public purpose' doctrine is obscure in the international juristic opinion.

Views of International Jurists on the Doctrine

The views of publicists are divided even on the very existence and desirability of this doctrine,

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23 See Katzerov, n. 13, p. 110.

24 'Negative sense' here meaning absence of public purpose perhaps where the measure is retaliatory or discriminatory.
as well as its scope. Its acceptance as objective international standard is not free from difficulties. It is not capable of any precise definition as a criterion of valid expropriation. Garcia-Amador, who was a Special Rapporteur of International Law Commission on "State Responsibility", said the following to say:

... the discretionary powers of the State in the matter are in practice unlimited, provided that the latter view is understood to mean only that it is for municipal law, and not for international law, to define in each case the "public interest" or other motive or purpose of the like character which justifies expropriation. Particularly at the present time, when regimes of private property vary widely, it would be idle to attempt to "internationalize" any one of them, however generally accepted it might seem to be, and to impose it upon States which have adopted another system in their own constitutional law. 25

Amir Rafa't, who has studied the doctrine of public purpose in some depth, observes as follows:

As long as the international community remains composed of States with social systems so divergent from one another

as they appear to be at the present time, one cannot hope for the emergence of an internationally agreed-upon definition of public utility. 26

The Explanatory Note to Article 10 of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens states that significance of a public purpose in various legal systems greatly differs. There is a lot of doctrine but no precedent in favour of 'public purpose' doctrine. What constitutes a 'public purpose' has hardly been considered by international tribunals nor have they declared any taking invalid as lacking public purpose. As the Note further puts it:

This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States ... to embark upon a survey of what the public needs of a nation are and how these may best be satisfied. 27

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The Note explains that for lack of judicial precedent reference to the doctrine of public purpose in the draft convention has been made with some hesitation. "Because the verbal formula has so often been employed, it was considered unwise to omit it at this point, empty though it may be of any operative legal content." The American Law Institute seems to have adopted similar approach to the problem. Comment to Section 185(a) of the Restatement reads as follows:

... there is little authority in international law establishing any useful criteria by which a state's own determination of public purpose can be questioned. There appear to be few, if any, cases in which a taking has been held unlawful under international law on the sole and specific ground that it was not for a public purpose. 29

Comment in the Restatement further goes on to say that the concept of public purpose originating in municipal legal system has any meaning in international law only if the latter is developed with laissez-faire as the universally accepted basis. Similarly, Gillian White wonders 'whether the concept has ever had a specific meaning in international law, or whether it was always

28 Ibid., p. 556.
given an interpretation derived from municipal systems". She is also of the view that in absence of any other element of illegality, the mere lack of public utility motive will not render an expropriation illegal. She contends that "it is contrary to reason and to the general principles of international law that so grave a consequence should follow from the non-observance of a rule whose content is as vague as that of the principle of public utility has been shown to be". S. Friedman rejects it as "entirely subjective" and as lacking in "objective standard of conduct". Opinions of publicists can be multiplied to show that the doctrine of "public purpose" imported from the municipal systems into the field of international law does not prove as effective and meaningful as in the systems of its origin. According to Baade,

30 Gillian White, Nationalisation of Foreign Property (London, 1961), p. 146

31 Ibid. p. 150.


33 Ibid.
"public utility" or "public interest" is not to be treated as "a limitation but a purported
authorization" for carrying out expropriation.

It is indeed difficult to enumerate various public purposes or to specify their exact scope and nature. McNair talks of "bona fide social or economic purpose involving the use of the property nationalized". Mere declaration by a State that the nationalization is in furtherance of a public purpose would not ipso facto vouch for its truth. For example, Indonesia, in nationalizing Dutch-owned enterprises, had declared that it was intended thereby "to provide the greatest possible benefit for the Indonesian nation and further to enhance the defence and the security of the State". McNair, however, expresses the belief that, if an impartial tribunal were to be appointed, it would hold that true motive was to obtain


sovereignty over West Irian. Where the motives are stated to be multiple, including such as Indonesia declared, i.e. obtaining sovereignty over West Irian, how could one dismiss the whole transaction as having been vitiated? There can be conglomeration of various motives. What is important is to determine whether expropriation is for a direct or indirect public purpose. 'Public purpose' to be a meaningful condition of a lawful expropriation must be directly related to the act of expropriation. It is in this view that McNair observes:

I am not aware of any case in which a Government has sought to justify a measure of nationalization on the ground of a purpose which is totally unconnected with the subsequent use of the property being nationalized. 37

36 Ibid., p. 246. In sharp contrast according to Herz "there is no relevant distinction between cases of real public utility and arbitrary acts; international law does not contain its own definition of 'public use' ..." (n.16, p. 253). It is left to the discretion of the State to determine what constitutes public purpose. See Joseph Kunz, "The Mexican Expropriations", N.Y. Univ. School of Law, Contemporary Law Pamphlets, series 5, n. 1 (1940), p. 55.

While examining the scope of 'public purpose' principle, a distinction may be possible between measures of police power affecting the private alien property and the expropriation of the latter for public purpose. Herz does not consider expropriation to be merely an extended version of police power but observes that "in spite of difficulties of demarcation, the distinction between measures of police and expropriation for public utility is one of positive international law, recognized by state practice as well as by the almost unanimous opinion of theorists". This distinction may be relevant from the point of view of consequences for the State. Where the measure is in exercise of police power, compensation might not be payable, whereas in case of expropriation, compensation is usually required. In any case, this distinction appears superfluous in case of


39 Cf. Ian Brownlie, Principles of Public International Law (Oxford, 1973), edn. 2, p. 522. "Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, i.e. exercise of police power, health measures, and the like".
socialist economies of the Soviet type as they do not seem to admit of any compensation for expropriation of alien property.

As earlier stated, public purpose of expropriation must be bona fide. Many publicists consider retaliatory expropriation as illegal. Domke, while commenting on the Indonesian and Cuban measures, maintains that private property of aliens is not a proper object for retaliation against their home government.

The Cuban Law No. 851 of 6 July 1960, authorized the President and Prime Minister to order nationalization of American-owned property "through expropriation by eminent domain" against what the Law called "constant aggression for political purposes against the fundamental interests of the Cuban economy". The expropriation was thus


carried out for an avowedly political purpose.

The Portuguese expulsion of Indian nationals from Mozambique, then under Portuguese administration, and take over of their assets also appears to have been in retaliation against Indian liberation of Goa. According to Shihata, a State is free to resort to nationalization for whatever reasons it deems fit, even if they are politically coloured, so long as it pays appropriate compensation. This view is unexceptionable although cautions of appropriate compensation being paid in these cases of nationalization or expropriation cannot be rated very high.

42 See Ibrahim Shihata, "Arab Oil Policies and the New Economic Order" Virginia Journal of International Law, vol. 16 (1976), p. 282. According to Lapres there may be justification for the blacks taking retroactive action against foreign economic interests in South Africa or elsewhere on seizing power if these enterprises had practised apartheid and had impeded their development. (Lapres, n. 7, p. 107). It is understood that six hundred British companies are operating in South Africa contributing £5000 million of foreign investment out of a total of £10,000 million. (Hindustan Times, New Delhi), 13 February 1978, p. 7.

43 Subsequently, on 31 December 1974, under Article 3 of the Treaty on Recognition of India's Sovereignty over Goa, Daman, Diu, Dadra and Nagar Haveli and Related Matters, India and Portugal agreed to settle "through bilateral negotiations rights and claims of Indian citizens and other persons who had to return to India from territories under Portuguese administration concerning their property and assets".
Publicists have emphasized that minimum standard of international law must be observed but they have concentrated in this regard only on the payment of compensation. They do not categorically say whether minimum standard of international law is violated if an expropriation is lacking in public purpose.

Even though there are difficulties in laying down objective criteria for determining whether property of an alien has been expropriated for public purpose or not, in our view it would not be prudent to altogether discard this test in the absence of a better alternative. Moreover, this criterion appears to be well founded in State practice.

and no opposition has ever been heard on this doctrine. There is understandably more emphasis on minimum standard of international law relating to payment of compensation, for, public purpose appears to touch only the procedural aspect whereas payment of compensation is considered as an essential ingredient of a lawful taking.

**Compensation for Expropriation**

The word "compensation" is derived from the Latin verb *compensare* and, according to Murray's New English Dictionary, it is defined as "counterbalance, rendering of an equivalent, requital, recompense". It is widely recognized that a State can expropriate alien property as a matter of sovereign right. However, this right generally can be exercised only subject to payment of compensation. But there is a bitter controversy on the quantum of compensation payable. Traditional international law requires that when alien property

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is expropriated "adequate, prompt and effective" compensation ought to be paid by the expropriating State. Sometimes the compensation formula is expressed in terms of "full, prompt and effective" or "due, prompt and effective" compensation. If a state pays less than full compensation, it does so in violation of minimum standards of international law. The developing and many capital-importing countries have serious objections to this formula, especially in view of the colonial background of some of the investments and concession contracts a brief background of which has already been given in the earlier chapter dealing with concession contracts. Even in respect of nationalization of post-independence investments there are difficulties, both economic and political, in paying full compensation. Apart from economic, political and practical difficulties (e.g. inability to pay full compensation) international juristic opinion is also divided on this question.

Rationale of Compensation

Payment of compensation to aliens for expropriation of their property is supported on the
basis of the theory of "vested rights", "unjust  
enrichment", abuse of rights, good faith, as well  
as on the basis of "international minimum standard"  
of treatment of aliens.

(1) **Unjust Enrichment**

Judge Levi Carneiro in his Dissenting  
Opinion in the **Anglo-Iranian Oil Co. case** (Jurisdiction)  
(1952) before the International Court of Justice,  
gave the following interesting reason for payment  
of compensation when any property is expropriated:

> Where damage has been suffered by a  
> member of the community in the interests  
> of the latter it would be unjust that  
> that member alone should bear the full  
> burden of the sacrifice. 47

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46 See F.O. Vicuna, "Some International Law Problems  
Posed by the Nationalization of the Copper  
Industry by Chile", American Journal of Interna-  
tional Law, vol. 67 (1973), p. 723; "Principles  
such as unjust enrichment, abuse of rights,  
good faith, and other relevant factors should  
be weighed in the process of determining the  
amount of compensation in a particular case".  
Report of the Secretary-General on Permanent  
Sovereignty Over Natural Resources (UN Doc.  
E/5425, 3 October 1973, p. 15, para 44) refers  
to claim made by some that unilateral action  
without proper regard for fair compensation  
constitutes an abuse of the right.

47 ICJ Reports(1952), p. 162.
Bin Cheng is also in agreement with this reasoning. He submits that

The rationale of compensation for expropriation consists in the fact that certain individuals in a community, or certain category of individuals, without their being in any way at fault, are being asked to make a sacrifice of their private property for the general welfare of the community, when other members of the community are not making corresponding sacrifices. The compensation paid to the owners of the property taken represents precisely the corresponding contributions made by the rest of the community in order to equalise the financial incidence of this taking of individual property. 48

The above statements of Judge Carneiro and Professor Bin Cheng seem to be based on the principle of "unjust enrichment" or enrichissement sans cause. The principle of unjust enrichment has been invoked by some writers as a principle of general international law to support the payment of compensation. In this connection, much reliance has also


been placed on the Lena Goldfields Arbitration Case where the arbitrators based their award specifically on the principle of unjust enrichment. But a different view was taken in Dickson Car Wheel Company v. United Mexican States where the US - Mexican general claims Commission said:

It is obvious that the theory of unjust enrichment as such has not yet been transplanted to the field of international law as this is of a juridical order distinct from local or private law... it is necessary to establish the international illegality of the causative act ....

Moreover, equities involved between an individual and community cannot be properly appreciated unless the context is made clear. An international conception of equity cannot overlook the colonial context of private foreign investments. Amerasinghe

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51 Reports of International Arbitral Awards, United Nations, vol. 4, p. 676.

observes that "the nationalization of such investment will not be sine causa. If this argument that nationalization of private foreign investment introduced under a colonial regime is not sine causa were stretched further so as to cover private foreign investment made under a capitalist regime but not at the specific invitation of the State, it would follow that subsequent nationalization may still not be generally sine causa because of the inequities of the situation. It is submitted that the principle of unjust enrichment or the one "providing for the distribution of burdens and of damage suffered" does not hold promise for modern international community. García Amador, former Special Rapporteur of the International Law Commission, suggested that the doctrine of unjust enrichment "permits the taking into consideration of equities in favour not only of the individual but also of the community." It is,

53 Amerasinghe, ibid., p. 149.

54 Judge Carneiro's phrase in his Dissenting Opinion, n. 47, p. 162.

however, borne out by experience that this principle is more biased in favour of the private individuals and supports the latter even though the individual concerned has gained at the expense of the community. The principle does not come to the rescue of the State when it is carrying out programmes of economic and social reform or when the State is engaged in the formidable task of preventing concentration of wealth in a few hands. In a recent article, one writer remarks that a general concept of unjust enrichment is "hopelessly open to manipulation" and is "detached from specific prescriptions determining its application" and he says this is aptly illustrated by its use in the controversy over compensation for expropriated foreign property. The same

f.n. 56 contd.


writer observes that the "suggestion that the duty to pay compensation arises because otherwise an unjust enrichment would occur somehow begs the question it seeks to answer". The writer does not forget to mention that there are many lawyers who are less well disposed towards the idea of compensation and have contended that the said principle should be mainly applied to the foreign investors.

On the other hand, the State would not be justified in rendering the individual or individuals destitute by depriving them of their livelihood. In some of the countries the action of the states was so drastic that aliens were rendered homeless and were mercilessly driven out. This cannot be

57 Ibid., p. 285. However, we have noticed a case where the Government of Argentina filed a complaint against oil companies in the Federal Court and made unjust enrichment as the basis of claim. See International Legal Materials, vol. 3 (1964), p. 114.
the aim of a nation striving to achieve economic and social justice. It is in this respect that certain minimum standards of international law should be established. In carrying out programmes of socio-economic nature the humanitarian considerations should not be overlooked. 'It is, however, unfortunate that the principle of international minimum standard of treatment of aliens is invoked where less than full compensation is paid.' This position is not universally accepted. In fact, many jurists have denied that there is any obligation to pay any compensation at all for expropriation of alien property particularly in respect of "acquired rights" of the colonial period.

(ii) **Doctrine of Acquired Rights**

Doctrine of acquired rights means that a State must respect rights of aliens which were lawfully acquired by him under the relevant municipal law. This doctrine as the basis of compensation

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58 Strupp and Friedman, n. 265; Rubin, n. 262; Foighel, n. 275; Brierly, n. 276.
has come to be seriously challenged in the recent years. Although the Permanent Court of International Justice in Certain German Interests in Polish Upper Silesia Case (Merits) stated that the principle of respect of acquired rights is a part of general international law, Gillian White has observed that the principle of respect for vested rights was confined only to cases of cession of territory. According to her, more general rule of respect for acquired rights was not applicable where no transfer was involved. Similarly, Arechaga, a member of the Sub-Committee on State Responsibility set up by the International Law Commission, in his memorandum pointed out that, although some statements by judicial or arbitral organs might be invoked in support of the rule, these decisions belonged to the period when laissez faire was the only recognized economic system. Therefore, in his view the principle of acquired rights did not enjoy the degree of generality required to constitute

59 PCIJ (1926), series A, no. 7, p. 31.
60 See White, n. 30, p. 10.
a rule of international law. S. Friedmann takes the view that the concept of acquired rights is so obscure in municipal law that "international law would stand to gain nothing by its acquisition".

The concept of acquired rights may acquire relevance in a number of contexts e.g., (1) when certain rights have been created in favour of a foreigner under some agreement or treaty; (2) rights available to a foreigner under municipal law of the concerned State at the time he enters into that State; and (3) rights acquired under predecessor State but no longer recognized by the successor State. According to orthodox school of thinking the rights acquired in all the three above situations must be respected. However, according to some writers a right acquired under a treaty or contract is an "acquired right that is stronger than the ordinary right of property".

62 Friedmann, n. 17, p. 122.
63 See Wortley, n. 49, p. 35. Wortley does not accept the view that treaties are the sole basis of international law. According to him, a "treaty or a contract may underlie a duty, or make it easier to prove a breach, but obligations in international law can exist without treaties to support them". (ibid., p. 36). See also pp. 125-126.
Acquired rights in categories (2) and (3) are created under municipal law of the host state but paradoxically it is claimed by some writers that a state is not free to change or modify these rights under the same law without paying compensation. This limitation is sought to be imposed under customary international law. If this were indeed so, there appears to be no need to insert an express provision of the following nature in agreements:

Any conditions as to the duration of his residence or as to his employment, profession, business or occupation which a national of one Contracting Party who is permitted to reside in any territory of the other is required to observe during the period of his residence in that territory shall be imposed at the time of the grant to him of permission to enter or to reside, shall be made known to him at the time when they are imposed and shall not thereafter be varied so as to make them more restrictive. 64

Professor Borchard expressed the view that "it becomes somewhat dangerous to be too dogmatic and

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to assert that a particular right is immune to restriction, because of some superior principle involving the protection of vested rights". It may be further added that the so-called doctrine of acquired rights would result in discrimination against nationals who may not be paid any compensation for modification of their existing rights. Foighel asserts that the maxim of vested rights has no binding force on the legislator. Kaeckenbeeck goes further and states that suppression of every acquired right need not give rise to an indemnity. He regards the theory of acquired rights "totally inadequate and powerless" to solve problems of nationalization. As far as acquired rights in State succession situations are concerned, the current thinking is predominantly in favour of discarding these rights in favour of freedom of the

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67 See Wortley, n. 49, p. 126.
successor State to deal with them consistent with its national interests. Second Report of the Special Rapporteur of the International Law Commission (Mohammed Bedjaoui) is wholly devoted to "Economic and financial acquired rights and State Succession". Bedjaoui observes:

It has by no means been proved that there is a rule of international law requiring any successor state to respect acquired rights, and it is to be feared that as time goes by the declining number of writers who continue boldly to defend such rights will find less and less support in practice.

He admits that political considerations rather than legal grounds are of decisive importance in this matter. He further argues that attitude towards

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68 UN Doc. A/CN.4/216 (1969). Professor Fatouros has objected to wholesale rejection of theory of acquired rights. He considers that empirical evidence is necessary to determine whether or not acquired rights should be rejected. However, he finds merit in the argument that a new State should not be forced to come into existence encumbered with extensive controls over its resources and continuing interference in its economic life by the predecessor State. (Unpublished paper commenting on the First Bedjaoui Report, p. 24).

69 Ibid., p. 47.
acquired rights may differ in accordance with the type of State succession involved. Thus, it would be legitimate to expect that acquired rights would be respected when succession is through merger or integration of States. Ex hypothesi the States in question share common objectives where they decide to merge or integrate. This is not the case where decolonization is involved. As noticed earlier, Bedjaoui rejects the theory of acquired rights in this situation. He questions the ethics of requiring the successor state to pay compensation for doing away with acquired rights in the decolonization context. He does not see any justification for continuing the privileges which were obtained under coercion or through other illegitimate means. Professor R.P. Anand and Parker Thomas Moon have thrown light on some of the practices used by the colonial powers in obtaining privileges for themselves.


71 P.T. Moon, Imperialism and World Politics (New York, 1927), p. 82.
The principle of minimum standard of international law would seem to imply that the status of aliens is governed by international law. Consequently, standard of municipal law of a State must conform to some recognized international standards. This standard, as applied to the problem of expropriation contemplates not only that it is obligatory on the expropriating State to pay compensation but that the compensation paid should be "adequate, prompt and effective". Undoubtedly, this standard of payment of compensation "arose among States having a similar civilization based upon common ideas of right and justice ...", and evolved on the basis of their legal conscience and political expediency. Their common objective was to exploit underdeveloped non-European countries and protect their nationals who had gone to those countries for business and profit. This formula, as developed by the industrial States sharing common ideals and interests, would not tolerate national standard of treatment of aliens which might not measure up to the so-called international standards.

However, this international minimum standard always remained rather indeterminate and it is difficult to apply it in all situations.

It is only natural that the new States emerging after a long colonial rule are not convinced that the principle of international minimum standard is equitable or fair to both the developed and the developing countries. On the other hand, hostility of some capital-exporting countries to the principle of national treatment is because of the conflicting interests involved. They feel that at times national treatment may mean no compensation at all to the aliens for expropriation of their property when no compensation has been paid to nationals in similar circumstances. However, as Ian Brownlie rightly points out:

Thus those supporting the national treatment principle are not necessarily committed, as is sometimes suggested, to the view that municipal law has supremacy over international law; it is quite possible to contend that, as a matter of international law, the standard of treatment is to be defined in terms of equality under the local law. Protagonists of national treatment point to
the role the law associated with the international standard has played in maintaining a privileged status for aliens, supporting alien control of large areas of the national economy, and providing a pretext for foreign armed intervention. 73

Borchard has also taken the view that "equality with the nationals] is the ultimate that the alien may ask of municipal law, which is by no means bound to grant equality". He has further maintained that any international claim would rest on the State's violation of its own law and not on the minimum standard. Unlike Brownlie, who is aware of the possible objection to the so-called international standard as a standard which was used to maintain privileged status for the aliens, Borchard considers that "the substantive content of the standard .... is associated with certain elementary privileges of human existence which every state admitting aliens may be deemed to extend — mainly

73 Ian Brownlie, n. 39, p. 511.


75 Ibid., p. 449.
rights to life and the elementary liberties connected with the earning of a living." If past history of the "international minimum standard" was associated with this lofty ideal one could hardly have any objection to such a principle, for, this as a minimum standard of international law, should be acceptable to the new States. Unfortunately, most of the supporters of the principle have given a different version of the minimum standard of international law when applied to expropriation cases. Moreover, they do not seem to attach much importance to Borchard's advice that a "voluntary conformity to the standard and to the rules of international law and practice which it embodies would be more profitable in the long run ...". Consequently, there is a misplaced insistence on payment of "adequate, prompt and effective compensation" irrespective of circumstances of each case.

Elements of Adequate, Prompt and Effective Compensation

The above classic formula on compensation was evolved during the nineteenth century and was

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76 Ibid., p. 458.
77 Ibid., p. 461.
accepted in the inter-war period. The sole exception was in cases of expropriation of general and impersonal character. Early reference to the formula is contained in Secretary of State Hull's notes of August 22, 1938 and of April 3, 1940 to the Mexican Government. While recognising the right of a sovereign state to expropriate property for public purposes, the notes emphasized that the "right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement". The United Kingdom Government also founded its claims in the post-war period against Hungary, Romania and other countries on the above formula though settlements did not take place on that basis. This formula continues to be relied upon largely by developed countries of the West.

78 White, n. 30, p. 11.

The "adequate, prompt and effective" compensation formula which apparently appears to be simple, has given rise to endless controversy. The three elements of this formula may be considered in turn.

(i) Adequate Compensation

The term "adequate" has been used in practice interchangeably with "full", "just", "fair", "appropriate" and "reasonable" compensation. For instance, Schwarzenberger states that the "difference between the terms 'full' and 'adequate' compensation is merely one between synonyms. A claimant is likely to consider full compensation in accordance with his own petition to be adequate. Conversely, compensation considered adequate by an impartial third party, but falling short of a claimant's exaggerated expectations is not necessarily less than full compensation". Further, according to international judicial practice, "full" compensation is the market

value of the expropriated property. According to a draft Convention prepared at its thirty-seventh Conference by the International Law Association, expropriation was admissible only if compensation was paid before the time of dispossession and was full and complete. Article III of the Abs-Shawcross Draft Convention calls for payment of "just and effective" compensation. To be just, compensation must be determined at, or prior to, the time of deprivation of the property and represent its genuine value. The purpose of the article is said to be to restate the minimum standards. Article 25 of the Economic Agreement of Bogota, signed at the Ninth International Conference of American States (1948) provides:

81 Ibid., p. 11. Schwarzenberger prefers the expression "full" since it "bring[s] out more precisely the actual rule on the question of damages". (p.10). According to Rosalyn Higgins (n. 32, p. 57) the term "adequate" though imprecise, has usually been taken to mean bearing a reasonably close relationship to the value of expropriated property. The term is not taken to mean full market value.


83 Ibid., p. 121.
Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner. 84

The notes of the United States of America have used such expressions as "actual, fair and full". At the 1952 Vienna Session of the Institute of International Law there was a body of opinion to the effect that a nationalising state fulfilled its obligations by the payment of such compensation as was reasonable, in the circumstances taking into consideration the whole of its national economy.

Article 10(2)(a) of the Harvard Law School Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) (or more


conveniently Sonn - Baxter Draft) envisages just compensation in terms of the fair market value of the property; if no fair market exists, just compensation in terms of fair value of the property. Section 187 of the Restatement of the Law by American Law Institute defines just compensation as (a) adequate in amount (b) paid with reasonable promptness, and (c) paid in a form that is effectively realizable by the alien, to the fullest extent that the circumstances permit. Adequacy of compensation is further elaborated in Section 188 of the Restatement according to which "the amount must be equivalent to the full value of the property taken, together with interest to the date of payment". An exception is provided where "special circumstances make such requirement unreasonable". But the Restatement does not elaborate these special circumstances.

The debate in connection with draft resolution of the Commission on Permanent Sovereignty Over Natural

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88 Ibid., pp. 563-564.
Wealth and Resources throws interesting light on the question of compensation. Paragraph 4 of Resolution 1903 (XVII) adopted by the General Assembly on 14 December 1962 provides that in cases of nationalization, expropriation or requisitioning "the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted". During the debate the term "appropriate compensation" came to be interpreted differently by different group of States. Afghanistan and the United Arab Republic favoured another expression "adequate compensation, when and where appropriate". Afghanistan proposed this amendment since it was opposed to an "automatic compensation procedure" which might be dangerous to the economy of the nationalizing countries. The

89 UN Doc. A/AC.97/L.7 (1962).

representative of the United States of America stated that in the context of paragraph 4 of the draft, "appropriate compensation" could only mean prompt, adequate and effective compensation. The U.S.S.R. amendment to the effect that "the question of compensation to the owners shall in such cases be decided in accordance with the national law of the country taking these measures in the exercise of its sovereignty" was defeated.

The General Assembly resolution referred to above attracted comments from several publicists. For instance, Stanley Metzger expresses the following view:


After a struggle the underdeveloped countries succeeded in watering down the traditional formulation of "just" or "full" compensation in respect of takings to "appropriate compensation". While the United States made statements for the record that "appropriate" compensation meant the same thing as "prompt, adequate and effective compensation", this could hardly be convincing in view of the negotiating and voting history of the resolution.

Similarly, O'Keefe commenting on the resolution states that its "failure to specify more precisely the requirements that must be met in paying compensation is one of the Resolution's greatest defects. On the other hand, it is highly likely that a more specific formulation would have failed to achieve sufficient support in the Assembly for adoption. This is particularly evident from the result of efforts by the United States to introduce the standard of 'prompt, adequate and effective

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compensation." He further adds that it is difficult to reach a definite conclusion as to the content of "appropriate compensation" because there is no universally acceptable juridical basis of compensation on expropriation of alien property. Since the resolution under consideration was the result of hard bargaining and compromise, it would obviously be wrong to infer from the resolution any support for the traditional formula, i.e., "adequate, prompt and effective" compensation even though the interpretation of the United States was not "directly opposed or contradicted in debate". In fact, Mughraby draws the conclusion that the developed countries waived their insistence on the standard of "prompt, adequate, and effective" in favour of "appropriate". Richard Falk, however,


95 Ibid., p. 267.


97 Muhamad A. Mughraby, Permanent Sovereignty Over Oil Resources (Beirut, 1966), p. 29.
believes that the word "appropriate" is open to interpretations from every ideological angle. In this context it may be noted that real uncertainty seems to have been introduced by the words "in accordance with international law". The view is, however, widely shared that traditional international law on the question is outmoded. The resolution, as will be seen later, was a step in the direction of modifying that law.

Ability to pay compensation

It became quite apparent in the above debate that the developing countries wanted modification of the traditional international law in the light of their financial situation and difficulties, which they considered were not of their own making. Consequently, they did not favour a compensation formula which ignored their capacity to pay. By replacing the classic "adequate, prompt and effective" compensation formula by "appropriate compensation"
they were seeking recognition of their ability to pay as a necessary element in deciding the amount of compensation payable to owner of expropriated property. The developing countries have constantly emphasized that insistence on strict compliance with orthodox standards of compensation would thwart their efforts to carry out badly needed social and economic reforms. A large number of lumpsum agreements arrived at on the basis of partial compensation indicate the emergence of a realistic trend consistent with changing conditions. Professor Lissitzyn rightly observes: "Compromise settlements have been frequent, and there is reason to believe that in many of them the expropriating states' ability to pay was taken into account". A number of publicists have expressed support for the view that ability of the expropriating State to pay should be taken into consideration. Dawson and Weston observe as follows:

To assert as do some, that States lacking sufficient gold reserves, foreign exchange, or other financial resources should not undertake social and economic reforms is both unrealistic and patronizing. After

99 O.J. Lissitzyn, "Iranian Oil, Foreign Investments and the Law", Foreign Affairs Reports (New Delhi), vol. 2 (1953), p. 27.
years of political and economic inferiority, nations which are but recently independent or which seek to transform outmoded socio-economic institutions are unlikely to accept voluntarily restrictions incompatible with their legitimate aspirations. 100

These authors recommend the consideration of such factors as gross national product of the depriving state, earning capacity of the depriving or claimant vis-a-vis other nations, and whether high compensatory demands would be prohibitive to the depriving state? Professor Seidl-Hohenveldern is also in favour of deviating from the classic compensation formula by taking into account the paying capacity of the state resorting to nationalization. The Draft Convention prepared by John and Baxter recognizes


101 Ibid., pp. 751-752.

that a state may consider it desirable to resort to general programme of economic and social reform because of the "poverty of its treasury, the demands of its internal economy, or an adverse balance of payments". To meet these exigencies the Draft Convention makes a provision for payment of deferred compensation provided that a reasonable part of the compensation due is paid promptly. Professor Kenneth Karst thinks that this provision "gives controlling weight to the factor of the ability of the expropriating government to pay. The point is made in their comment that the taking state would probably have to give up its reform if the standard of full compensation were applied to a widespread taking".

It is submitted that this conclusion is not warranted from plain reading of the Draft Convention or commentary. A concession is made only as regards deferred payment of partial amount on the basis of ability to


104 Kenneth L. Karst "Land Reform in International Law", in Miller and Stanger, n. 34, p. 64.
pay but there is nothing to suggest that less than full compensation may be paid. In any case, Sahn-Baxter draft does make a departure from the classic compensation formula although only to a limited extent by making provision for deferred partial compensation.

In the International Law Commission, Professor Bartos of Yugoslavia conceded that compensation would not always be paid in full, but would be proportional to the responsible State's ability to pay. A contrary view is expressed by Schwarzenberger who states:

105 Also at Seidl-Hohenfelder, n. 102, p. 550.

106 Yearbook of the International Law Commission, vol. 1 (1963), p. 85. Mr. Bartos further added that "for purposes of determining the amount of compensation to be claimed, that State would be treated, by a kind of quasi-analogy, in accordance with the modern rules applicable to bankrupts .... In the case of Italy and the other States with which peace had been concluded in Paris in 1947, a lump sum had been claimed, taking account of the ability to pay. That system was very often applied in practice, in cases of compensation to foreigners for expropriation of property. (Ibid.). Garcia-Amador in his Fourth Report refers to Lapredelle, Chargueraud-Hartman, Vitto and Guggenheim who hold the view that the nationalizing State's capacity to pay is one of the most important factors which must be taken into consideration in deciding the amount, time and form of compensation. Ibid., vol. 2 (1959), p. 23.
The fact that most of the contemporary subjects of international law are poor, and that a good many of them are hardly "viable" in economic terms or prefer to default on their obligations is scarcely an acceptable substitute for evidence of a changing convic'tio juris. 107

Schwarzenberger does not seem to recognize ability to pay compensation as a juridical basis for fixing the standard of compensation. Some writers have categorically pointed out that a State unable to pay compensation should not exercise the right to expropriate. According to Drucker, "States which expropriate and are unable or unwilling to pay such compensation ["full and adequate"] are violating international law and should not be encouraged by compensation agreements which do not bring real relief to the expropriated interests but tend to 108 petrify the international wrong". Position of

107 Schwarzenberger, n. 20, p. 8.

c. c. Hyde, L.W. Woolsey and Verzijl seems to be similar. However, it would be seen that strict adherence to the classic "adequate prompt and effective" compensation formula is unworkable. Thus, the Iranian oil expropriations involved assets approximating $1400 million, whereas the Iran's gold reserve (main part of Iran's liquid national wealth) amounted to only $239 millions. Obviously, in this situation Iran could not pay what is called "adequate, prompt and effective" compensation. In this connection Foighel observed:

A demand for adequate, prompt and effective compensation in such a situation would be absurd unless it were interpreted as implying that a State, which — like — Iran — lacked the economic possibilities to make such compensation payments — should refrain from nationalization. Such an interpretation of the rules of

C.C. Hyde observes: "... a territorial sovereign may find its very right to expropriate conditioned upon its power to pay, and that if it be sought to exercise that right when evidence of the possession of such power and the disposition to use it are not evident, there is reason to demand that there be restored to the owners what may have been taken from them" (emphasis added) "Compensation for Expropriations", American Journal of International Law (Washington, D.C.), vol. 33 (1939), p. 112. See also L.W. Woolsey, "The Expropriation of Oil by Mexico", Ibid., vol. 32 (1938), p. 526
international law would be difficult to uphold because the interests ... motivating the acts of nationalization are far too important to allow such interpretation. 110

Moreover, as it may be seen later, in practice the ability of the states to pay compensation is always taken into consideration when compensation agreement is arrived at. This becomes clear from a large number of lumpsum settlements providing for only partial compensation. For example, by exchange of Notes on 24 April 1946 the United States of America and Poland agreed that the "terms of payment of compensation should be fixed by agreement of the two Governments in light of the Polish balance of payments when the total amount of compensation will be known". Also, these agreements provide for payment of compensation in instalments which is a departure from the so-called principle of 'prompt' payment.

110 Foighel, n. 66, p. 76.

(11) Prompt Compensation

The rule concerning 'prompt' payment of compensation is observed more in breach and does not have much support in state practice. Two experts with special knowledge on the problem of compensation observe thus:

Historic practice ... seriously challenges theories of immediate or prior payment, emphasizing instead the deferred character of compensation. 112

In certain judicial and arbitral cases, such terms as "in due time", "as quickly as possible", and a "reasonable period" have been used to indicate the deferred time of payment of compensation. These terms do not necessarily mean


immediate payment of compensation nor is it necessary 116
"in equity". According to Schwarzenberger prompt
compensation means "compensation after a reasonable
interval of discussions on all relevant aspects of
the expropriation, including the market value of
the property concerned". Rosalyn Higgins observes
that the requirement of promptness is imprecise and
has to be interpreted in the light of the facts.
She points out that international tribunals have
deprecated to interpret it to mean prior to or before
the actual act of expropriation. In the case of
Algerian nationalizations which came before a French
Court, the latter held that —

116 Schwarzenberger, n. 80, p. 11.

117 Ibid. The term 'prompt' refers to the time at
which payment should be made, not to the time
at which the amount of compensation should be
assessed. (Case concerning the Factory at
Chorzow, PClJ (1928) series A, no. 17, pp.47-49).

118 Higgins, n. 32, p. 57. S. Friedman observes
that writers favouring payment of compensation
prior to expropriation are influenced by
municipal law provisions and that there is
no conclusive precedent or authority for
this requirement (n. 17, p. 218).
the principle applied formerly, that foreign nationalization laws that do not fix prior and fair compensation shall not have any effect in France as contrary to public policy, cannot be applied in this instance ... prior evaluation of the compensation owed to the Société Narbonne cannot in practice be accomplished, because it depends on accounting and other operations, long and complicated. 119

Weston asserts that customary international law has never required anything like 'prompt' compensation. Practice of States is also not uniform or consistent on this question. Solutions have


considerably varied depending upon circumstances of each case. Thus, Special Rapporteur of the International Law Commission on State Responsibility observes:

It is clear that the time-limit for the payment of the agreed compensation necessarily depends on the circumstances in each case and, in particular, on the expropriating state's resources and actual capacity to pay. Even in the case of "partial" compensation, very few states have in practice been in a sufficiently strong economic and financial position to be able to pay the agreed compensation immediately and in full. 121

France and Great Britain paid compensation in the form of bonds, redeemable, over a number of years when those countries nationalized banks, airlines, insurance companies, transportation and steel industries. This formula was accepted by the affected states, such as Switzerland, the United States of America and Belgium. In the Anglo-Iranian


Oil case, the United Kingdom admitted before the International Court of Justice that the payment might be made over a number of years.

One view of the 'prompt' compensation is that compensation should be fixed at the time expropriation although payment may be made afterwards. Article 3 of the Treaty between the Swiss Confederation and the Tunisian Republic Concerning the Protection and Encouragement of Capital Investment concluded in 1961 specifically provides for "the payment of an effective and adequate indemnity, which must be fixed at the time of expropriation, nationalization, or dispossession, and will be paid over without unjustified delay to the entitled party. The amount of such indemnity will be transferred in a reasonable time". The General Insurance Business (Nationalisation) Act, 1972 enacted by India in September 1972 indicated the precise amount to be paid to the foreign insurers and provided for

123 Anglo-Iranian Oil Co. Case, n. 121.

its payment in cash within three months of the appointed day (not being a day later than 2 January 1973). Similarly, The Burma Shell (Acquisition of Undertakings in India) Act, 1976 mentioned the precise amount of payment for the acquisition and transfer of the right, title and interest of the Company.

At times no compensation is fixed at the time of expropriation but only a promise is made to pay it at future date which is not specified. The tough United States position was explained by Secretary Hull in these words: "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." Thus, the Legal Adviser of the U.S.

125 See Art. 3 of Iraqi Law 69 of 1972 nationalizing Iraq Petroleum Co. which provides for compensation but not the time or manner of its payment. *International Legal Materials*, vol. 11 (1972), p. 847.

126 Quoted in Drucker, n. 128, p. 108. (emphasis added). Also cf. Art. 3 of the relevant Ordinances and Decrees on the nationalization of Foreign Oil Companies operating in Algeria (24 Feb. 1971): "The nationalization resulting from the present ordinance will allow for the right to compensation by the State, the means of determination and settlement of which will be fixed, insofar as necessary, by decree." *International Legal Materials*, vol. 10 (1971), p. 848, 850, 852.
Department of State commenting on the means of payment contained in the Cuban Agrarian Reform Law stated that "the issuance of bonds as purported compensation is nothing more than evidence of a present intent to pay in the future ... a mere promise to pay in twenty years".

However, very often in practice compensation is not even fixed, leave aside its payment, at the time of expropriation. For instance, Ugandan Decree No. 27 (i.e. The Assets of Departed Asians Decree, 1973) provided that the compensation payable might be spread "over such period as the Minister shall determine, having regard to the period within which the said assets may generate sufficient income to offset the amount of compensation payable". In this case, until the Minister had notified his decision, appeal to the High Court could not be made. At least theoretically, it was quite possible that the Minister might take very long to give his decision or might not give any decision at all in which case compensation would become illusory. The 1973 Decree was

127 quoted in Whiteman, n. 41, p. 1169 (emphasis added).
amended by Decree No. 12 of 1975 followed by direct negotiations between representatives of India and Uganda. Agreed amount of compensation for the assets of expelled Indian nationals was paid by a cheque in one lump sum. However, in the case of stateless Asians the Ugandan Government, after negotiations with the representatives of the United Nations High Commissioner for Refugees, agreed to pay Ugandan shillings 40,500,996.51 out of which only shillings 5,509,996.51 were to be immediately paid in cash. The balance amount was agreed to be paid over a period of ten years at half-yearly intervals and without interest. Article 7 of the Libyan law nationalizing the interests of British Petroleum Co. (Libya) in the oil concession envisaged a Committee to determine compensation but did not lay down any time limit for establishing such a Committee.

A Burmese Notification (No. 277) regarding the payment of compensation for national and foreign owned enterprises nationalized under the Business Nationalisation Law, 1963 and the Socialist Economic System Establishment Law, 1965 was issued on 7 December 1973 i.e. after ten years of the nationalization. The Notification provides for the following mode of compensation after calculation:
(1) Compensation not exceeding K 10,000 will be paid in a lump sum.

(2) A sum of K 10,000 will be paid as the first instalment in respect of compensation exceeding K 10,000.

(3) The balance will be given in the form of Government Security Bonds, of which five per cent of the balance of K 10,000, whichever is more, will be encashable every year after payment of the first instalment.

(4) These Government Security Bonds will be issued on the day the first instalment is paid.

(5) Such Government Security Bonds will not bear any interest. 128

It would be seen from the Burmese notification that no time limit has been set for fixing or paying the compensation. However, the notification merely indicates intention to pay. Even if 'reasonable period' is permitted for fixation or payment of compensation this requirement is not met in the instant case where relevant legislation regarding payment was made after ten years of nationalization.

Amerasinghe observes that prompt payment is not required since the "exigencies of the international situation permit payment over a period of time" and that period according to him is a 'reasonable period' which never exceeds ten to twelve years. Amerasinghe rightly concludes that the 'reasonable period' for payment of compensation is to be distinguished from the 'reasonable period' allowed for the assessment of compensation which is much shorter.

129 Amerasinghe, n. 52, p. 167.

130 Ibid. The American Law Institute Restatement provides that "provision for determining compensation must exist at the time of taking. It must include provision for determination within a reasonable time and for payment promptly after determination". (n. 29, pp. 568-569). In this connection see Art. 7 of the Libyan nationalization law which sets maximum time limit for the Committee on compensation for fixing the amount of compensation although no time limit is laid down for setting up such a committee. International Legal Materials, vol. 11 (1972), p. 381. Francisco Orrego Vicuna considers even a period of thirty years in the Chilean Constitution for payment of compensation as not violative of international law. (Vicuna, n. 46, p. 724).
It is submitted that a State's financial capacity and other relevant circumstances must be taken into account in deciding whether or not compensation has been paid within a reasonable time, for, the latter cannot be determined in vacuum. However, there is lesser justification for delaying appropriate legislation providing for compensation and mode of payment thereof.

A question is often raised whether title to the property passes immediately upon expropriation. Further, if compensation on an instalment basis is considered permissible, at what point does title pass to the expropriating State? It is contended by Professor Baxter that Sohn-Baxter Draft Convention envisaged that title passed at the time a reasonable portion of compensation was paid and bonds were tendered for the remainder bearing a reasonable rate of interest. It seems difficult to support this contention on the basis of preponderant case law or State practice. If title to expropriated property is mooted, for instance, in the foreign courts they are not likely to lightly interfere with the title of the expropriating State, whatever the circumstances of such expropriation.
This has more or less been the attitude of the courts in the United States, Britain, Germany, Japan and Italy in cases where title to expropriated property was challenged on the basis of lack of compensation or inadequacy thereof. These cases did not decide whether compensation was promptly paid or not, but whether lack of adequate compensation vitiated title of the expropriating State to the expropriated property. Typical of the reasons given for refusing to interfere in such cases was given by the Bremen Court of Appeals:

In showing proper respect for foreign Acts of State, new tensions between nations will be avoided and the economic adjustment will be better achieved from state to state and through mutual assis-

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f.n. contd..
tance between the states than through intensive interference of national courts on a large scale. 132

Yet another question relating to non-payment of compensation within a reasonable time is whether any interest is payable till compensation has been paid and, if so, the point of time when such interest starts accruing to the affected party, that is, the date on which property was expropriated or the date when compensation was assessed. On this issue there is no consistent practice nor an established principle of international law. Many jurists favour payment of interest in case of deferred payment of compensation.

f.n. 131 contd..


132 Quoted in M. Domke, "Indonesian Nationalisation Measures before Foreign Courts", American Journal of International Law, vol. 54 (1960), p. 314. Similarly, the U.S. Supreme Court in Sabbatino case stated: "...Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign, extent and recognized by this country at the time of suit, in the absence of treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law". (376 U.S. 398 (1964), p. 428).
Amerasinghe, for instance, expresses the view that interest must be paid from the date of nationalization as it falls due. Sohn-Baxter Draft (Article 10(4)(c)) envisages that bonds equal in fair market value to the remainder of the compensation after reasonable part of the compensation has been paid and bearing a reasonable rate of interest are to be given to the alien. The practice of the Foreign Claims Settlement Commission of the United States is to compensate the claimant in terms of interest "for the loss of the use of the compensation he was entitled to receive on the date the property was taken, from the date of taking to the date of payment" by the nationalizing Government. Mexican-United States settlement on expropriation of oil by Mexico envisaged 3 per cent interest on the compensation. Compensation Agreements between

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133 Amerasinghe, n. 62, p. 167.
135 White, n. 30, p. 12.
Sri Lanka and Caltex, Esso and Shell, signed in 1965, provide that "As from the date of the signature of this Agreement simple interest on the unpaid balance of the instalments shall accrue at the rate of three per centum (3%) per annum and shall become due and payable on the dates the instalment payments are due". However, in the recent past in a number of cases no interest was paid. Thus, the United Arab Republic did not pay any interest on the compensation to Shell Co. of U.K. nationalized by the former on 25 March 1964; the Burmese example has already been given where the Government security bonds did not bear any interest; Article 1 of the Supreme Decree setting terms for indemnity for nationalization of Bolivian Gulf Oil Company by Bolivia specifically states that the deferred payment


shall not earn any interest. A preambular paragraph of this Decree also mentions that "the payment of interests on the amount of the indemnification is detrimental for the economy of the State". Article 4 of the recent Agreement regarding the settlement of claims between the United States and Hungary contemplates lump sum payment in instalments but there is no mention of any interest to be paid. Similarly, Article 8 of Venezuela's Natural Gas Nationalization Act, 1971, makes provision for compensation, payment of which cannot be deferred beyond ten years; but it is silent on payment of interest. However, a recent Chilean Decree law approving Settlement Agreement with Kennecott Copper Corporation of the United States of America does provide for "the interest corresponding to the period of time which elapsed between said date (i.e. January 1, 1971 when indemnity was fixed) and September 30, 1974 ...". Similarly,

India's practice in cases of nationalization of foreign enterprises has been to pay fair compensation including interest, wherever payment was made in instalments. When air transportation was nationalized in 1953, ten per cent compensation was paid in cash and the balance in the form of five-year bonds bearing 3.5 per cent interest. The bonds were guaranteed by the Government of India. Subsequently, the Government of India took over the rights, title and interest of the Burmah Shell Oil Storage and Distributing Company of India Limited, under Section 8 of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, and provided for payment of amount of £15,209,772 in four equal instalments including interest at the rate of eight per cent till the date of payment.

The above examples indicate the difficulty of laying down any general rule on payment of interest in cases of deferred payment of compensation in view of the varying circumstances of the expropriation measures. Moreover, lump sum compensation agreements providing for deferred payment of compensation are arrived at between the parties taking into account possible pragmatic solutions.
(iii) **Effective Compensation**

By 'effective' compensation is meant the compensation which could be readily used by the alien to his benefit. Thus, payment of the compensation in the currency of the expropriating State is not considered effective if the claimant has no possibility of investing it there. According to Schwarzenberger, what is 'effective' compensation depends on the uses the claimant desires to make of the compensation granted. This definition appears too wide. It should suffice for compensation to be effective if the claimant can make use of it even if it is not necessarily according to his choice. According to Kronfol "'effectiveness' usually refers to the precise form of the indemnity, and especially to the possibility of its immediate utilization by the recipient". In the Anglo-Iranian Oil Co. case, the United Kingdom Memorial explained the term 'effective' compensation thus:

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142 Schwarzenberger, n. 30, p. 11.

The claimant must be able to make use of it. He must, for instance, be able, if he wishes, to use it to set up a new enterprise to replace the one that has been expropriated or to use it for such other purposes as he wishes. Monetary compensation which is in blocked currency is not effective because, where the person to be compensated is a foreigner, he is not in a position to use it or to obtain the benefit of it. The compensation therefore must be freely transferable from the country paying it and, so far as that country's restrictions are concerned, convertible into other currencies.

Thus, it would be seen that the question of 'effective' compensation is largely related to the currency in which such compensation is paid. Compensation may be paid in (a) nationalizing state's currency; (b) currency of the state of claimant; and

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144 Anglo-Iranian Oil Co. Case (United Kingdom v. Iran, 1952), ICJ Pleadings, p. 106-107. Recent example of payment of compensation in blocked account is that of Peru's nationalization of International Petroleum Company (IPC). The payment of compensation was made conditional on the payment of back taxes by IPC from 1924 onwards. The amount of taxes exceeded the amount of compensation. (Nigel S. Rodley, "The Nationalization by Peru of the Holdings of the International Petroleum Company", in Nigel S. Rodley and G. Neale Ronning (editors), International Law in the Western Hemisphere (The Hague, 1974), p. 118.
(c) convertible currency of a third State. According to Foighel, since compensation is aimed at ensuring that claimant's financial position remains unaffected by the nationalization, the payment ought to be made in the currency of the state in which the nationalized property was situated at the time of the nationalization. However, Foighel considers this solution as only theoretical because "payment in the currency of the nationalizing state will seldom constitute any redress to the person entitled to compensation, for he will normally be precluded from reinvestment in the same or similar kinds of activities in that country". However, where reinvestment is possible in the nationalizing State in conditions comparable to investment elsewhere, it is suggested by Amerasinghe that payment may be made in the currency of the nationalizing or expropriating State or in securities. The argument

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145 Foighel, n. 66, p. 122. In this connection, example of Peace Treaties with Italy, Bulgaria, Hungary and Romania is given, (id., p. 123).

146 Ibid., p. 124. He pleads that payment should be made in foreign currency at least in those cases where investment was also in the foreign currency. (id., p. 124)

147 Amerasinghe, n. 52, p. 162.
advanced in this regard is that, just as an alien cannot remove his investment whenever he pleases, he cannot repatriate compensation received by him. He can only remit the interest on his compensation on the analogy of profits on investment. According to Rosalyn Higgins 'effectiveness' means "that the payment must not be illusory; the alien must be able to withdraw it from the country concerned and use it to his benefit. The particular country in which payment is made, for example, would often be of relevance here". Here, the expression "must be able to withdraw it" does not necessarily reflect the prevalent position since some expropriating States merely afford possibilities for reinvestment in the same State. It may also be mentioned that writers have not paid much attention to the possibility of compensation in kind being considered as 'effective' compensation. To save the expropriating State from payment difficulties, particularly

148 Ibid., pp. 161-162.
149 Rosalyn Higgins, n. 32, p. 57.
150 Cf. J. Kunz, Mexican Expropriations (New York, 1940): "It is perfectly clear that 'adequate, effective and prompt' compensation under international law means compensation in cash. But it is equally clear that the parties involved may waive this right and agree to reach a compromise solution".
relating to foreign exchange, it is not uncommon to link compensation agreements with trade arrangements. Thus, by an agreement in 1948 France agreed to accept specified quantities of Polish coal over a number of years in lieu of compensation. Commenting on agreements providing for compensation in kind Gillian White states:

These agreements are exceptional and are undoubtedly the result of particular circumstances and considerations of expediency rather than considerations of international law. However, there is nothing in international law to prevent States from entering into such agreements ... it does not stipulate that compensation should always be in the form of money. 152

The American Law Institute Restatement on "Responsibility of States for Injuries to Aliens" specifically envisages compensation in kind as an "effective" mode of payment. Section 190 of the Restatement provides:

151 Dawson and Weston, n. 100, p. 744; White, n. 30, p. 205. Similar agreement took place between Poland and Belgium. (White, ibid., pp. 205-206).

152 White, n. 30, p. 206.
Compensation, to be in effectively realizable form ... must be in the form of cash or property readily convertible into cash.

The juristic opinion and the practice of States indicate that under international law an alien is not necessarily entitled to compensation in the currency of his national State. Metzger substantiates the proposition that customary international law does not require compensation to be paid in the national currency of the alien by giving the following examples:

1. under Articles of Agreement of International Monetary Fund (IMF) members may prohibit capital transfers.

2. Article 12 of Geneva draft of the Charter for International Trade Organization (ITO) provided for payment of just compensation to the foreigner where his property was taken into public ownership. But a note to that article read: "A Member's obligation to ensure the payment of just consideration or just compensation to a foreign national (insofar as it is an obligation to make payment in currency) is essentially an obligation to make payment in the local currency of that Member." This note had the support of nineteen countries including UK, Canada, France, Brazil and the Netherlands.

153 Note 29, p. 569 (emphasis added).
(3) Under Article XII of the Friendship, Commerce and Navigation Treaty between the United States and Japan, the latter's right to prohibit remittance of foreign currency was recognized. 154

Metzger is of the opinion that "in 1947, far from there being a rule of international law requiring remittance in foreign exchange of currency paid in compensation for takings, there was in fact only an obligation to make payment in the local currency of the taking State". In Garrow Claim, Foreign Claims Settlement Commission of the United States held that the "tender of adequate compensation in domestic currency satisfied the requirement of international law that effective compensation be paid for the taking of property". The former Special Rapporteur of the International Law Commission on


"State Responsibility expressed the view that once payment was made in the form required by municipal law and if compensation was not manifestly arbitrary, there would appear to be no ground for requiring the State to make payment in a more effective form. A recent case of a developing country making payment of effective compensation is that of Uganda which handed over in January 1976 a cheque to the Government of India in the United States dollars as compensation for assets of expelled Indian nationals.

From the above it would appear that State practice as to whether compensation should be paid in currency of the claimant or the expropriating State is not uniform and consistent. It is also clear that whether "local currency payment is effective compensation depends upon all of the circumstances of the case, i.e., the convertibility of the currency, whether or not it is useful to the foreign-owner for new investment within the country, etc., which can only be determined at the time of,

157 Note 121, p. 23.
and would usually be determined in the course of negotiations. Payment in kind may be as effective a compensation as payment in cash. Similarly, payment in currency of expropriating state may be as effective as payment in the currency of the claimant’s state. In any case the basic criterion has to be whether compensation could be put to effective use by the alien claimant. If an alien claimant has been expelled after expropriation of his property, payment in local currency could hardly be considered effective, particularly if currency is not convertible.

**ADEQUATE, PROMPT AND EFFECTIVE COMPENSATION**

After having discussed the various elements constituting the classic formula called “adequate, prompt and effective” compensation, we shall now turn to the formula itself. Supporters of this traditional formula insist that unless all the three interrelated elements are complied with, requirements of international law would not be fulfilled.

158 Memorandum of the Office of the Assistant Legal Adviser for Economic Affairs, quoted in Whitman, n. 41, p. 1183.
Many writers have not commented individually on all the elements of the above formula but they have generally alluded to its rigours and outmoded character in the context of present-day world situation. In the post World War II period, the formula has weakened to a point where it could no longer be considered as a binding principle of international law. The untenable position of the formula has led Lissitzyn to remark as follows:

It is probable that if the formula were squarely put to a vote in the General Assembly, it would be rejected by a majority composed of most of the less developed nations and the Soviet bloc. It can no longer be counted on to protect the interests of foreign investors in all the less developed countries. In this matter, the attainment of independence by so many capital-importing nations has certainly contributed to the weakening of a norm of international law which once seemed firmly established.

159 For instance, William Bishop states: "The International Court of Justice might well rule, today, that there was no clear violation of international law in case some reasonable amount of compensation, though less than full value, were paid". ("General Course of Public International Law", Recueil Des Cours (Leyden), vol. 115, no. 2, (1965), pp. 409-410.

Lissitzyn points out that there is a tendency in the West to recognize that the formula may be unrealistic in many situations and that it may have to be replaced by a more flexible test, such as reasonable compensation, the latter being determined in the light of several relevant factors other than the full value of the property. The classic formula has been further weakened by the post-war agreements which have not complied with the formula. Dawson and Weston have strongly criticized this formula in the following terms:

 Appeals to the somewhat metaphysical standard of "prompt, adequate and effective" compensation are not only unrealistic... but frustrate efforts to achieve at least minimum stability of interaction in a world of violent and radical change. Moreover, to proclaim the fundamental moral propriety of this standard for extensive deprivations is to seek to impose Judeo-Christian norms upon diverse political and social systems which are becoming increasingly sceptical of "universal" and "customary truths" largely formulated without their participation. 163

161 Ibid., p. 85.
162 White, n. 30, p. 235. She gives several examples of deviation from the classic formula.
163 Dawson and Weston, n. 100, p. 749.
According to the above writers the classic formula is used merely for bargaining purposes which is relegated to the place of "legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy". Several other writers from the United States have come to recognize the inadequacy of the traditional formula. They do not consider it as an effective mode of protecting foreign investments or a basis for mutual settlement between the host state and the alien investor. Commenting on Peruvian nationalization of International Petroleum Company and how the United States approach was conditioned by the Barcelona Traction Case, Rodley takes the view that the case "seems to suggest that international law, though perhaps demanding compensation in some cases of expropriation, is incapable at this stage of its development of providing any meaningful standards of determining what those cases are or how the level of compensation is to be measured". Rodley further concludes that

164 Ibid., p. 757.
165 Rodley, n. 144, p. 124 (emphasis added).
the traditional formula does not have the sanction of general international law. He is of the view that in due course satisfactory bilateral arrangements may "crystallize into meaningful norms or standards of general international law. I submit that there are none such now and that any durable arrangements will emerge at the initiative of States wishing to improve their investment climates, not under pressure of those wishing to defend the economic interests of their nationals abroad".

This appears to be the crux of the problem. New standards of international law on the expropriation problem will have to be evolved in the fast-changing environment. The new standards have not clearly emerged but there is already a

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166 Ibid., p. 125. (emphasis added). See also comments of Robert K. Goldman in Proceedings of the American Society of International Law, 1973 (Washington, D.C.), pp. 78-79, 80, who agrees that there is lack of global consensus on what international law requires in expropriatory situations and what are the sources or standard of applicable international law. A United Nations study describes the present situation with regard to standards of compensation as representing a "vanishing consensus" on the basic principles of international law governing the protection of foreign private investments. (E/4293, p. 31).
realization for this need. The jurists from even Western countries often speak of the new patterns and futility of the old concepts. The opponents of the classic formula are increasing in number because of its ineffectiveness. Publicists from U.S.A. for many years have been constantly imploring their government and investors to shed their undue obsession with "adequate, prompt and effective" compensation formula. Thus, Axelrod and Saul Mendlovitz strike a note of caution as follows:

We believe that it would be wrong and destructive for the United States in its dealing with at least some of the national upheavals which generate expropriations to begin negotiations with the old-style international law position that a less than full-value payment makes the taking unlawful. 167

These writers go even further and justify uncompensated expropriation which may be undertaken by States for achieving ends of redistribution. They repeat their warning in the following terms:

... it is wrong and destructive for the U.S. to reinforce full-value compensation as a criterion of taking legality. It is wrong, because to describe an uncompensated expropriation as illegal may be, as we have laboured to show, to deny the higher egalitarian aspirations within our own society. It is destructive because the attempt to reinforce a full value compensation "norm" is apt to generate underdeveloped-nation contempt for international law and thus weaken further the fragile net of order to which that law contributes. 168

Among the reasons for discarding the classic compensation formula the most important one is that it is unrealistic since it can scarcely be complied with in practice, even by the developed States, not to speak of developing nations. This view is shared by many publicists. Lowell Hedmond, for instance, states:

"Prompt, adequate and effective compensation" is a shibboleth which is a fine, high-sounding legal phrase, indulged in by writers, or governments, when sovereign rights are confused with, or overwhelmed by sovereign power. It is a shibboleth which hides many ills and sins. Indeed, fairly, honestly and realistically speaking, there are many situations where there is no such thing as prompt,

168 Ibid., p. 115 (italics in the original).
The traditional formula is unrealistic not only because the standards it lays down are incapable of achievement in a great many situations but also because it does not correspond to the needs of newly independent developing States which represent more than two thirds of the world's population. It is obvious that the classic formula fails to protect the economic interests of these countries and does not help them achieve economic independence.

Main targets of the expropriation measures by the new States are pre-independence concessions, investments or properties, the privileges which were largely obtained under duress, coercion or ignorance. The cases of expropriation of post-independence investments are likely to be comparatively lesser because investments are made with the free will of


170 See Richard Falk, "International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal", American Journal of International Law, vol. 59 (1965), p. 69. Falk rightly poses these questions: "Why should not international law be revised to take account of their particular interests? Why should the traditional 'code' be satisfactory for an international society that is so altered in composition?" (ibid.).
the new State concerned. Post-independence investments are, therefore, bound to receive fair treatment from these states, for, they would have been permitted in the selected areas which would contribute to their economic development. This element of choice and participation is lacking in the pre-independence privileges granted to the colonial powers or their subjects. It is in this context that the developed nations have to grasp that "the continued effectiveness of international law depends upon the pragmatic self-interest of the participants, including the new states, as conceived by them rather than upon juristic logic". Moreover, same standards of justice, equity or international law were not applied in the creation of the privileges which are now sought to be applied to their termination by the new States. Several jurists have, therefore, emphasized the need to refashion the compensation standard based on contemporary requirements rather than customary claims practices and settlements which "differed too widely for there

to be any real international custom". The struggle of the developing countries against the traditional norms of compensation has further intensified as would be seen by some recent developments.

EXPROPRIATION AND COMPENSATION: RECENT DEVELOPMENTS

Apart from Resolution 1803 (XVII) which was adopted by the United Nations General Assembly in 1962 and which provoked considerable discussion, the problem of compensation for nationalization has again figured recently in a big way in the United Nations Conference on Trade and Development (UNCTAD) and the General Assembly in the context of permanent sovereignty of States over their natural resources as well as in the context of new international economic order.

At the twelfth session of the UNCTAD Trade and Development Board, held in 1972, Chile drew attention to the fact that the Kennecott Copper Company, an American corporation nationalized by it, had asked a French court in Paris to block payment to a Chilean State organization called "Codelco" of payment for copper shipped to French buyers. The representative of Chile pointed out that the Kennecott Copper Company had petitioned to a court in a country with different legal principles regarding nationalization and compensation and that court had granted a provisional order. He described these actions as flagrant violations of both international law and the principles of non-intervention and self-determination of peoples as set forth in the Charter of the United Nations. Chile was instantaneously supported by eight Latin American countries which declared that "expropriation and subsequent nationalization of natural resources

are acts of undeniable sovereignty within the exclusive competence and subject to the sole decision of the state in which the resources are situated, in conformity with its national Constitution, laws and regulations. Thereafter, eleven Latin American countries submitted a draft resolution, reaffirming in its preambular paragraphs the sovereignty of every country to dispose of its natural resources for the benefit of its development in conformity with the principles of the Charter of the United Nations, with recommendations of the General Assembly and UNCTAD, in accordance with

174 Ibid., p. 188; TD/B/330. The declaration by the Latin American countries was supported by some other Latin States and countries from the Third World e.g., Algeria (ibid.).

175 UNCTAD Doc. TD/B/L.299.

176 General Assembly resolutions 523(VI), 626(VII), 1615(XV), 1803(XVII), 2165(XXI) and 2386(XXIII). Subsequently, the General Assembly adopted unanimously Resolution 3016 (XXVII) of 18 December 1972 on the same subject. Also see, Security Council res. 330 of 21 March 1973.

177 UNCTAD, CONF. 1st sess., General Principle III (E/CONF. 46/141, vol. 1, annex A.I.1); and UNCTAD, CONF. 3rd sess., res. 46, operative para. 1, principle II (TD/III/Misc.3).
the relevant provisions of the International Development Strategy and the Covenants on Human Rights. On the question of the respective spheres of application of national and international law to acts of nationalization, paragraph 2 of the draft resolution read as follows:

... in the application of this principle, such measures of expropriation or nationalization as States may adopt in order to recover their natural resources are the expression of sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for such measures of expropriation, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts.

The representative of Ghana, speaking on behalf of the African countries members of the Board, referred to the Organization of African Unity (OAU) resolution 245 (XVII)

178 General Assembly Res. 2626(XXV), para. 10 of the Preamble.

179 Article 1 of International Covenant on Economic, Social and Cultural Rights as well as International Covenant on Civil and Political Rights. Both these covenants entered into force on 3 January 1976 and 23 March 1976 respectively.
which had reaffirmed that the exploitation of natural resources in each country should always be conducted in accordance with its national laws and regulations. He expressed belief of the African Group that draft resolution "reflected the general requirement of developing countries to be allowed to manage their own natural resources and it fully supported the principles referred to in the draft resolution".

The representative of the United States of America, on the other hand, felt that the purpose of draft resolution appeared to be to eliminate all standards of compensation applicable in cases of expropriation. He and a few others expressed the view that the draft resolution departed from paragraph 4 of resolution 1803(XVII). This was disputed

180 Note 173; UNCTAD Doc. TD/B/SR.334, p.239. Also see, Chile's statement, ibid., p. 245, para.10.

by the sponsors of the draft resolution. However, to accommodate the viewpoint of those who saw a conflict between the proposed draft resolution and Resolution 1803, the sponsors agreed to add at the end of the operative paragraph 2 the words "without prejudice to what is set forth in General Assembly resolution 1803 (XVII)". Two amendments proposed by the United States, one seeking replacement of second part of paragraph 2, after the words "are the expression of a sovereign power" with a phrase more or less repeating language of resolution 1803, and another seeking insertion of the words "in violation of international law" in paragraph 3, after the words "any act", were defeated. The sponsors explained that they were not opposed to international law, but in their view there was no codified international law on the subject and that that law was emerging from the principles and resolutions cited in the preambular paragraphs of the draft resolution. Castaneda of Mexico lucidly explained

132 Ibid., pp. 253 and 255; UNCTAD Doc. TD/B/SR.335.
the concepts contained in paragraph referred to above, viz., (1) the sovereign power of states to adopt measures of expropriation or nationalization; (2) the right of each state to fix the amount of compensation and the procedure for such measures of expropriation; and (3) where the question of compensation gave rise to a controversy, the national jurisdiction of the state taking the measures had to be exhausted. Recourse to foreign courts could be had only in exceptional circumstances by agreement between the parties, as laid down in Resolution 1803 (XVII). He claimed that all the above concepts were implicit in the latter resolution. He, however, conceded that text of the resolution "went somewhat further than the General Assembly resolution [1803], clarified it in certain respects and thus represented an advance on it". Opposing the United States amendment to paragraph 2 he stated that his delegation could not accept its deletion because this was "precisely the element of innovation in the draft"

183 Ibid., pp. 240-41; UNCTAD Doc. TD/B/SR.334.
184 Ibid., p. 252, para. 52.
resolution". Paragraph 2 of the resolution concerning the sovereign rights of States freely to dispose of their natural resources was finally adopted by the Trade and Development Board by thirty-nine votes to eighteen, with seven abstentions. It stated that

in the application of this principle, such measures of nationalization as states may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts, without prejudice to what is set forth in General Assembly resolution 1803 (XVII).

About a year later, on 17 December 1973, the General Assembly of the United Nations, on the recommendation of the Second Committee, adopted resolution 3171 (XXVIII) on the same subject. By operative paragraph 2 of this resolution the General Assembly affirmed that

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185 Ibid., p. 251, para. 44.
186 See Res. 88(XII) on Permanent Sovereignty over Natural Resources, 19 October 1972, UNCTAD Doc. TD/B/421. (emphasis added).
the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures. (emphasis added).

This paragraph was taken from section VII of the Economic Declaration of the Fourth Conference of Heads of State or Government of Non-Aligned countries, held at Algiers from 5th to 9th September 1973, and was incorporated at the instance of the delegations of Iraq, Algeria and Syrian Arab Republic.

The addition of the above paragraph was expressly supported by USSR, Mongolia, Argentina, United Nations General Assembly, Twenty-eighth sess., 1973, A/C.2/SR.1576; A/C.2/L.1334. This was added by way of amendment to draft resolution (A/C.2/L.1328/Rev.1) introduced by Argentina, Chile, Ecuador, Egypt, Guyana, Iceland, Kenya, Libyan Arab Republic, Peru, United Republic of Tanzania, Venezuela and Zaire. Later on, Burundi became a sponsor of this resolution.

See UN Doc., A/9330, p. 67.

United Nations General Assembly, Twenty-eighth sess., 1973, A/C.2/SR.1576; A/C.2/L.1334. This was added by way of amendment to draft resolution (A/C.2/L.1328/Rev.1) introduced by Argentina, Chile, Ecuador, Egypt, Guyana, Iceland, Kenya, Libyan Arab Republic, Peru, United Republic of Tanzania, Venezuela and Zaire. Later on, Burundi became a sponsor of this resolution.

Ibid., A/C.2/SR.1576, p. 16.


Ibid., p. 5.
The above paragraph was adopted by eighty-one votes to eleven, with twenty-three abstentions.

It is interesting to note that although the resolution speaks of "possible compensation" which may also mean no compensation in some cases, the delegate of Iraq contended that "States had the power to carry out nationalization, subject to compensation, if that was the only means of safeguarding their interests". The opponents of the above paragraph contended that its language was too

192 Ibid., p. 7.
193 Ibid.
194 Ibid., p. 11.
196 Ibid., p. 16.
197 Ibid. The countries that opposed the inclusion of this paragraph included Netherlands, Spain, United Kingdom, United States of America, Belgium, France, Federal Republic of Germany, Greece, Israel, Italy and Japan.
radical, intemperate and emotive, and went beyond existing international law. They also stated that national action could not be taken in fields where existing rules of international law were in force without reference to those rules, that the paragraph altered the system established under international law with respect to foreign investments, that the language did not permit the interpretation that disputes concerning nationalization should be settled in accordance with international law, that it touched upon the basic relations between national legislation and international law, and that acceptance of the paragraph would jeopardize the implementation of the provisions of the International Development Strategy. Australia

199 United Kingdom, UN Doc. A/C.2/SR.1577; Also see, UN Doc. A/PV.2203 (1973), pp. 7-11.
201 Spain, ibid., p. 8.
202 Japan, ibid., p. 10.
203 Federal Republic of Germany, ibid.
204 Greece, ibid., p. 12.
and New Zealand, while reiterating their support for the traditional formula of "prompt, adequate and effective" compensation, refrained from casting negative votes when a separate vote was taken on the paragraph, unlike in the case of paragraph 2 of the UNCTAD Resolution 88 (XII) where they voted against that paragraph.

Some discussion on the question of nationalization took place at the Sixth Special Session of the General Assembly held from 9 April to 2 May 1974. The most comprehensive statement on the subject was made by the President of Algeria who stated that nationalization in itself was an act of development. It is interesting to note that the Declaration on the Establishment of a New International Economic Order and Programme of Action on the Establishment of a New International Economic Order, adopted by the General Assembly at its Sixth

206 A/C. 2/3R.1578, p. 11.

Special Session on 1 May 1974, while recognizing the right of States to nationalize natural resources in exercise of permanent sovereignty over these resources makes no mention of corresponding duty to pay compensation. The representative of the United States expressed his dissatisfaction with the Declaration as it "did not couple the assertion of the right to nationalize with the duty to pay compensation, in accordance with international law. For this reason, the United States did not find the formulation complete or acceptable. The governing international law could not be and was not prejudiced by the adoption of the Declaration".

The Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly on 12 December 1974, is yet another development in the evolution of norms concerning nationalization or expropriation of alien property. The idea

208 See resolutions 3201 (S-VI) and 3202 (S-VI). For a summary of discussion on nationalization and compensation questions during Sixth Special Session of General Assembly see, Report of the Secretary-General on Permanent Sovereignty Over Natural Resources (E/5549,1974).

209 Ibid., p. 18, para. 69.
of drawing up such a Charter originated in an address of the President of Mexico, Louis Echeverria Alvarez, at ninety-second plenary meeting of the Third Session of UNCTAD held at Santiago, Chile, suggesting that international economy should be placed on a firm "legal footing" through a formulation of a Charter of Economic Rights and Duties of States which would define and protect the economic rights of all countries. The representatives of the developing countries, supporting this idea, also expressed the view that the principles had to be converted into internationally binding legal instruments in order to make it possible for the states concerned to invoke their rights. They said that the Charter should be a counterpart in the economic field to the Universal Declaration of Human Rights and the International Covenants on Human Rights. At the same session Resolution 45-III was adopted, constituting a Working Group composed of forty members, to draw up a text of draft Charter. Ambassador Jorge Castaneda of Mexico was elected the chairman of the Working Group. The cracks showed up at the very beginning
of the Working Group's work. The developed and
developing countries did not see eye to eye on
the purpose of the Charter. According to Castaneda,
the purpose of the Charter was to

enunciate authentic economic rights
and duties of States in the only way
in which it is logically possible
to do so as rights and duties of a
juridical nature intended to be binding
if the draft should become part of the
corpus of international law. 210

He hoped that the Working Group would formulate legal
and therefore obligatory rights and duties of States.
Similarly, the representatives of India, Pakistan,
Philippines, Yugoslavia, Romania, Algeria, Egypt,
Kenya, Nigeria, Chile, Mexico, and Peru suggested
that the Charter should go beyond codification of
stated norms of international law and contribute
to the progressive development of international
law by creating new rules which responded to the
present and future needs of the international com-
munity. The representative of the United States,
however, stated that:

210 UNCTAD Doc. TD/B/AC.12/R.4, p.2.
211 UNCTAD Doc. TD/B/AC.12/1, p.6. Also see, Chile's
statement, UNCTAD Doc. TD/B/SR.338 (1972),
p. 293, paras. 31 and 32.
States might not be prepared at present to give up the degree of sovereignty that acceptance of such sweeping juridical commitments might imply. 212

Due to divergence of views, it was not possible to draw any obligatory rights.

The Working Group on the Charter of Economic Rights and Duties of States held four sessions. It was at the third session held at Geneva in 1974 that the process of negotiation on conflicting proposals began. The negotiations continued at the fourth session held at Mexico City in the summer of 1974 and in a consultative group consisting of the representatives of the United States and Canada on the one hand, and the representatives of India, Egypt and Jamaica, on the other. One category of questions before the

212 UNCTAD Doc. TD/B/AC.12/1, p. 8.

213 See the statement of Ambassador Castaneda made on 10 September 1974 at 407th plenary meeting of the Trade and Development Board, UNCTAD Doc. TD/B (XIV)/Misc.8, p. 4. Conclusions of this consultative group may be found in UNCTAD Doc. TD/B/L.365. These conclusions were commended to the Board for approval.
Working Group related to the principle of permanent sovereignty over natural resources, the question of foreign investments, nationalization or expropriation, and the question of limitation of the activities of transnational corporations. On all these related questions the Working Group had four alternatives before it. Alternative 1 represented the basic position of the Group of 77. Alternative 4 represented the views of Group B mainly consisting of developed countries (Japan, U.S.A. and EEC countries). Alternative 3 was proposed by Australia and Canada as a compromise solution. Alternative 2 was drawn up by Ambassador Brillantes of Philippines in his capacity as chairman of one of the sub-groups which according to him combined common elements of positions held by various groups. Each of these alternatives may be discussed in turn.

Alternative 4 contained the traditional "prompt, adequate and effective" compensation formula which, according to Group B, represented an applica-

214 For text of all the alternatives see UNCTAD Doc. TD/B/AC.12/4, pp. 7-10.
able rule of international law subject to which alone a State could nationalize or expropriate natural resources on grounds of "public utility", security or the national interest". It further recognized that all "States have the right, subject to the relevant norms of international law, to regulate foreign investments within their jurisdiction". It required equitable and non-discriminatory treatment of transnational corporations.

Alternative 3 recognized the right of every State to permanent sovereignty over its natural wealth and resources and jurisdiction over foreign persons and property within its territory. It also recognized the inalienable right of every State fully and freely to dispose of those resources "subject to fulfilment in good faith of its international obligations". It made provision for just compensation in case of nationalization or expropriation of foreign investment and provided for recourse to national jurisdiction in case of controversy over compensation. Alternative 4 did not speak of recourse to national jurisdiction. Alternative 3 made no
reference to applicable rules of international law or to requirement of public utility etc., but emphasized respect for "international obligations". The difference in the two approaches was explained by the representative of Canada in the Second Committee of the United Nations General Assembly. He said that the words "international obligations" were used in place of "international law" so as to permit both groups of States (i.e., developed and developing countries) to maintain their positions. No reference was made to "international law" since it was recognized by him that there was disagreement regarding what principles of customary international law were relevant to the treatment of foreign investment. He, however,

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216 See General Assembly Official Records, Twenty-Ninth sess., A/C.2/58.1649, p. 446. The proposal co-sponsored by Canada and others is contained in UN Doc. A/C.2/L.1404. See, however, the remarks of Garcia Robles in Proceedings of the American Society of International Law, 1976 (Washington, D.C.), p. 231, who said: "It is not correct to say that the sponsors of the draft charter rejected the inclusion of the undertaking 'to fulfil in good faith their international obligations'. What they rejected was the inclusion of such an undertaking in what they considered the wrong place in the charter. This principle was incorporated where it rightly belongs. Chapter 1, entitled "Fundamentals of international economic relations", lists the principles that shall govern economic as well as political relations among states; it includes (1) 'Fulfilment in good faith of international obligations'. It was necessary for all these principles to remain together".
did not favour an unqualified reference to the domestic law of the nationalizing State which could not help to establish the rule of law among States in respect of foreign investment.

Alternative 2 did not figure as a separate proposal before the Second Committee and was not materially different from Alternative 3 except that it provided for payment of just compensation "in the light of all relevant circumstances". The latter element, which did not figure in Alternative 1, was incorporated later in the draft Charter.

Alternative 1 provided for the right of full permanent sovereignty of States over their wealth and natural resources including the right to nationalization. In the event of nationalization, it provided for the payment of compensation, as appropriate, in accordance with the domestic law of the nationalizing State. Any question of compensation was to be settled

216 Ibid., p. 446, para. 48
by tribunals of such a state. It further provided that no state would demand privileged treatment for its nationals investing abroad.

The category of principles referred to above were finally incorporated in Article 2 of the Charter of Economic Rights and Duties of States which reads as follows:

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

2. Each State has the right:

(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;

(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies.
Transnational corporations shall not intervene in the internal affairs of a host state. Every state should, with full regard for its sovereign rights, cooperate with other states in the exercise of the right set forth in this subparagraph.

(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. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.

At the request of the Swedish delegation separate votes were taken in the Second Committee on each of the above paragraphs. Paragraph 2(c) of

218 Note 215, UN Doc. A/C.2/6168, p.139, para.20. Art. 2, para. 1, was adopted by 119 votes to 9, with 3 abstentions; Art. 2, para. 2(a), was adopted by 115 votes to 10, with 4 abstentions; Art. 2, para 2(b), was adopted by 119 votes to 4, with 6 abstentions; Art. 2, para 2(c) was adopted by 104 votes to 16, with 6 abstentions.
Article 2 secured lesser number of votes as compared to other paragraphs. The reasons are not difficult to guess. Some of the developing countries were afraid that it might discourage foreign investment to attract which some countries had made special provisions by legislation. They also did not wish to give an impression that they were unwilling to respect the obligations which they might have undertaken in connection with foreign investment. Consequently, even the representative of Malaysia had requested for a separate vote on paragraph 2(c) of Article 2. The representative of Indonesia stated that

His delegation endorsed the right of every State to exercise permanent sovereignty over its wealth, natural resources and economic activities, including the right to nationalize foreign property with appropriate compensation. However, it had long been his Government's view that foreign investment could make an important contribution to its development endeavours ... His Government would therefore fully respect the obligations in bilateral or multilateral agreements on foreign investment, in which the question of nationalization and compensation was clearly stated. His delegation's interpretation of article 2, paragraph 2(c), of
the Charter should therefore be viewed in the context of the policy which he had stated. 219

The representative of Jordan said:

It had hoped for a more flexible and balanced treatment of the subject in the Charter and had accordingly voted for article 2, paragraph 2(b), but had not participated in the vote on paragraphs 2(a) and 2(c). While it was the sovereign right of every State to nationalize foreign property if legitimate circumstances so required, the rights of foreign investors should be adequately guaranteed in accordance with international law and in the interest of international co-operation. 220

The representative of Kuwait remarked:

His delegation fully endorsed the right of every State to nationalize and expropriate foreign property, which was a basic principle of the exercise of State sovereignty. Nonetheless, his delegation was not at ease with the formulation of article 2 concerning the role of local tribunals in the settlement of disputes over the nature of compensation. In that connection, its interpretation was that article 2(c) of the draft Charter did not in any manner affect the provisions of agreements concluded bilaterally between the recipients of capital and its suppliers. 221


It is also conceivable that the attitude of some States belonging to the Group of 77 was deliberately guarded. Some of the oil-rich countries are already making investments abroad and some would be doing so not in the distant future. As such, they might have been anxious to safeguard their investments although they could not come out openly against certain provisions of Article 2 of the Charter. Such countries whose reservations to Article 2 were aired in a muted form may become more pronounced in future. Only recently it was reported that on the eve of global negotiations which opened in Paris on 11 February 1976, between nineteen countries of the Third World and eight industrialized partners, oil-producing countries, most of which have themselves nationalized Western oil interests, sought guarantees from the Western countries for their own investments there against non-discriminatory treatment, confiscation of investments and guarantee of appropriate compensation in case of nationalization. According to

222 For a detailed list of guarantees sought, see Economic Times (New Delhi, 29 January 1976), p. 5.
estimates of the United States treasury the oil-rich nations might invest $44.87 billion in the United States and other Western countries.

The respective legal position of the developed and developing countries which emerged during formulation of Article 2 of the Charter of Economic Rights and Duties of States may be summarized as follows:

(1) According to the developed States, if a State admits foreign capital under an agreement, such agreement must be carried out in good faith. The developing countries do not deny general obligation to fulfil their commitments vis-a-vis any party. However, in their view, such commitments not being between States do not constitute international agreements but merely agreements between a State and a foreign enterprise which are concluded under the domestic law of the State concerned. As such, these agreements have no international status. The developing countries do not wish to grant an international status to multinational enterprises nor do they consider these enterprises as subjects of international law.

Ibid.
(2) As to the applicable law and the nature of compensation payable on expropriation of alien property, the views of the two sides are considerably apart. The developing countries maintain that compensation should be determined in accordance with their domestic laws. However, the solutions available under these laws vary from State to State. These may range from complete denial of compensation to payment of prompt, adequate and effective compensation in cash. Between these extremes a number of possibilities exist. The developed states argue that where domestic laws do not meet international standards in the matter of payment of compensation for expropriation or nationalization of foreign property, international law applies. This in turn means customary norms on the subject as developed by these States. The developing countries take the view that the legal precedents lack in uniformity and generality essential for constituting a true international custom.

(3) The developing countries were prepared to agree on a formulation requiring fulfilment in
good faith of international obligations. However, they maintained that this applied to only those international obligations which were "freely undertaken". According to the developed states, in addition to those obligations, there were other international obligations deriving from general international law or from the customary norms.

(4) The developing countries insisted that foreign investors were not entitled to privileged treatment. As against this, the developed countries claimed that there existed "minimum standard" of International law to which the national standard of treatment should measure. The concept of "minimum standard" was rejected by the developing countries.

During the negotiations the two sides appeared agreeable to some such vague formula as payment of compensation in the light of all relevant circumstances which would have facilitated a compromise. But here also certain snags did not permit

224 See generally, UNCTAD Doc. TD/B(XIV)/Misc. 8, pp. 5-7; n. 352, UN Doc. A/C. 2/84.1638, pp. 383-84, paras. 7-10. As to point (2), see also UN Doc. E/5425 (1973), para. 46.
an agreement. The developing countries insisted that the decision as to which circumstances would be considered relevant rested with the nationalizing state. They could not agree with developed countries' formulation which would make exercise of the right of nationalization or expropriation conditional upon payment of compensation. Attempts to properly characterize the latter expression by such words as "appropriate" or "just" within the above formula also did not succeed.

On the applicable law also a solution was explored viz. "compensation should be paid in accordance with law", omitting reference to municipal or international law so that both the sides could interpret it in their own way. There was no success on this either.

The Chairman of the Working Group on Charter of Economic Rights and Duties of States, Jorge Castaneda pointed out that "it was impossible to arrive at any agreement on the subject because
the respective positions have become too cry-
stallized after such a long period of discussion
of these matters".

It may, however, be pointed out that
the dialogue, or as some may call it confrontation,
between the developed and the developing countries
on the above issues has not yet ended. There is
every possibility that these questions will come
up again for a discussion and consideration in
connection with "Consolidation and progressive
evolution of the norms and principles of inter-
national economic development law", an item which
was included on the agenda of the General Assembly
for its thirty-first session on the recommendation
of the Second Committee. A draft resolution was
introduced by Philippines in the Second Committee
of the General Assembly at its thirtieth session


226 UN Doc. A/C.2/L.1474/Rev. 1 (1975). Also see
Note by the Secretary-General, UN Doc. A/31/
172 (1976); UN Doc. A/10467 (1975), pp.33-34.
in connection with agenda item 12 (report of the Economic and Social Council) which was later approved by it. In this resolution the Secretary-General of the United Nations was requested to study the question of the consolidation and progressive development of the norms and principles of international economic development law, and the feasibility of their codification taking into account resolutions, quoted in paragraph 3. Romulo of Philippines had raised the same question in the Sixth Committee of the General Assembly where he suggested that the International Law Commission should give priority consideration to the economic rights and obligations of States. He stated that the Charter of Economic Rights and Duties of States and other relevant resolutions "lacked the legal formulation and hence the enforceability of international law". Among the questions suggested by him for consideration by the International Law Commission were the following:

(a) What were or should be acceptable regulations on foreign investments or the activities of transnational corporations?

227 Resolutions referred to in this preambular paragraph include resolutions 2626 (XXV), 3201 (S-VI) and 3202 (S-VI) and 3281 (XXIX).
(b) What was or should be the international law on the nationalization or socialization of foreign property and the compensation payable therefor? 228

Romulo stated that it was a matter of importance and urgency to translate the Charter of Economic Rights and Duties of States into an enforceable Convention and urged the Sixth Committee to request the International Law Commission to give this work highest priority.

At the thirty-first session of the General Assembly a Philippines working paper was also circulated in the form of a "Draft Convention on the Principles and Norms of International Economic Development Law". Article 7, paragraph 1(c), of this convention provides that each state has the right:

To nationalize, expropriate or transfer ownership of foreign-owned 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 fair, equitable, and relevant under the circumstances. In any case, where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. 230

It would be observed that this provision is identical with Article 2, para. 2(c) of the Charter of Economic Rights and Duties of States.

The item included in the agenda of the General Assembly at Philippines' initiative was allocated to the Sixth Committee which was unable to consider it during thirty-first and thirty second sessions. During thirty-third session of the General Assembly the Committee did consider this item at its 63rd and 64th meetings and decided to recommend to the General Assembly the inclusion of the provisional agenda item entitled "Consolidation and progressive

development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order. The recommendation of the Sixth Commission was adopted without vote by the General Assembly. However, representative of the United States of America made the following interesting statement:

Our positions with regard to a New International Economic Order are well known and are unchanged. The concept is a political and economic one in a very early stage of evolution. It is thus premature, in our view, to speak of "legal aspects" in this context. 230a

The above statement indicates that it will not be easy to obtain co-operation of the developed States in the venture initiated by Philippines.

We may now turn to lump sum settlements and see how the traditional "adequate, prompt and effective" compensation formula has been watered down under the impact of these agreements.

230a UN Doc. A/33/PV.86 (1979), p. 46.
Lump sum agreements are also called "global" or "en bloc" settlements. A pattern of settlement has developed in recent years in the form of payment of a lump sum by the expropriating State to the home State of the aliens in satisfaction of their claims. Global compensation agreement has been defined by Foighel as a "settlement of a number of claims arising out of homogeneous circumstances, where the state that is pledged to render compensation pays a lump-sum accepted by the claimant state, both on behalf of its nationals and on its own behalf, so that no further claims derived from the action that gave rise to the compensation claim can be raised, either by the states concerned, or by their nationals with consent". Wortley defines an en bloc settlement


232 Foighel, n. 66, p. 97.
as "one made by a state through diplomatic channels, on behalf of a large number of dispossessed owners who have not been paid in full by the foreign state dispossessing them. It usually involves the payment of a sum of money to the claimant State in respect of the 'global' or 'total' claims of the dispossessed. In return for the payment the claimant State usually agrees to prevent the dispossessed persons from pressing further claims". Another author describes global settlement as "an agreement, arrived at by diplomatic negotiation between governments, to settle outstanding international claims by the payment of a given sum without resorting to international adjudication. Such a settlement permits the State receiving the lump sum to distribute the fund thus acquired among claimants who may be entitled thereto pursuant to domestic procedure". Sir Francis Vallat observes

233 Wortley, n. 30, p. 146.

that the expression "global settlement" is not a
technical one. "It is used ... somewhat loosely
to cover any kind of agreement by which a group
or groups of claims are settled by payment of a
single sum of money. Such settlements are normally
made without any determination as to the validity
of particular claims". These agreements may have
resulted through diplomatic and political negotia-
tions but set at rest legal issues and claims. Of
all the above descriptions of global settlement,
the one by Foighel seems to reflect more precisely
the legal status and nature of such agreements.

Global settlements are but one of the
several forms which compensation agreements may
take. Foighel classifies compensation agreements
into four categories: (a) agreements in general
terms; (b) agreements providing for direct individu-
dual compensation; and (d) agreements providing
for global or lump sum compensation. Under

235 Francis Vallot, International Law and the
236 Foighel, n. 66, p. 88.
the agreement of the first kind, there is a promise to pay compensation for nationalized property in general terms. Many questions of detail are not solved. Hence, these types of agreements are unsuited to solve compensation problems in their totality. Under the second type of agreements certain rules of procedure and possible facilities to be provided to the aliens for nationalization of their property are settled but individuals have to directly approach the nationalizing State for receiving compensation. This arrangement avoids the individual compensation claims being placed on the international plane. These agreements are said to fit in with the Western individualistic legal view. In the third type of agreements individuals are required to present their claims to the nationalizing State through their own government. Each individual claim is settled by negotiation between the governments concerned. "Indirect individual compensation" arrangement is

237 Ibid., p. 91.
238 Ibid., p. 93.
in accordance with the traditional diplomatic handling of the claims and has the possibility of bringing about desired result but the method is considered unworkable in practice. These arrangements are superseded by global settlements.

Gillian White divides compensation agreements into three groups: (1) Agreements which envisage payment of compensation but do not result in the actual transfer thereof; (2) Agreements which result in the actual payment; and (3) Agreements between the expropriating State and the individual claimant. The first group is subdivided into three groups: (a) agreements setting up mixed commissions entrusted with the determination of compensation; (b) agreements under which individual claims are to be treated separately, and the determination of compensation is either left to the discretion of the nationalizing State after processing the claimant's case, or are governed by the municipal law of that State; and (c) agreements containing only a general recognition by the nationalizing State of its

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239 Ibid., p. 96.
liability to pay compensation. Agreements in the second group are divided thus: (a) agreements under which amount of compensation is governed by municipal law of the nationalizing state; (b) agreements under which compensation is paid in kind rather than in money and (c) lump sum compensation agreements. In all, more than 139 international compensation agreements were concluded between the end of World War II and 6 March 1973.

Lump sum settlements are very important from the point of view of their impact on the customary international law relating to expropriation of foreign property. Most of the lump sum settlements provide for payment of compensation in instalments over a period of years. However, under a few agreements, payment of compensation is made in a single transaction. A recent example is the Agreement of


240a The texts of these agreements are reproduced in Richard B. Lillichi and Burns H. Weston, International Claims: Their Settlement by Lump Sum Agreements (Charlottesville, 1975), Part II.

241 White, n. 30, p. 206. These agreements for instance are; the agreement between the United States of America and Yugoslavia (19 July 1948); the agreement between Norway and Poland (23 December 1955); and the agreement between Sweden and Czechoslovakia (22 December 1956).
19 February 1974 on the Compensation for Expropriated Properties of U.S. Nationals between Peru and the United States. Art. II of the Agreement provides that a lump sum of $76,000,000 will be paid to the Government of the United States upon signature of the Agreement. It is generally acknowledged that the amount of compensation agreed upon in most of the lump sum agreements does not represent the full value of the expropriated property even if it is admitted that in most cases the claims are highly inflated.

For instance, under the United States - Mexican settlement of 1942, Mexico agreed to pay a sum of about 24 million dollars for nationalized oil property, although American claims totalled 260 million dollars. Interest-free amount of 28.3 million Egyptian pounds was agreed upon as compensation for the nationalization of the Suez Canal Company in 1958 as against Company's claim of 204 million pounds. The compensation agreements with Socialist countries also reveal that 100% compensation was never paid. According to the

official estimates the compensation agreed upon under U.K. - Yugoslavia Agreement of 1948 represented 50 per cent of the value of the nationalized British property. The compensation paid under this Agreement was £4.5 million as against a claim of £25 million. Compensation agreed upon under 1949 Agreement between U.K. and Czechoslovakia represented one-third of the value of the nationalized British property. The settlement with Poland in 1954 fetched only one-quarter of the value of the nationalized British property. Some of the agreements included claims other than those arising from the nationalization of property. The Anglo-French Agreement of 1951 after nationalization of British interests in the French gas and electricity industries resulted in

243 See the statement of the Attorney-General in the House of Commons on 8 May 1950 (House of Commons Debates, vol. 475, col. 64). According to Wall Street Journal (20 October 1975, p. 4) the Government of Venezuela was offered a total of £1.07 billion in compensation for all nationalized properties of multinational corporations against their book value of £5 billion.

244 Agreements of 1955 with Bulgaria, of 1956 with Hungary and of 1960 with Romania.
approximately 70 per cent compensation. A number of other agreements entered into during the recent years also provide for much less than full compensation. Further, the compensation under most of the agreements was payable in instalments, in many cases carrying no interest. Some of the important features or more appropriately the merits of the lump sum settlements may be summarised as follows:

(1) The fixing of the amount of compensation approximating the amount claimed is less complicated for all parties;

(2) Because of the simpler procedure, the amount of the compensation can be decided relatively quickly, which is advantageous to the claimants;

(3) The problem of individual doubtful claims can be solved by adjusting the amount of lump sum compensation upward or downward without needlessly investigating them in detail or causing conflict between the parties;

See Peighel, n. 66, p. 98. Sir Francis Vallat confirms this view when he states: "... the overall settlement may ... include claims which would not otherwise have been admitted. It may thus cover classes of claims as well as particular claims which otherwise would have received no compensation and could, on a strict application of international law, have received "no compensation from the defendant State" (n. 235, p. 44)."
(4) Some of the agreements specifically include a clause definitely and finally settling all the compensation claims and discharging the expropriating state from any future claims. Some agreements do not preclude the possibility of private claimants taking up their claims with the expropriating government but contain undertaking from the claimant's home state that they will not give support to such claims. The latter approach seems to be dictated by considerations of caution against possible challenge to the agreement by claimants under the constitutional law of the claimant's state for renouncing their rights.

The juristic opinion is divided on the exact value of the lump sum settlements. One group


247 See for example, Art. 2 of the Agreement between Sweden and Poland of 16 December 1949; Art. 3 of the Agreement between Sweden and Hungary of 31 March 1951; and Art. 3 of the Agreement between Norway and Poland of 23 December 1955.
sees in them a hopeful trend. The other group, rather more conservative one, is quite pessimistic and considers that law is being weakened by this practice. The latter view is reflected by Drucker, Schwarzenberger and some others. Schwarzenberger, while stressing the need for bearing in mind the complexity of the meta-legal factors involved in any evaluation of these agreements, seems to suggest "greater toughness than, in the post-1945 period, the United Kingdom considered it advisable to display". Gillian White thinks that these settlements "are of value to the international lawyer as evidence that agreement can be reached despite wide differences of view on fundamental principles, and as a perpetual reminder of the intimate relationship between legal and non-legal factors in the field of the treatment of

248 Schwarzenberger, n. 20, p. 44. Cf. also Seidl-Hohenveldern, n. 102, pp. 546-47.

249 Ibid., p. 45.
alien property. The third group of writers considers that practice of lump sum settlements "does not amount to a new trend, much less to an abrogation of the existing customary international law, but rather to a compromise in a given situation". On the other hand Dawson and Weston deplore the suggestion "that internationally negotiated settlements which seek the fair adjustment and compromise of conflicting interests are but quasi-legal aberrations, not indicative of uniformity", and consider it "a perochial view of international law". Lillich, like Gillian White, sees in the lump sum settlements a constructive and positive role and deduces from the practice of these settlements that "international


252 Dawson and Weston, n. 100, p. 750.
law requires the payment of some measure of compensation. At the same time, he feels that compromise reached in lump-sum settlements may result in estoppel against just and adequate compensation. This view thus seems to admit both positive as well as negative features of lump sum settlements. On balance, this is a reasonable and proper view to take and is closer to reality. But one would hesitate to use the expression estoppel. For, one agreement need not be precedent for the other. Gillian White regards these agreements as sui generis and thinks that "it may not be possible to utilise them as precedents or models in future cases of nationalisation of foreign property."


255 White, n. 30, p.226. Wortley also observes that "global agreements", like other treaties, only affect States which are parties to them; they leave other States free to evaluate a foreign expropriation whenever it comes before them as a root of title, and to take up claims of their own nationals to ensure restitution or full compensation, which has not been awarded by the lex situs" (n.49, p.3).
However, in practice this pattern of lump-sum settlements is likely to be followed with still greater frequency in view of "many reasons for taking this course which make it on balance advisable". Overall effect of these agreements is quite significant because they are bound to dilute the traditional compensation formula which invariably is not followed. This role of the lump-sum settlements cannot be easily overlooked because compensation fixed is the result of "negotiated" settlement and not unilaterally fixed by the expropriating state. We cannot agree with Bystricky who regards lump-sum agreements as merely agreements making ex-gratia payments.

256 Vallat, n. 235, p. 41. He further adds, "Political Reasons - make good sense of a global settlement which might at first sight, from the point of view of the individual, appear to be unreasonable". (id., p. 43). S.J. Rubin observes that "the over-all compensation agreement ... is likely to be used in future settlements. It seems effectively to have displaced settlements in which individual awards are made dependant on proof to be presented to a mixed arbitral tribunal or in which the amount of the total liability of the nationalizing government is not fixed". "Nationalisation and Compensation: A Comparative Approach", University of Chicago Law Review (Chicago), vol.17 (1949-50),p.474.

257 See Heidl-Hohenfeldern, n.102,p.547.
From the above discussion some of the more important and objective grounds for rejection of the traditional compensation formula seem to be the following:

(1) Its unqualified use ignores such peripheral factors as the possible inflation of claims or the timing of the assessment which may influence the valuation and therefore the amount of compensation.

(2) It is inequitable to adhere to this formula where investors have made many times more profits as compared to their investments.

(3) Financial or economic ability of the developing new States is overlooked and formula is applied mechanically which jeopardises their plans for economic development;

(4) It is urged that compensation is a matter for negotiations rather than a legal matter.

258 Dawson and Weston, n. 100, p. 738.

(5) The formula militates against equality principle.

(6) The formula is not universally accepted.

(7) The formula has been gradually eroded by lump sum compensation agreements and subsequently by developments in the United Nations General Assembly as well as other U.N. forums. Hence, the formula no longer represents the contemporary international law.

It now remains for us to examine whether expropriation can be carried out without compensation.

EXPROPRIATION WITHOUT COMPENSATION

When slavery was abolished in the United States as a result of civil war no compensation was


paid to nationals or foreigners in respect of previously existing property rights. Similarly, in 1789 the French decrees abolished the feudal system without indemnity for mortmain rights. While giving these examples Seymour Rubin observes that the principle that "the interest of the community or the state in a new economic or social order may justify the taking or abolition of private property rights without compensation -- is one of possibly wide and certainly important application in the modern world". Non-payment of compensation is sometimes justified on the following grounds: (i) it would be inequitable in circumstances of the case to pay any compensation (ii) Non-existence of any customary rule of international law obliging payment of compensation, and (iii) lack of treaty obligation to pay compensation.

262 S.J. Rubin, Private Foreign Investment: Legal and Economic Realities (Baltimore, 1956), p. 37; C.G. Fenwick also feels that no compensation was payable in these cases because "the losses imposed by the law upon aliens were negligible compared to those imposed upon citizens; and in both cases alien owners of the property had due warning of its probable destruction". (International Law, edn. 3, New York, 1948, p. 289).
As far as the first ground mentioned above is concerned, an overwhelming juristic opinion recognizes justification for the stand taken by the newly independent countries in "rebel [Ang.] against some of the economic and political rights acquired during the period of their subservience which they have felt and still feel are unreasonable and, although accepted by the present international legal order, iniquitable". These countries consider that for ethical reasons the problem of compensation is not properly propounded and that the very concept of equity which is advanced to justify compensation could be invoked to deny any compensation in cases of decolonization.

Some jurists have denied that the principle of compensation can be supported on the basis of customary international law. Thus, Strupp observes that:

263 Anand, n. 70, p. 58.
264 See Badjaoui's Report, n. 68, p. 65.
There is no norm of customary international law which forbids a state to expropriate property of the nationals of other States, either with or without compensation .... 265

But Strupp qualifies this statement by contending that there should have been no discrimination between nationals and foreigners. Sir John Fischer Williams, Friedman, Poighel and Cavaglieri in varying degrees are in agreement with the view that compensation for expropriation has no firm basis in customary international law. According to Friedman, compensation is "purely voluntary, and is dictated by the consciousness of governments of a more intense national solidarity, but in no way deriving from a legal obligation". In his view, the practice of States reveals absence of a duty to pay compensation when they are engaged in reforms of their economic or social structure. As opposed to states which continue to adhere to laissez-faire economy,

266 Ibid., p. 206.
267 Ibid., p. 207.
the states favouring social function of property
do not consider compensation to be an essential
element of expropriation. In the case of socialist
countries compensation has completely lost its com-
 pulsory character and depends on their discretion.

The school of thought represented by
Cavaglieri and Sir John Fischer Williams always
held that the duty to compensate does not exist
outside a treaty. Several writers lay emphasis
on the freedom of the states to take over property
in the course of a general programme of economic
and social reform with or without payment of com-
268 pen5ation. This view is also shared by de Visscher,
270 Rubin, Freeman, Friedmann, Delson and Feighel.

268 See Yearbook of the International Law Commission,
vol. 2 (1959), p.18, para. 69.

269 B. Sen cites Katz, Brewster, Wortley, Kuhn and
Schwarzenberger in this connection. See, A-
Diplomat's Hand Book of International Law and

270 De Visscher, n.9, p.193.

271 Rubin, n. 256, p. 561.

272 A.V. Freeman, The International Responsibility
of States for Denial of Justice (London, 1938),
p. 577.

f.n. contd...
Others, like Wortley do not seem to share this viewpoint.

There seems to be a definite trend against an absolute rule regarding payment of compensation. Thus, Brierly felt:

... there is not, nor is it desirable that there should be, any absolute rule forbidding the taking of an alien's property by a state without compensation. The sanctity of private property may be in general a sound maxim of legislative policy, but it is difficult in these days to hold that it may in no circumstances be required to yield to some higher public interest. 276

According to Brierly, the precedents are not decisive on the question of whether compensation is required when measures of expropriation are applied

f.n. contd

273 Friedman, n. 17, pp. 206-211.


275 Foighel, n. 66, pp. 40-41.

for some public purpose and without discrimination. In this context, it is quite pertinent to mention the controversy on the question whether payment of compensation can be separated from the question validity of expropriations. According to Folghel, if compensation is not paid, "the act may still be considered lawful, but the omission to pay compensation is then an independent breach of the law. Understood in this way, the liability to pay compensation is not a precondition for the lawfulness of the said act, but a result of the same". Similar view is held by Richard Falk and R.Y. Jennings. According to Falk the "act of expropriation as an aspect of territorial jurisdiction is effective to transfer title. The International Law is more aptly shifted from the locus of title to the character of the duty to compensate aliens whose property has been expropriated". Similar conclusion is reached by Jennings on the ground that international law has no law of ownership at all.

277 Folghel, n. 66, pp. 40-41.
279 Ibid., p. 81.
On the other hand, a view was expressed by the American and British Claims Arbitration Tribunal in the Eastern Extension, Australia and China Telegraph Co. Ltd. Case (1923) that the grant of compensation alone justified the carrying out of expropriation. The tribunal stated that "the right is not absolute but limited, and is in reality only itself acquired in consideration of the payment of compensation and has no existence apart from the obligation to make compensation". The United States in particular, and other developed States in general, have never admitted that the question of taking could be separated from the question of compensation. Answer to the question under consideration is crucial to determining whether a particular expropriation is lawful or valid even if no compensation has been paid or with compensation which does not measure up to "full, prompt and effective compensation" formula. Distinction between lawful and

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281 Ibid., p. 76.
unlawful expropriation is supported by several writers.

Some scholars assert that even a lawful taking becomes unlawful \textit{ab initio} upon failure to pay just compensation. This position was rejected by the authors of American Restatement. Allan Axelrod and Saul Mendlovitz are also unwilling to describe an uncompensated expropriation as illegal. According to Assemoah, the difference between lawful and unlawful measures of taking is one of degree and is reflected in the duty to compensate. Fatouros also feels that there is a strong similarity in the legal effects of lawful and unlawful expropriations since there is obligation to compensate in both cases.

\begin{itemize}
  \item[284] Miller and Stanger (ed.), n. 34, p. 115.
\end{itemize}
The difference lies in the manner in which compensation is assessed. However, according to commentary to the Harvard Draft (1961) even payment of compensation will not rectify the action taken in violation of a treaty. According to some writers, in the case of lawful taking compensation is to be assessed on the basis of State's profits and not on the basis of alien's loss. However, payment of future profits (lucrum cessans) is opposed on the ground that it contradicts the distinction between lawful and unlawful expropriations. It is contended that if legality of an expropriation is made to depend on conditions which can be fulfilled rarely and with the utmost difficulty, it would render all expropriations unlawful and distinction between lawful and unlawful expropriations would become meaningless.

288 Asamoshi, n. 285, p. 95.
289 See Fatouros, n. 286, p. 729.
In conclusion, it may be stated that although distinction between lawful and unlawful expropriation is useful, it may be unwise to make the validity of an expropriation solely depend on a payment of compensation. It takes years before the question of compensation is settled in practice. In the meantime, status of an expropriation would be left undecided if compensation is made the sole criterion of a lawful expropriation. An expropriation may be unlawful for reasons of lack of public purpose, discrimination, violation of a treaty etc. However, it would be difficult to agree with the commentary on Soan-Baxter Draft Convention (1961) that the situation cannot be rectified even if compensation is paid for an expropriation which is in violation of a treaty. It would be a better policy to keep the twin questions of expropriation

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290 See n. 297, p. 556. According to Brownlie, certain categories of expropriation are illegal per se and not merely in the absence of appropriate compensation (n. 39, p. 527).

291 This term has been deliberately used here and hereafter since today's policy may become tomorrow's law. Lex ferenda may turn into lex lata. Judge Ammoun in Barcelona Traction, Light and Power Company, Ltd., Judgment, I.C.J. Reports (1970), p. 303 observed that "to erect a partition between policy and law is calculated to bring about a result which is contrary to reality".
and compensation separate, as is advocated by Friedman. Similarly, it would be ordinarily difficult to justify non-payment of any compensation at all except where investments have a colonial background. It would be equally difficult to justify an absolute rule in favour of full compensation. The number of jurists who favour partial compensation in cases of nationalization where structural changes of economic and social nature are involved, is fast growing. Thus, on the one hand, there are "unitarians" who maintain that international law requires "full compensation" for major and minor takings alike; on the other hand, there are "dualists" who plead for "full compensation" in the case of minor takings but only "partial compensation" in the case of major takings. The "unitarian" viewpoint is expressed by B.A. Wortley and Schweizerberger.


International customary law merely distinguishes between lawful expropriation and illegal confiscation. It does not know of any third category concerned with differentiations on political ideological or sociological grounds. 294

The "dualist" school represented by Sir Hersch Lauterpacht and others favours a different treatment for cases where structural changes are involved.

Whether or not any distinction is accepted between nationalization and other forms of expropriation, the traditional formula requiring "due, prompt and effective compensation" is considered utterly unsuitable in modern conditions. This formula representing the amount, time and manner of payment of compensation is treated with unequivocal contempt by the developing States, particularly newly independent countries, as well as jurists from these States.

294  Schwarzenberger, n. 80, p. 41.

Having discussed two conditions for expropriation of alien property, we may consider the last one viz. non-discrimination between nationals and aliens or aliens inter se.

**NON-DISCRIMINATION**

The term "non-discrimination" is used in international law in numerous contexts. As a concept it "implies that aspects of equality and inequality are fully taken into account, and carefully weighed against each other in the light of the specific right involved, in such a way that the sufficient connection is established". However, it may be difficult to single out one particular method of determining "sufficient connection". What may satisfy this test in one field of international law may not do so in another.

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296 See ibid., pp. 78-79.
Equality also has two meanings: formal and material equality. The achievement of the latter may necessitate violation of the former. Thus, "because of a prevailing situation of social and economic inequality, the attainment of material equality would call for unequal treatment". Consequently, equality may be regarded as a relative term. While considering the question of non-discrimination between nationals and aliens these considerations may be kept in view. In traditional international law, however, both discrimination between nationals and aliens as well as aliens inter se is supposed to be prohibited.

Strupp attaches paramount importance to the principle of non-discrimination and does not regard even payment of compensation as enough once aliens have been discriminated against. He says:

There is no norm of customary international law which forbids a State to expropriate the nationals of other States, either with or without compensation, it being clearly understood

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297 Ibid., p. 3.
that in the application of these measures, there is no difference of treatment and no inequality between the nationals of the State applying them and foreigners ... and that the measures must not be directed, in law or in fact, against foreigners and certain foreigners as such. 298

The non-discrimination principle appears to be supported by a large number of jurists such as

298 Strupp quoted in Friedman, n. 17, p. 190. It appears that the Government of India attach considerable importance to the principle of non-discrimination. When the properties of Indians were nationalized in Burma and Tanzania, no protest was lodged since the nationalizations affected foreigners and Indians alike. (See Rajya Sabha Debates, vol. 47 (1964), col. 878; Lok Sabha Debates, vol. 42 (1965), col. 12135).

299 Le Droit des Gens, Book 2, chap. 7 § 84, vol. 3 (1916), p. 139.

300 McNair, n. 35, pp. 222-223.


302 Herz, n. 17, p. 119, 243, 249, 259.

303 White, n. 30, p. 119.

304 Friedman, n. 17, p. 190.
This principle also finds support from recent drafts aimed at codifying state responsibility for injuries to aliens. The American Law Institute Restatement provides as follows:

166. Discrimination against Alien

(1) Conduct, attributable to a state and causing injury to an alien, that discriminates against aliens generally, against aliens of his nationality, or against him because he is an alien, departs from the international standard of justice ....


(2) Conduct discriminates against an alien ... if it involves treating the alien differently from nationals or from aliens of a different nationality without a reasonable basis for the difference. 308

Article 10(4)(a) of Sohn-Baxter draft provides that when a property is taken by a state in furtherance of a general programme of economic and social reform, "the method and modalities of payment to aliens should not be less favourable than those applicable to nationals". The rule of non-discrimination has also found support in

308 See F.V. Garcia-Amador, L.B. Sohn and R.R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (New York, 1974), p. 385 (emphasis added). Art. 1 of Cuban Nationalization Law No. 881 of 6 July 1960 is generally considered discriminatory. It reads that: "The nationalization, through expropriation of the properties or concerns belonging to natural or juridical persons nationals of the United States of America or the concerns in which the said persons have a majority interest or participation even though they be organized under the laws of Cuba". (Quoted in Kronfol, n.143, p. 25).

309 Garcia-Amador, Sohn and Baxter, ibid., pp.204, 213.
judicial decisions, practice of States, treaties, and in municipal legislation.

In the Anglo-Iranian Oil Company Case and the case of Phosphates in Morocco the respective governments had alleged discrimination against their nationals. But the cases were decided on jurisdictional grounds and no decision could be

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310 See for example, Art. 23 of the European Convention on Establishment signed at Paris on 13 December 1955 (entered into force on 23 February 1965) which provides that "nationals of any Contracting Party shall be entitled, in the event of expropriation or nationalisation of their property by any other Party, to be treated at least as favourably as nationals of the latter Party". (International Legal Materials, vol. 4 (1965), p. 723). Also see Netherlands-Tunisia Agreement for Encouragement of Capital Investments and Protection of Property signed on 23 May, 1963.


312 PCIJ (1938), series A/B, no. 74, p. 27.
given on the question of non-discrimination. In the former case the United Kingdom Government stated that a measure of expropriation which affected only foreign nationals might be contrary to international law. It was also alleged that the Iranian measure was actuated by "anti-foreign prejudice". It may, however, be noted that there was no question of making any distinction between different enterprises since no enterprise other than the Anglo-Iranian Oil Co. fell within the scope of the Iranian nationalization law. In these circumstances, the allegation of non-discrimination cannot be sustained. Similarly, the Egyptian nationalization of the Suez Canal Company affected a single and unique alien enterprise and was not capable of affecting any other undertaking. The question of discrimination between aliens and nationals did not arise. The Mexican nationaliz-
tion of oil industry in 1938 involving only foreign capital offers another example of the same kind. It is "discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups" that would amount to discrimination. In the Sabbatino Case, the United States Court of Appeals, Second Circuit, held that "international law is not violated when equal treatment is accorded aliens and natives, regardless of the quality of the treatment of the motives behind that treatment." This decision seems to uphold principle in its formal sense. Some publicists also subscribe to the principle of equality or non-discrimination in its literal or formal sense. Thus, Feigl observes as follows:

... the rules of international law against discrimination can be con-
idered to be satisfied when foreigners


According to Friedman, who believes in "equality of nationals and foreigners in the sharing of national financial burdens", there would be discrimination if compensation is refused in cases of individual expropriations as distinguished from general expropriations. Refusal to provide compensation in case of individual expropriations, in his view, "would have the effect of neutralising the positive rule of non-discrimination by destroying the equality of nationals and foreigners ... to the detriment of the latter in favour of the former". Capital-exporting States in general do not distinguish between "nationalization" and "expropriation" for application of the non-discrimination principle.

318 Foighel, n. 66, p. 47 (emphasis added). See, however, Advisory Opinion in the German Settlers in Poland, PCLJ (1932), series B, no. 6, p. 24, to the effect that a treaty provision guaranteeing same treatment to racial minorities "required more than mere formal equality".

319 Friedman, n. 17, p. 212.

320 Ibid.

321 See Amerasinghe, n. 52, p. 143, n. 2.
Amerasinghe categorically rejects such a distinction. He expresses the view that:

The fact that nationalization may represent a special category different from other kinds of expropriation does not call for the sacrifice of the principle of non-discrimination, as discrimination is not vital to the efficacy of nationalization. For this reason and because recent practice does not clearly show that the principle has been clearly rejected, it is submitted that the presumption is that it survives even in regard to nationalization. 322

He also does not agree with the reasoning of decision 323 given by the Bremen Court of Appeals that in cases of initial inequality arising from colonial relations, unequal treatment may be justified. It is submitted that Amerasinghe, like many others, takes a formal view of the principle of non-discrimination. This view is not in consonance with the changing needs of the international community which is striving to...

322 Ibid., p. 139. Also see same author, Ceylon Journal of Historical and Social Studies (Paradeniya), vol. 6 (1963), p. 135.

323 Notes 131 and 132; Also see American Journal of International Law, vol. 54 (1960), p. 315. See Kase whose thinking is in line with the Bremen Court's decision (n. 34, p. 24).
achieve international economic order on a more equitable basis. Concepts of international law must be so framed as to facilitate material equality to the developing countries. Amerasinghe himself acknowledges limitations in applying the principle of non-discrimination in a rigid manner when he states that "this is a principle which can only be applied in a general way taking into consideration all the circumstances of the case, for important questions of economic policy might render a certain differentiation necessary". Some writers would restrict the application of the non-discrimination principle by distinguishing "just" from "unjust" discrimination. Schwarzenberger seems to be in agreement with this distinction. He criticizes Article III of the Abs-Shawcross Draft Convention on

324 Amerasinghe, n. 52, p. 141. However, see White, n. 30, p. 144, who says: "there is no authority which permits a state to rely on the political or economic motives underlying a measure in exoneration of its discriminator affect". (emphasis added).

325 J.B. Moore, A Digest of International Law (Washington, 1906), vol. 6, pp. 698-701.

326 Schwarzenberger, n. 20, pp. 120-21.
Investments Abroad on the ground that it does not
distinguish between lawful and unlawful discrimina-
tion. In his view absolute non-discrimination goes
beyond the international minimum standard. In the
case of *Eastern Extension, Australasia and China
Telegraph Co. Ltd. (Great Britain) v. United States*,
the British-United States Arbitral Tribunal virtually
approved discrimination between nationals of different
states in the absence of any special agreement, in
certain circumstances, such as "political motive,
some service rendered, some traditional bond of
friendship, some reciprocal treatment in the past
or in the present ...". Where investment has been guaranteed against expropriation by an agreement with a particular State or undertaking, whether national or non-national, other undertakings may not be able to claim same privileged treatment. Hans Baade also expresses himself against strict and rigid application of the non-discrimination principle. He asserts that non-discrimination is not a rule of customary international law. In this connection, he refers to most-favoured-nation provisions in commercial and other treaties which would be superfluous if a rule of customary international law existed. Similarly, Kenneth L. Kerst observes:

When a given form of property is largely in the hands of foreign owners, a strict application of the non-discrimination principle would effectively prevent the taking of the property ... For that reason, it seems proper to include non-discrimination as one of the group of


330 Baade in Miller and Stanger, n. 34, p. 24. Metzger also believes that there is no consensus on avoiding discrimination although in his view most takings are non-discriminatory as between nationals and aliens (n. 283, p. 598).
factors to be considered by the international decision-maker, rather than to regard it as an independent requirement. 331

The United Nations study entitled "The Main Types and Causes of Discrimination" refers to "legitimate distinctions which do not constitute discrimination". The study concludes that: "Many distinctions, established by law, do not constitute discrimination because they are established on just grounds and apply to all alike, not merely to members of certain particular social groups". The examples of such distinctions include "lawful expropriation with fair indemnity".

Finally, the International Covenant on Economic, Social and Cultural Rights of 1966 seems to deal a hard blow to the traditional principle of non-discrimination in its rigid form. Article 2, paragraph 3, of this Covenant reads as follows:

331 Karst in Miller and Stanger (ed.), n.34, pp.79-80.
Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals. 333

The above provision was born out of the initiative of the representative of Indonesia who insisted that as far as economic rights were concerned, equality between nationals and aliens would only perpetuate "the dominant position of aliens in the economic field and possibly in the cultural and social fields as well." In the face of considerable opposition from the developed States, Latin American States who favour national treatment to aliens and grant this treatment under their constitutions or domestic laws, and some others, the Indonesian representative continued to press for a different treatment for aliens which may not be the same as enjoyed by nationals. He stated that


... the developing countries, which had to rebuild their national economies from the legacy left by colonialism, were not prepared to accept, equally with the highly-developed countries, an obligation to guarantee the same economic rights to their nationals and to nonnationals. That was not discrimination; but it would be discrimination to compel countries of unequal strength to carry the same load. The developing countries had inevitably to correct the consequences of the discrimination practised under the colonial regime by taking certain measures which might conflict with the interests of a privileged minority. 335

He also alleged that the equality of economic rights which nationals of the developing countries might enjoy in the developed countries was illusory because they were often barred from entering those countries by restrictive immigration policies. The Indonesian representative, therefore, pleaded that rights guaranteed under paragraph 2 of Article 2 of the International Covenant on Economic, Social and Cultural Rights should be confined only to citizens or nationals of a State. He subsequently

336 Ibid.
337 See amendments proposed by him, viz. UN Doc. A/C.3/L.1027 and Rev. 1.
suggested the following amendment to Article 2
by addition of paragraph 3:

3. Each State Party, in the exercise of its sovereignty and with respect for human rights, determines to what persons it would guarantee the rights recognized in this Covenant. 338

Afterwards, Indonesia and Burma proposed the following revised amendment to Article 2:

3. Each State Party, in the exercise of its sovereignty and with due regard for human rights and its national economy, determines to what extent it would guarantee particularly the economic rights recognized in this Covenant to non-nationals. 339

The representative of Poland proposed an oral sub-amendment to the above amendment as follows:

Developing countries, with due regard for human rights and their national economy, may determine to what extent they will guarantee the economic rights recognized in this Covenant to non-nationals. 340

339 UN Doc. A/C.3/L.1027/Rev. 3. Also see sub-amendment by Jordan (UN Doc. A/C.3/L.1053) and Lebanon's amendment (UN Doc. A/C.3/L.1054).
340 See Doc. A/C.3/SR.1205 (1962), pp.351-52. The amendment of Indonesia and Burma incorporating Polish sub-amendment was adopted by 41 votes to 38, with 12 abstentions. For counter-proposal of Argentina, Italy and Mexico, see UN Doc. A/C.3/L.1028, Rev. 1 and 2.
This was adopted by the Third Committee of the United Nations General Assembly and finds place in the Covenant in this form. It is significant to note that all the Latin American States (with the exception of Mexico and Haiti abstaining) voted against the above paragraph. The Indonesian statement that the amendment "would in no way jeopardize the practice of certain developing countries in Latin America which granted equal rights to nationals and non-nationals, since it clearly stated that every developing country was free to determine to what extent it wished to guarantee economic rights" did not satisfy the Latin American States. India was among the states which abstained from voting. Its representative wished it to be made clear whether the obligations which Article 2 imposed on States referred to aliens as well as nationals since "it was evident that not every right recognized in the draft Covenant could be applied in the same way to citizens of a country and to aliens". However, beyond that India was not

341 See n. 335.

342 UN Doc. A/C.3/SR. 1182, p. 240, paragraph 16. The Indian representative also clarified that certain special measures for social and cultural betterment of backward sections of the society should not be construed as discriminatory.
interested in diluting or weakening the substance of Article 2.

At plenary meeting of the United Nations General Assembly, although the International Covenant on Economic, Social and Cultural Rights was adopted unanimously, certain representatives made statements clarifying their position on Article 2, paragraph 3, which indicated that they were not reconciled to discrimination implied in that article. Thus, on a point of order the United States representative stated that this paragraph runs counter to the undertaking of the States Parties expressed in paragraph 2 of the same article by authorizing in virtually unqualified terms discriminatory treatment of non-nationals by ... the developing countries, a term which is not defined in the draft Covenant. 343

According to him, certain distinctions between nationals and aliens were permitted by international law; but paragraph 3 seemed to suggest that developed States were barred from making distinction between their nationals and aliens. He, therefore, did not

343 UN Doc. A/PV.1496 (1960).
favour that paragraph which created "a vague, double standard between developed and developing 344 countries". What appeared to be a "double standard" at that time is, however, being recognized more and more between developed and developing states as part of the process for achieving new international economic order. Thus, a recent "UNCTAD memorandum" dealing with the most-favoured-nation clause states that:

To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. 345

Similarly, General Principle Eight of annex A.I.1. of the recommendations adopted by the United Nations Conference on Trade and Development (UNCTAD) at its first session stated:

344 Ibid.

... developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concession in return from developing countries ... Developing countries need not extend to developed countries preferential treatment in operation amongst them. 346

Article 21 of the draft articles on most-favoured-nation clause formulated by the International Law Commission and certain articles of the Charter of Economic Rights and Duties of States are also based on concessions on a non-reciprocal basis. The traditional concept of non-discrimination may be said to have undergone a considerable change.


347 Note 345, p. 132. The Commission notes that in this area "extensive State practice, precedents and doctrine are not easily discernible. The Commission therefore has attempted to enter into the field of progressive development and has adopted article 21". (ibid., p. 16).

in the field of international trade and investment, at least as far as relations between developed and developing States are concerned. This may not have necessarily affected its applicability as between the developed States inter se.

The developing States may be legitimately expected to accord a more favourable treatment in the field of economic relations to nationals from other developing countries as against nationals of developed countries. A recent example of this is the nationalization of foreign banks by Sri Lanka but exempting certain banks, Indian and Pakistani, from this measure. "The reason for their exemption from nationalization is that these banks will have an important role in expanding trading and bilateral relations between Sri Lanka and her immediate neighbours". This may also be part of the effort to promote collective self-reliance between developing States, an objective enshrined in the Declaration

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349 Economic Times (New Delhi), 26 November 1976, p. 10. The law was to come into force from 21 January 1977.
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and Programme of Action on the Establishment of

a New International Economic Order.

CONCLUSION

Opinions are widely divided on limits of a State's power to expropriate alien property. The United States Supreme Court observed that divergence on the applicable international standards is indicative of the conflict of interests between capital-importing and capital-exporting States. It is an admitted fact that large-scale uncertainty prevails in this area of international law. John Fischer Williams expressed himself against importing municipal law limitations into the field of international law. According to traditional international law a State's power to expropriate alien property is subject to three conditions, namely (1) Public purpose; (2) Payment of full, prompt and effective compensation" and

350 United Nations General Assembly Resolution 3201 (S-VI) of 1 May 1974 and Resolution 3362 (S-VII) of 16 September 1975.
(3) non-discrimination, subject to fulfilment of which a State may lawfully expropriate alien property. Their relevance in the form in which they have existed hitherto to the international community as it is composed today has become doubtful.

The expression "public purpose" is not precise but broadly denotes that overwhelming collective interest of the people alone could justify expropriation of alien property. A particular public purpose may be immediate or long-term. The doctrine is capable of absorbing large range of purposes. However, in view of different social and economic systems prevalent in the world today, it is difficult to arrive at an agreed definition of public purpose. No international tribunal appears to have declared a taking illegal on the ground of lack of public purpose. Some writers do not view public purpose as a limitation but an authorization for taking alien property. There are others who do not regard a taking invalid for lack of public purpose. However, in state practice there has been no opposition to this doctrine and States have invariably
professed that nationalization in question is for a public purpose. Hence, in spite of difficulties in laying down objective criteria for determining existence of public purpose in case of expropriation of alien property, it would not be desirable to abandon this test for making an assessment as to the genuine character of expropriation.

While discussing the traditional formula of "due, prompt and effective" compensation it has been noticed that minimum standard of international law, unjust enrichment, doctrine of acquired rights, abuse of rights and good faith are rallied in support of that formula. These concepts on which the compensation formula is based are open to much manipulation and have also been questioned. In effect, the formula requires full market value of the property thus ignoring ability of the States to pay it. Several jurists, both from capital-exporting and "Third World" countries, either reject this formula or else treat it as already dead. Bedjaoui goes even further and claims that compensation is
due to the countries which were victims of colonialism. In any case, in view of the General Assembly Resolution 3171 (XXVIII) of 1973, Article 2 of the Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly, this formula can no longer be said to reflect the consensus of the world community. In fact, these developments may be said to have completely watered down requirement of compensation by converting an obligation into discretion of the nationalizing State. The formula has been reduced from "due, prompt and effective" compensation to "possible compensation" under the 1973 resolution. Article 2 of the Charter of Economic Rights and Duties is based on the view that there does not

351 Explaining his vote on the Charter of Economic Rights and Duties Mr. Martinez of Cuba stated that his vote for Art. 2 of the Charter did not imply "acceptance of the right to compensation in every case. On the contrary, the question of compensation implied the possibility of the payment of compensation in reverse, by nationalized concerns to the nationalizing State. There were many cases where such action would be justified by the concept of redress to the victims of colonialist and neo-colonialist exploitation over the years". (UN Doc. A/C.2/649). Also UN Doc. E/5425 (1973), p. 15, para. 44.
exists a generally accepted practice on the question of compensation, "since the legal precedents and opinion on the matter differ too widely for there to be any real international custom". In fact, the Report of the Secretary-General of United Nations on "Permanent Sovereignty over Natural Resources" recognizes that "there is no body of international law which defines the fairness or adequacy of compensation". The traditional formula has been considerably eroded by the lump-sum settlement agreements without going into the validity of particular claims and on the basis of partial compensation. Since the Second World War more than one hundred and


353 UN Doc. E/5425 (1973), p. 16, para. 44.
twenty-six such agreements have been concluded. Further, the rule of prompt payment of compensation is observed only in breach. There is no uniform practice as regards payment of interest in cases where payment of compensation has been deferred. There is a general agreement that alien should be paid compensation in such a manner that he is able to make effective use of it. It may be in cash or kind but need not be in the currency of the alien whose property has been nationalized.

Abandonment of the traditional compensation formula will no doubt greatly relieve the developing capital-importing countries but would create a void which will have to be filled before long. In the meantime, the concerned capital-exporting and capital-importing States may find it more convenient to conclude bilateral agreements as regards treatment of alien property.

The rule of non-discrimination, which was traditionally supposed to operate as between
nationals and aliens and aliens of different nationalities inter se, also seems to have undergone considerable change in the field of trade and investment in response to needs of the developing countries. According to Article 2 of the International Covenant on Economic, Social and Cultural Rights (1966) whether aliens in the developing countries will enjoy similar economic rights as the nationals is a matter which those countries will determine in the light of their national economy. Quite a few jurists also have expressed themselves against rigid application of the rule of non-discrimination. Moreover, in view of concepts emerging in a new international economic order which favours preferential treatment of the developing countries it may not be possible to support strict application of this rule.