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Thesis submitted to the School of Graduate Studies and Research, University of Ottawa, in partial fulfilment of the requirements for the LL.M. (Legislation) Degree.

COMPENSATON FOR NATIONALIZATION OF PRIVATE FOREIGN INVESTMENT : INTERNATIONAL LAW STANDARDS.

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ISBN 0-315-46788-6

UNIVERSITÉ D'OTTAWA
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To Marcel Zollinger:

A Canadian whose love for and willingness to assist the people of Manus and Papua New Guinea remains strong and unchanged. The completion of this thesis is a testament of that love and willingness.

Acknowledgments.

The completion of this study would not have been possible if not for the valuable guidance and support of others. Among the good help of the professors of the Law School of the University of Ottawa, I owe much to the excellent supervision and direction of Judge Maxwell Cohen. Not only did Judge Cohen provide me with guidance par excellence, but he also made me strive for a better understanding and analysis of issues pertaining to the international problem of compensation for nationalization. His vast academic background and experience in the legal profession are assets that proved very valuable to this study. For these reasons, I shall be forever grateful and indebted to Judge Cohen, not only for helping me realize the completion of this study but for helping me develop and appreciate good research and analytical habits as well.

Marcel Zollinger, whose help and contribution is no less significant, merits acknowledgement. Not only did he allow for the free and unlimited use of his word processor but he also arranged for all typing work to be done and paid for. As well, I was able to draw on his years of vast experience in Africa and Papua New Guinea. And from him, his wife

(Morven) and children (Andrew, Martin, Sarah and Rosemary) came non-reciprocal benefits that directly and indirectly contributed toward the study's completion. To say, therefore, that I shall always be appreciative of their very generous support and encouragement is an understatement.

Appreciation is also extended to certain members of the Staff Development Unit of the University of Papua New Guinea. Nakanat Kote, Kerri Malara and Roger Giaruva were very helpful, so were Louis Perri-Kiromat and Jennifer Totabu-Popat. I also appreciate the assistance of the Law Librarian of the University of Ottawa without whom the endnotes would have remained a mess.

Finally, but not least, I fully appreciate the silent, yet very significant contribution of Bospidik and Chiquie. They were always there.

Notwithstanding, the good help of those who made this study's completion possible, I remain solely responsible for any error, misconstruction or shortcoming one may come across.

Abstract.

Notwithstanding its appearance of being in a contemporary state of chaos and the misleading illusion that there are no well defined universally acceptable legal norms regulating the determination of the amount of compensation a private foreign victim of nationalization receives, there in fact exists a compensation framework of universal international law application which is consistent with the practice of states, the twin functions of international law and which has been consistently applied by international tribunals. It is important to note here that the compensation framework is not based on a particular standard, found either in the jurisprudence of a single state or a group of states. The compensation framework is a mixed framework, for it is founded on the:

(a) the general principle or principles of law common or neutral to the host state's domestic law and international law;

(b) the terms of any investment agreement regulating the rights and interests of the host state and the nationalized investor's investment; and

(c) all the circumstances affecting the investment's valuation and profitability.

As well, the mixed compensation framework goes further to qualify the aforementioned factors by requiring that where the investor's host state and home state enter into a "free choice of means" agreement in their mutual effort to determine compensation payment, all factors outside of the terms of their agreement shall be precluded from determining compensation payment.

As is only too obvious, the compensation framework is not based entirely on the standard of prompt, adequate and effective, the Calvo doctrine, the written down (unadjusted) book value notion or the Eastern Bloc states' notion of compensation. Depending, therefore, on all the elements of the compensation framework and whether or not the investor's host state and home state have concluded a "free choice of means" agreement, compensation may amount to no compensation payment, if the investor suffer no actual loss, or it may go as far as measuring up to adequate compensation. Consequently, it is more apt to regard the compensation framework as a mixed and neutral framework and not as a single non-mixed standard.

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Introduction.

The international legal order accepts the process of nationalization as a right inherent in the sovereignty of all states. Prior to 1917, however, any such taking of private foreign property by the host state was pursued in conformity with the notion of strict liability. Nationalization of foreign investments in and after 1917 shifted the international law position from strict liability to acceptance of a state's sovereign right over its resources. This change is described by Williams and de Mestral in the following language:

> "The influence of the Soviet Union's policy of nationalization after the 1917 revolution gave impetus to the growing trend of newly independent states to regain control of the economy and policy making in their countries. Thus, international law in this area has done an about-face from advocating strict liability for expropriation to adhering to the view of a state's absolute right over its resources." [1]

Although accepted as a sovereign right of all states, nationalization may only be effectively pursued upon the satisfaction of certain conditions, the most important being; that it be dictated by a high public interest, that it is non discriminatory and that it be accompanied by compensation payment. This paper takes particular interest in the requirement that compensation be paid, not because the high public interest and non discrimination requirements are seen as less important, as is not the case, but simply because the requirement to compensate is the most controversial aspect of the institution of nationalization. Its controversial nature makes it a lively, stimulating and challenging

issue which has lured many writers to write about.

Differences between states on the applicable international law standard from which compensation payment is determined serves not only to illustrate the controversial nature of this aspect of nationalization but they also serve as indicators, showing that this international law issue, once settled, is now experiencing a transitional phase. Membership of the international community is no longer exclusively nor is it largely dominated by developed capitalist states. The international community of the present finds its membership extended to include developed socialist states as well as developing states with different economic and legal systems as between themselves and different to those of the developed capitalist states. This explains why the issue of compensation for nationalization of private property is in a phase of transition as international law must resolve and settle varying and competing interests of identical, similar and different political, economic and legal systems.

The different positions on compensation, that compensation be satisfied on the basis of:

(a) prompt, adequate and effective;

(b) a nationalized investment's adjusted book value;

(c) a nationalized investment's writen down (unadjusted) book value;

(d) the Calvo doctrine

or that compensation is not a requirement of international law, suggest that the issue of compensation in international law is in a state of shambles. This conclusion is conceivable if we accept that a compensation framework of universal application in international law can only be one of the said standards. Accepting one of the said standards as a standard of universal international law application is conducive to inviting chaos and instability into the international community of states. States that do not support the standard would not willingly surrender their support for a different standard in favor of the standard. More importantly, they would perceive international law as being supportive and protective of the rights and interests of those states that support the standard in their domestice jurisprudence on one hand while being prejudicial to theirs on the other.

Similarly, we would also be opening the door to chaos and instability if we assume that there is no universal international law standard if one of the said standards is not capable of such determination. To say that the compensation issue is in a state of disarray at international law or to attempt to throw international law into a state of disorder with respect to the issue would be contrary tc the traditional and prevailing functions of international law. If the functions of international law, as stated by Weil [2], are to maintain the peaceful coexistence of all states and to preserve their common interest, then exclusive acceptance of any of the said standards or accepting the non ex-

istence of a universally applicable compensation framework would greatly prejudice the dual functions of international law. For this reason, this study pursues the thesis that there exists a compensation framework of universal application which is not framed exclusively on one of the said standards.

To be of universal application, the compensation framework can only be one that is able to satisfy the dual functions of international law. It must be able to foster the peaceful co-existence of all states irrespective of their differences. In other words, it must allow the states to maintain their differences from each other if they so choose, i.e., it must respect their sovereign right to determine and pursue legal political and economic systems of their choice, and at the same time maintaining their peaceful co-existence as states with similar and dissimilar systems and interests. Obviously, not one of the aforesaid standards supported by different factions of the international community is capable of satisfying this international law function nor is one capable of not being seen as prejudicial to those states that do not support it. As well, a universal compensation framework must be capable of ensuring that the common interest of the international community of states, which is the free movement of private capital and technology, is not compromised. While it is true that the standard of prompt, adequate and effective and the adjusted book value standard, both of which are supported by developed capitalist states, would serve this purpose well, the fact that they would fail to ensure satisfaction of the former in-

ternational law function dismisses their universal applicability as being the only basis for determining compensation payment. As for the remaining standards, they fail miserably in their capacity to satisfy the former function and to guarantee the free flow of private capital and technology.

However, notwithstanding their apparent shortcomings the different compensation standards shall not be rejected in a summary manner nor shall they not be analysed in our pursuit to determine a compensation framework of universality. Their importance to this study stems from several reasons. Some degree of inquiry into each of the different standards shall aid our understanding, even if only basic, of:

(a) their strengths and deficiencies in calculating compensation; [3]

(b) why a standard is supported by a group of states and not others; and

(c) why a standard is or is not capable of universal aplication.

It is only through an understanding of the underlying reasons and defects behind each of the different standards can we determine and better appreciate where and why international law's treatment of compensation disputes is heading in a particular direction, if any. As well, we become more appreciative of each standard's inability to mature into or to remain a standard of universal application. Out of this should also emerge the present status of prompt, adequate and effective, the former

standard of universality, and the reasons behind where it presently rests in contemporary international law development.

What is obvious as of now is that the different standards shall be used inter alia as catalyst for our determination of a compensation framework of universal application. However, this shall only be pursued within the confines of what constitutes a norm of international law. In this respect, it is only logical and rational, free of prejudice and bias, to address the issue of compensation within the ambit of the sources of international law as prescribed in Article 38 of the Statute of the International Court of Justice. This approach will, hopefully, help present an analysis not largely influenced by political and economic theories. After all, political and economic arguments used in support of one compensatory standard and against another serve as reasoning and motivating factors in advancing the interests and position of their disciples. The issue of whether or not there exists a settled universally accepted compensatory standard at international law may only be legitimately resolved through application of the doctrine of sources approach.

This approach allows us to inquire into the treaty practice of states, their domestic and reginal law position, their peaceful resolution of compensation disputes with other states, the decisions and judgements of international tribunals and the position of the United Nations. It is within this framework that our study shall not only satisfy the require-

ments of Article 38 of the Statute of the International Court of Justice, but through it shall emerge a universlly acceptable compensation framework. Before pursuing the doctrine of sources approach, based on the foregoing areas of reference, it is necessary to cover two other areas which are conducive to a good understanding of issues we shall inquire into. Not only do we need to cultivate a basic understanding of the three different groups of states so that we may appreciate their support for a particular standard, but we also need to distinguish lawful acquisitions from their unlawful opposites. Similarly, nationalization shall be distinguished from other lawful modes of acquisition of private property. Canvassing these areas provides direction in this investigation by placing matters, to be addressed, in their proper perspective. As well, issues of compensation for other forms of acquisition of property shall not be allowed to cloud the central theme of this paper.

Broken up into six chapters, our first chapter shall provide a background to the different compensation standards. This is necessary not only for a better appreciation of the different standards, but also for a basic awareness of some reasons behind each of the three groups of states support for one or more of the standards and not others. As well, the background chapter is valuable to the study in that it contributes to a better determination of whether or not the compensation framework of universal application that emerges out of the study is capable of being supported by the different groups of states even if it

is not that which exists in their domestic and regional jurisprudence.

Chapter 2 shall cover lawful and unlawful takings of property. It shall provide basic descriptions of those forms of acquisition of private property, including nationalization, that have usually been mistaken for nationalization measures. In this respect, the chapter helps to direct our focus on issues of compensation for nationalization and not issues related to other forms of acquisition of property as well.

Chapter 3 deals with the treaty practice of randomly selected states. It looks at the different compensation standards that are adopted in treaties and other agreements and inquires about whether or not those standards provide any meaningful direction with respect to formulating a universally accepted compensation framework.

Our forth chapter involves an analysis of the domestic and regional practice of states. Furthermore, it attempts to determine the international law status of the standards supported by different states and to see if the different standards in their practice provide some guidance for determining a universal compensation framework.

Chapter 5 is a look at general principles of law and their status in the compensation problem. It shall bring to focus the shift toward applying general principles of law in the formulation of a universally accepted framework for settling compensation disputes.

Finally, our last chapter shall be an inquiry into developments on the issue of compensation in the United Nations. In this respect, U.N. resolutions on compensation are important and the chapter is an inquiry into whether or not the resolutions are of any relevance in determining a universally acceptable compensation framework. To this end and equally true of Chapter 5, decisions and judgements of international tribunal are important.

Even if the areas of this study are not conducive to an exhaustive coverage of the compensation problem, it matters less. Our primary objective here is to show that, notwithstanding this seemingly chaotic situation respecting the compensation for nationalization issue, there is a compensation framework of universal acceptability and given the parameters so selected our objective is capable of realization however inexhaustive the study may be.[4]

Endnotes : Introduction.

1. S.A. Williams and A.L.C. deMestral, An Introduction to International Law (1975) at 95. They also touch briefly on the process, as accepted in the pre-1917 period.
2. P. Weil, "Towards Normative Relativity in International Law?" (1983), 77 Am. J. Int'l. L. 413, at 418-419.
3. Refer, for example, to J.L. Knetsch, Property Rights and Compensation (1983) at 1-24, and T.R. Johnston et al., The Law and Practice of Company Accounting in Australia (1983) at

153. These writers indicate clearly that there is no single valuation criteria nor is there an accurate one for determining the value and profitability of an investment in the capitalist economy because of the numerous factors that affect valuation. Determining an investment's value so as to satisfy the requirement of adequate compensation is not, therefore, easy especially in a complex investment venture.

4. Apart from the substantive aspects of the compensation problem which we find exclusive interest in this study, the different modes of compliance are also fundamental to the problem. But, given our restrictive analysis of the compensation issue, the different modes of compliance with respect to compensation payments shall be left for other interested parties to pursue.

Chapter 1: BACKGROUND.

The issue of compensation is a great controversial concern. This is evidenced inter alia by international political as well as legal disagreements on a compensatory standard, universally accepted as the standard form which claims of foreign nationals are determined at international law. When the Western Bloc countries (hereinafter referred to as developed capitalist states) had total dominance in the international sphere, prompt, adequate and effective compensation, by virtue of their domestic laws and state practice, gained acceptance as the standard for determining compensation at international law. But the entry of Eastern Bloc countries (hereinafter referred to as socialist states) and developing countries into the international community of states has led to a gradual decline of the complete dominance developed capitalist states assumed over the domain of international law. Now that membership of the international community is numerically dominated by developing states, international law is experiencing the impact of this dominance as well as challenges from socialist states. The controversial nature of compensation is a creation of this development.

Instead of accepting prompt, adequate and effective compensation as the present international law standard, most developing states and socialist states reject the standard as outside of international law. Conversely, instead of relaxing their support for the traditional standard of prompt, adequate and effective in order to accommodate the struc-

tural change in the international community, developed capitalist states continue to defend the traditional standard vigorously. The inability of all members of the international community to compromise their stand by accepting a single standard is partly a consequence of the competing and conflicting ideologies from which different political, economic and legal systems within that membership owe their root. In Bender's words:

> "Ideology serves as the web through which we see the world, its ideas and its people. It is the point of perspective from which the data taken in by our senses are fitted, altered and selected. Our ability to know and understand the experiences and thoughts of others is limited by the structure of our perceptual orientation. 'Our behavior is a function of our experience. We act according to the way we see things'. [1]

It is easy to dismiss a compensation standard as unreasonable and therefore unacceptable because of its inconsistency with the legal, political and economic systems of one's society. But, while this may be the acceptable practice at domestic level, it should not be transplanted into concerns of international law. After all, international law is that legal domain which regulates the interactions of states, states with identical, similar and conflicting ideological backgrounds. Such background gives to each state a personality that allows it to participate with other states of identical or similar backgrounds on issues of major concern. The compensation issue is an example. Where states possess personalities that are dissimilar, then, the degree to which they seek to agree on issues of major concern becomes more difficult to bridge. To understand the players with respect to their position in the field of international law and the compensation issue is to understand

their position on property. This approach sets the foundation on which a better understanding of the different compensation standards to be discussed in the course of this paper is attained. As well, linking a particular standard with the basis of its creations becomes possible. In pursuit of these objectives, we shall begin by looking at developed capitalist states and their position on ownership of property, followed by the stand of socialist states and, then, that of developing states. The intention here is not to present an exhaustive coverage of the different positions on property but rather an adequate presentation that would serve to bridge those positions on property and the different compensation standards advanced by each group.

A. Developed Capitalist States.

The present position of developed capitalist states respecting property rights extends back in history to the "economies of ancient Greece and Rome". [2] Private ownership of property was defended as an important and necessary institution in those ancient economies. So much so, that although merchants then "were regarded with suspicion as to their morals and with aristocratic contempt as to their role and status in the good society" [3], Greek and Roman philosophers took little interest in formulating "an ethical doctrine of individual freedom in the economic sphere". [4] Aristotle on the other hand is known to have been a strong advocate of the institution of private property. His support for

the institution is referred to by Viner: "The defense of private property as against communism presented by Aristotle, and taken over by several of the early Church Fathers, included the proposition that private property alone imbued men with incentives necessary for care in the preservation of scarce assets and the industrious application to producing useful goods". [5]

For Aristotle and the Greeks, the institution of private property encourages individuals to be innovative and creative. It allows an individual to build a construction according to whatever plan he has in mind or mold "a statue in accordance with his artistic conception ...". [6] Only through this can a man be able to realize his essential form, that which he is naturally good at. [7] Not only does he benefit as a consequence but so does the society to which he is a member. Consequently, involuntary alienation of property was not tolerated in ancient Greece. If property was to be transferred, it had to be voluntarily done "by sale or gift ...". "Expropriation without compensation", as pointed out by Jones, "although an ever present danger in the troubled conditions of Greek politics, was regarded as essentially inconsistent with the nature of the institution of property". [8]

Private enterprise, as it exists today, however, owes its birth not so much to the Greeks and their philosophers but more so to ancient Roman private laws. According to Watson: "Rome's greatest legacy to the modern world is undoubtedly its private law. Roman law forms the basis

of all legal systems of Western Europe with the exception of England (but not of Scotland) and Scandanavia. Outside Europe, the law of places as diverse as Louisiana and Ceylon (Sri-Lanka), Quebec and Japan, Abyssinia (Ethiopia) and South Africa is based firmly on Roman law. Even in England and the countries of Anglo-American law in general the influence of Roman law is considerable and is much greater than is often admitted". [9] The Roman theory of property was the foundation on which grew the institution of private property as is today. During the classical period Roman property law was dominated by the concept of absolute ownership. [10] Obviously the most individualistic property law then. But its misconstruction by some writers led them to not realize that the concept of absolute ownership did not preclude taking of private property by the Empire. [11]

That emphasis should be placed by the Romans on private ownership of property, not public ownership, is based on obvious reasons. Like the Greeks and Aristotle, the Romans accepted the institution of private property as the most important system through which the individual is able to utilize his own resources for his benefit and in so doing the Empire benefits as well. Nowhere is this more obvious than in the Roman law maxim: "It is expedient for the commonwealth that a man should not use his property badly". [12] Empire interference of private property was greatly restricted as any such interference was inconsistent with the institution of private property. Nonetheless, even though there were "restrictions and abstractions of property for the common good," [13] the

construction of "straight military roads and aqueducts" attests to the fact that when necessary and through passage of special laws, the Empire acquired private property for public works. [14] A victim of any such acquisition would, in view of the emphasis placed on private ownership of property, have received full compensation for his losses. [15]

Private ownership of property was also defended by great thinkers like Aquinas, one of the Church Fathers greatly influenced by Aristotle. But unlike Aristotle and the Romans whose support for the institution was influenced more by its benefits to the individual and his society, Aquinas and others defended private ownership of property for different reasons. They took the position that private ownership of property was a natural right necessary for the survival of the individual. Aquinas' defense of the institution as a natural right is well documented in these words:

> "To possess something is to have it not only for oneself but as one's own. So much so, that it seems the goods possessed constitute, as it were, a very part of the person. If we take the position of natural law, no such appropriation of goods is called for. We do not say that natural law prescribes community of goods nor, consequently, that their individual appropriation is contrary to natural law, but simply that it ignores it. It is reason which has added private appropriation of goods to natural law, because it is necessary for human life that each man possess certain goods as his own". [16]

The fact that private property is a necessary prerequisite for sustaining human life compels a private property owner to ensure continued maintenance thereof. Hence, while Aristotle's concern centers on private property encouraging industrious individuals "to producing use-

ful goods", Aquinas goes further to add that "when a thing belongs to everyone, nobody takes care of it,whereas everyone is willingly busy with what belongs to him alone". [17]

Using the natural law position to defend individual interests over society were some renowned thinkers whom Gierke refers to in his work, Natural Law and the Theory of Society. The author also discusses the impact of natural law and those thinkers in European jurisprudence after mid-1600. [18] During this period, individualism being the dominant aspect of natural law was in the forefront of natural law's influence over European thinking. [19] Hence, as stated by Gierke: "Every attempt to oppose this tendency was necessarily a revolt, on this point or on that, against the idea of natural law itself." [20] Society, according to natural law, is the creation of sovereign individuals, "originally free and equal, and therefore independent and isolated in their relation to one another," [21] who by virtue of a social contract allow the stronger to rule over and protect the weaker. As each individual, prior to creation of society, had naturally "been his own sovereign ...the natural law theory of society" retained its individual base by prioritizing the individual over the group. [22]

Legal philosophers, Hobbes, Locke, Rousseau, Fichte and others, referred to by Gierke, who belong to the strict individualistic school were the front runners in using natural law to advance the priorities of the individual over society. [23] Locke was very influential in England

while Rousseau, who saw "the state of nature, as a state in which the liberty and equality of men were still unlimited by any social fetters" and who regarded society "as a necessary evil" whose "institutions were allowed a right of existence only in so far as they were directed to the restoration of the liberty and equality of the state of nature", was the thinker of great influence in the European continent. [24] This trend of thinking led Locke to espouse the theory "that property already existed, in the pre-social state, as the result of individual labor and occupation; and he was thus able to reckon it, along with liberty as one of the natural law rights which civil society found already existing when it appeared on the scene, and which it could not touch or modify". [25] His theory found extensive support, most notably from Rousseau, Justus Moser and Kant. [26]

Conforming to these positions, Roman private law and natural law, on property ownership was Bentham who demonstrated his strong support for private property when he attacked the economic impact of communal ownership of property. He argued that:

> "1. Such an arrangement (communal ownership) is an inexhaustible source of strife and contention: far from being a state of satisfaction and enjoyment for all parties interested, it is generally one of disappointment and discontent.
>
> 2. So far as concerns every one of the co-partners, this individual property is deprived of a greater part of its value. On the one hand, subject to dilapidations of every kind, seeing that it is not under the protecting care of individual interests; on the other it fails to undergo any sort of improvements. Why should I be at charges, of which the burden will be certain and fall entirely upon myself, while the benefit will be doubtful and, of necessity, shared with others?

> 3. The apparent equality of such arrangement serves to veil very real inequality. Without fear of punishment, the stronger abuse their greater strength; at the expense of the poor, the richer folk increase their treasure. This community of goods always calls to my mind the sort of monster known to come into being on rare occasions - twins joined together by a ligament. The stronger always drags the weaker." [27]

For Bentham, like the ancient Greeks and Romans, development of a society is best achieved through individual ownership of property and, like Locke, Rousseau and others, "everything possible should be done to create and enforce individual rights in property...". [28]

With the influence of Roman private law, boosted by natural law and individualistic theories of property after mid-1600, the institution of private property consolidated its hold on Europe, dominating the entire continent's political, economic and legal life until the Russian revolution of 1917. Having firmly rooted itself in Europe, the notion of private property was later exported into the so-called new world when European powers extended their sphere of influence in search for colonies and raw materials. Although contrary to views of disciples of the strict individualistic school, it was accepted by European capitalist states, just as the ancient Greeks and Romans did, that the state in restricted circumstances may take over private property and in consideration for which compensation is to be paid. Aquinas's concern against negative consequences of unrestricted ownership of private property lends support for the need for restrictive state interference of private property to satisfy public need. His concern is seen in

these words:

> "... we must not forget that by natural law the use of all things is at the disposal of everyone. This fundamental fact cannot be removed by the progressive establishment of private ownership. That each should possess as his own what is necessary for his own use is quite sound as a safeguard against want and neglect. But it is a very different matter when some accumulate more goods than they can use under the title of private property. To assume ownership of what we do not need is to make fundamentally common goods our own. The use of such goods should remain common. The remedy for this abuse is never to consider even the goods possessed in our own name as reserved for our own use. Let us have them, since they are ours, but let us always keep them at the disposal of those who may need them. The rich man who does not distribute his superfluous wealth is robbing the needy of the goods whose use is theirs by right. He is defrauding them by violence. Wealth, let us recall, is not bad in itself. But we must know how to use it reasonably." [29]

Here, we see without a doubt that centuries ago, Aquinas was already theorizing about what is known as the sovereign right of each state to nationalize, expropriate or requisition private property to satisfy public needs therefor.

Obviously, not only did the institution of private property survive and develop from the ancient Greek and Roman economies into the period of feudal law, manorial law and then mercantile law throughout Europe [30] but so did the restrictive power of society (state) to interfere with private property. Dependence on private property for development continued into the Papal Revolution, other subsequent revolutions and to the present. [31] Not out of economic and legal sight during this period was and still is the sovereign right of the state to take over private

property. The present position of developed capitalist states on property is in essence no different to that of the ancient Greeks and Romans. As well, it does satisfy the philosophical concerns of renowned philosophers ranging from Aquinas to Bentham. Private enterprise, because of the institution of private property, has evolved into the basis for growth in present capitalist economic life. So much so, that even the ancient Greeks and Romans could not have foreseen the extent of its stimulating effect on the rate of growth of the present capitalist state. But, while private enterprise today has reached a degree of sophistication well beyond the ancient Greek's or Roman's understanding of it, the institution of private property which allows private enterprise to flourish remains basically the same with the same basic arguments advanced therefor.

Arguments advanced in support of private foreign investment do little to hide the fact that supporters of private property today, no different to the ancient Greeks and Romans, accept the institution as the most effective economic and legal creation which paves way for a faster rate of growth in a society. Private foreign capital inflow coupled with appropriate government policies of the host state, according to advocates of private foreign investment, help generate a steady and rapid rate of development in the state's socio-economic sectors. Growth in the economy subsequently leads to growth of the rate of growth of G.N.P., increase in the areas of employment and of technological transfer. Further, private foreign investment possess the ability to stimulate new

and supporting investment opportunities. These characteristics, it is often argued, aid to create a stable and predictable investment climate that leads to the encouragement of more private investment input from without and within. [32]

In order that the right conditions for encouraging private investments are created, private ownership of property governed by the legal relationship an individual has with his property is protected, in capitalist systems, "from interference by third parties and even the government role in the relation is de-emphasized". [33] Seen from their position of emphasis on private property, the powerful support of developed capitalist states for the traditional standard of prompt, adequate and effective compensation as the present requirement of international law is understandable. Not only is the standard generally consistent with the capitalist ideology but, more specifically, it is consistent with the institution of private property which it safeguards against indiscriminate abuse by the state. Acceptance of an inferior compensatory standard well below prompt, adequate and effective would not only be contrary to the institution of private property but any such standard would challenge and threaten the very basis on which capitalist economies rest. One of the top seven most powerful developed capitalist states, West Germany, regulates private property in a different legal environment. Here, an individual's interest in property are shared with the state [34]. Hence where his property is nationalized, his rights therein are upheld "to an extent consistent with public interest". [35]

In this sense West Germany's position is an exception to the majority stand of other developed capitalist states. Seen in this wide capitalist context, the continuing advancement of prompt, adequate and effective compensation by developed capitalist states at the international level is better appreciated.

B. Socialist States.

Property, according to the adherents of Marxist theories, is the source of power which controls modern industrial society. [36] The private investor, "by virtue of his ownership of the means of production, effectively controls society. He exercises the powers of command which ought to be vested in the community". [37] In order that the individual does not assume those powers to the detriment of the community, socialist theories insist on subordinating interests of individuals to public interest. But such subordination of interests of individuals according to Seidl-Hohenveldern, was "a commonly accepted line of reasoning in most systems of law long before Karl Marx." [38] Seidl-Hohenveldern's observation is substantiated by the ancient Greeks and Romans, who, centuries before Karl Marx, allowed the taking of property for public works. And even today the capitalist systems of law have up to the present continued to subject interests of individuals to public interest.

There is a point of departure, however, between the Marxist position and the capitalist position on subjection of individual interests to public interests. On one hand are capitalist systems which, while accepting public interference of an individual's interests, impose restrictive shelters against such interference. For example, where private property is taken, a victim of such taking is to be paid prompt, adequate and effective compensation. If this standard of compensation payment cannot be satisfied, private property must remain uninterfered with. Hence, subordination of an individual's interests in the capitalist sphere is not absolute, it is subject to legal restrictions. Though not absolute, the degree in which it is found in socialist systems is even greater and therefore more obvious. For Karl Marx and the socialist states, subordination of interests of an individual, example - private interests in property, to public interest finds the extent of its application in Article 4 of the Constitution of USSR. Article 4 provides that:

> "The economic foundation of the USSR is the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of the private ownership of the instruments and means of production, and the elimination of the exploitation of man by man".[39]

The notion of subordination of individual interest to public interest, for the socialists, in essence means depriving the individual of ownership of the "instruments and means of production" and vesting them in public control without restriction". [40]

While "the notion that private property is an essential condition of human freedom is ... accepted" [41] in developed capitalist systems, private property according to adherents of socialism allows a minority class to take ownership of the means of production and to accumulate enormous economic power as a consequence. Using their economic power, private owners of the "instruments and means of production" control their society. Seen from this perspective, one observes that the institution of private property subordinates public interests to individual interests. Or more specifically, the institution subordinates interests of the state to the interests of those who own and control the "instruments and means of production". Nowhere is this trend of reasoning more obvious than in the words of Lenin: "Private property is robbery, and a state based on private property is a state of robbers who fight to share in the spoils." [42] Consistent with this is the socialist theory that private property, as legally accepted in capitalist economies, is an institution which is primarily adopted for the continuing exploitation of one class (majority) by another (minority).

It was Karl Marx, the founding father of socialism, who categorized the capitalist system into two classes. He saw the capitalist state divided by virtue of its law, "into two groups of antagonistic economic interests, two 'classes', the class of the exploiting owners of the means of production and the class of the exploited workers". [43] Lenin endorsed the same theory in 1920 when he said:

"Classes are that which permits one section of society to ap-

> propriate the labor of another section. If one section of society appropriates all the land, we have a landlord class and a peasant class. If one section of the society possess the factories and works, has shares and capital, and the other section works in these factories, we have a capitalistic class and a proleterian class." [44]

To do away with a "state of robbers", to use Lenin's words, and have it replaced with one based on socialism requires "The proletariat" to "use its political supremacy to wrest by decrees all capital from the bourgeoisie, to centralize all instruments of production in the hands of the State, i.e. of the proleteriat organized as the ruling class". [45] Guided by the Communist Manifesto, Lenin, while destroying "private ownership in the means of production" during the formative phase of Russian socialism after the 1917 revolution, made sure that "private ownership of consumer goods" remained safeguarded. [46] It was in 1920, however, that all commercial entities with over five employees using mechanized tools or ten employees not using such tools were taken over by the state. [47] Influenced by socialist principles, ownership of property falls into two categories, socialist property (public property) and personal property (individual property).

Creation of socialist property stems from socialist ownership of the "instruments and means of production". This category, however, is not restricted to the "institutions and means of production". Included are: "state property; property of collective farms, of other cooperative bodies, and their combinations; property of public bodies". [48] State property according to Article 6 of the Russian Constitution are:

> "The land, its mineral wealth, waters, forests, factories, mines, rails, water and air transport, banks, means of communication, large state organized agricultural enterprises (state farms [machine and tractor stations], and the like) as well as municipal enterprises and the bulk of the dwelling houses in the cities and industrial localities, are state property, that is, belong to the whole people."[49]

The other form of socialist property as stated by Article 20 of the Basic Principles of Civil legislation is the "property of the collective farms" and of "cooperative bodies", example - fishermen's cooperatives and cooperatives of small handicraftsmen. [50] Article 7 (paragraph 1) of the Constitution is expressly clear on this, stating:

> "The common enterprises of collective farms and cooperative organizations, with their livestock and implements, the products of the collective farm as well as their common buildings, constitute the common, socialist property of the collective farms."[51]

Property of public bodies, that of sporting organizations and trade unions for instance, is the third form of socialist property.[52]

While socialist property is that which is publicly owned, personal property falls under individual ownership. Personal property under Article 25 of the Constitution is not of the same technical meaning given to the term in common law jurisdictions. Article 25 refers to income and savings from the work place, "a dwelling and subsidiary husbandries, articles of domestic economy and use, personal necessity and convenience " as personal property. Such property, "the purpose of which is to satisfy" the owner's material and cultural needs, ... may not be used for the production of unearned income".[53]

Although personal property rights of individuals are protected, by virtue of Article 28 of the Constitution,[54] against arbitrary state interference. The state, however, is not precluded from taking over such property, but within the limits of Article 31 of the constitution. Article 31 states that:

> "The taking of property from the owner thereof by the State for State or public purposes accompanied by the payment to him of the value of the property (condemnation), and the uncompensated taking of property by the State by way of sanction for violation of the law (confiscation), are permitted exclusively in cases and according to the procedure established by the laws of the USSR and the Union Republics". [55]

Here we see that, although the general socialist position is that, as stated by a writer, the state enjoys absolute rights in property and non payment of compensation upon nationalization is accepted as justified,[56] the Soviet Union recognizes the need to pay compensation to a private citizen whose property is taken by the state. It must be emphasized though that any obligation to pay compensation is restricted to personal property, described in Article 25, supra. Hence, socialist recognition for the need to pay compensation should not be translated as no different to its recognition by capitalist systems and therefore contrary to the socialist notion of ownership of property. In fact, the requirement of compensation under Article 31 of the Constitution is consistent with the socialist theory of property.

Construed with Articles, 4, 6, 7, and 25 of the Constitution and Ar-

ticle 20 of the Basic Principles of Civil Legislation, Article 31 provides clearly that where personal property is used within the scope of Article 25 and subsequently taken over by the state, the owner thereof is entitled to compensation based on the value of the property as determined by laws passed by the State and Union Republics. Where personal property, however, is used to generate profit (unearned income) in contravention of Article 25 and other laws, it will be taken without compensation payment. As well, if an individual challenges the system by attempting to build and operate a factory (an instrument of production) as a profit generating private enterprise, such an attempt would be contrary to soviet constitutional requirements, making it illegal, and therefore open to confiscation by the state.

What we now see is the very basis on which the socialist systems owe their existence, i.e., public ownership and control of the "instruments and means of production". Leonid Brezhnev, then Soviet leader, made this obvious in his report of November 2, 1977 on the Russian revolution of 1917 and its impact on Soviet society, other socialist states and the international community at large. He stated inter alia that:

> "The six decades of socialist construction most vividly demonstrate what can be achieved by working people who have taken over political guidance of society and have assumed responsibility for their country's destiny. These decades have proved that there is no way, nor can there be a way to socialism without the working people taking over power, without socialist statehood.
>
> The victory of the October Revolution gave working people their opportunity to put an end to exploitation and free themselves from the bondage of economic anarchy. This key problem of so-

> cial progress was resolved through the abolition of private property and its replacement with public property. Anarchy of production gave way to scientific, planned economic management".[57]

Private ownership of investment, i.e. "instruments and means of production", not only is inconsistent with socialist theories of property but is also illegal in socialist societies. Confiscation of this category of property is therefore not only theoretically justified but is legally justified in a socialist society as well. Consequently, the socialist position that compensation not be paid for nationalized private investment is consistent with the socialist notion of property. Also, non payment of compensation for the taking of private foreign investment is a measure that helps safeguard the very fabric (public ownership of the "instruments and means of production") on which socialism survives. Hence, the observation by Lapres that the socialist states enjoy absolute rights in property and non payment of compensation upon nationalization is accepted as justified [58] should be understood in the foregoing context.

C. Developing States.

Aside from developing states like Greece and Portugal which have long been recognized as sovereign states, most other states that belong to this community of states were once under the colonial domination of European capitalist powers. [59] Being former colonies of developed capitalist states and being referred to as developing states (also

referred to as Third World states, under developed states, or less developed states) are two commonly shared factors among states of this category of states. Commonly shared by most developing states as well is their possession of fragile and vulnerable economies based on cash cropping and raw materials whose prices depend on the fluctuating prices of the world market and the economies of developed capitalist states. Consequently, except for the oil rich states, they always suffer from a chronic shortage of capital. While sharing these factors with most other developing states, a developing state, however, is essentially a member of a mixed bag of states.

There are those developing states whose political, economic and legal systems are modeled on that of their former colonizers. Some developing states that have membership in the Commonwealth of States exemplify this situation. Papua New Guinea for instance is one such state whose legal system is basically common law based, whose economic system is capitalistic [60] and whose political system is based on the British parliamentary system. The same is generally true of India, Fiji, Solomon Islands, some states in the Caribbeans and others in Africa. There are those states in South America that inherited all from Spain, Portugal and the United Kingdom. Although a former Spanish colony, Mexico's economy is closely linked to that of the U.S.A., not Spain's, largely because of its close proximity to the U.S.A. But Mexico's legal system has more in common with Spain's than with that of the U.S.A. On the other hand are those states that have turned to socialism. The most

notable of which are Cuba, North Korea, Vietnam, Nicaragua, Ethiopia and Mozambique. Within this community of states is another group of states (Mexico, Argentina, Brazil and Bolivia are some examples) that have accumulated enormous debt burdens which continuously threaten to cripple their economy. And the list of factors separating some developing states from others goes on. [61]

The fact of the matter is that although sharing a few common concerns and referred to as developing states, one discovers the existence of different and conflicting political, economic and legal systems within this group of states. The apparent lack of uniformity is largely due to the competing influences and domination of capitalist and socialist ideologies that have been exported into the developing states by their developed and powerful adherents. Capitalism was the first to be introduced into the developing states, together with colonialism, followed by socialism many years later. But while colonialism has been largely phased out, the struggle between the chief exporters of the two ideologies to maintain and increase their sphere of influence among the developing states continues. The fact that most developing states possess fragile economies renders them open and vulnerable to the dictates of economically powerful states. If, however, economic sanctions imposed by the powerful states do not compel developing states to submit to their interests, their military power will sometimes do so. For example, when Allende, a Marxist, assumed leadership of Chile via the democratic electoral process and implemented socialist policies, of

which sweeping nationalization of private foreign investments was a major part, he was assasinated. The role played by the U.S.A. in over throwing Allende's government is common knowledge. Similarily, Russia's adventures into developing states, for example its invasion of Afghanistan in 1980, have been a global concern. These are considerations which help shape and determine a developing state's position on private foreign investment and the question of compensation for nationalization of such investment.

Except for states like Taiwan [62] and South Korea [63] that have basically adopted an open door policy to private foreign investment and those like Cuba, North Korea, Vietnam, Mozambique, Ethiopia and Nicaragua that have modeled their political, economic and legal systems on socialist theories, most developing states' acceptance of private foreign investment is coupled with suspicion thereof. Apart from seeing private foreign investment as a threat to their sovereignty, the inability of private foreign investment to gain the confidence of most developing states also goes back to the colonial history of these states. When European powers competed with each other to extend their area of influence into the new world, early merchant adventurers were in the forefront of this challenge. They ventured into Africa, Asia, the Pacific, the Americas and the Caribbeans in search for economic benefits. Dictated by their home state's demands, the early business adventurers were out looking for spice, sugar, gold, silver, slaves and other items. [64] For them profit seeking opportunities were plentiful

and when rapid urbanization in Europe took off, so increased the area and volume of their profit generating activities in the colonies. [65]

Motivated by their strong and primary desire for profit making, these business adventurers thought little of or gave no consideration at all to any possible negative effect of their activities visited upon the native inhabitants and their societies. Likewise, the profit seekers' home states paid little or no attention. Colonial administrations in the colonies were more concerned about advancing the interests of their merchants and those of their home state. Little concern was given to protecting, upholding and encouraging traditional values and institutions already in place and regulating the lives of people prior to colonial rule. [66] Land under customary or traditional ownership but unoccupied by the traditional owners were mistakenly assumed to be ownerless and consequently subjected to alienation by colonial administrations. In Papua New Guinea such land was declared by the Australian colonial administration as waste and vacant. [67] In Vanuatu such land was alienated by the joint British and French colonial administration and some of which were subsequently transferred to the ownership and use of colonial investors from these European powers. [68] The Papua New Guinea and Vanuatu transfers of land, erroneously assumed to be ownerless, meant the traditional owners thereof received no compensation payment for deprivation of their land. Even where land was sold by the traditional owners, for most, payments received as consideration for their land fell well short of the market value notion.

In Papua New Guinea for instance, traditional land owners still complain even today of trinkets given to them by merchants as consideration for their land. [69] There were also instances in Vanuatu where traditional land owners entered into land transactions with colonial investors but who did not intend for such transactions to rid them of their ownership and usage rights. [70] Colonial investors, parties to such transactions, on the other hand intended for those land arrangements as outright transfer of land to their ownership as being the substance of those transactions. [71]

Today, the scars left from their colonial past, a period of extensive exploitation and, in some cases, destruction, remain visible in the political and economic lives of many developing countries. The Papua New Guinea government has been and is still subjected to claims for compensation from traditional land owners for land lost through alienation by the Australian colonial administration. Papua New Guinea, given its capital capacity, has not been able to meet those claims nor has it accepted the claims as valid. Except for a few, plantations owned by Australian colonial investors and purchased by the Papua New Guinea government and subsequently handed over to traditional land owners have generally not been economically viable. [72] Run down plantations remain a familiar sight in Papua New Guinea today. Compensation claims for land and economic deterioration of plantations have continued to frustrate the Papua New Guinea government mainly because of its inheritance of those problems from the Australian colonial legacy. That

such circumstances and others already discussed should help shape and determine the economic attitudes and policies of developing states is seen in the words of Turner: "It may well be that the virulence of today's economic nationalism in many parts of the world is at least conditioned by memories ... of the times when foreign companies were very much on top". [73]

In spite of their colonial past and because of their continuous shortage of capital, save the oil rich states, developing states see that there exists a real need to accept and encourage private foreign investments. To accept private foreign investors with an open arm policy, for many developing states, is unacceptable. Scars from their colonial past coupled with their awareness of the negative effects of foreign investment and the strong competitive capabilities of foreign investors over their domestic rivals, continue to haunt developing states in this regard. Short points out that production of goods, creation of employment opportunities and acquisition of new skills should not be allowed to camouflage the reality that foreign investment is generally incapable of generating economic growth. [74] In almost all such investment relationships, says Short, the host state does not receive its full entitlements thereunder because foreign corporations are renown for accumulating large profits through transfer pricing, over invoicing and other tax avoidance schemes. [75] Not only do such schemes allow profits from being taxed but they also allow profits generated in the host state to be repatriated for investment outside, instead of

being reinvested within. [76]

For most developing states is the realization that due to their capital shortage, a faster rate of development can only be achieved by allowing in and encouraging foreign investors. Concurrent with this is also the realization that they would only be playing into the hands of those they thought they would rid themselves of upon attainment of statehood. Foreign investors have, as a consequence, been the subject of continuing suspicion and question. Some obvious and strong concerns of developing states over foreign investors, especially multinationals, are found in the words of Turner:

> "The chief arguments against the multinationals stem from the fact that they are larger and more profitable than their local competitors and they they are concentrated in the Third World's growth industries. These factors would well lead to their perpetual domination of the future economies of these countries. However, even in the short term, the multinationals are abusing their dominant positions by devices that benefit the company first, their parent economy second (i.e. the United States and Europe),and only then their host economy in the Third World". [77]

Turner adds further that:

> "... when ... dealing with reactions in the Third World, we should remember that it is not uncommon to find economies in which between a quarter and a half of their modern industry is controlled or influenced by firms that will appear far larger than people in Europe imagine. It is sheer hypocrisy for European industrialists who are frightened of the Americans, or American industrialists apprehensive of the Japanese, to argue that the Latin Americans are being totally unreasonable when they act against the multinationals. The discrepancy between the economic power of the Third World and the developed countries is so great that it would be unnatural if multinationals were accepted without question". [78]

Given the different political, economic and legal environments in which developing states exist, and given their colonial backgrounds, their continuous shortage of capital and the threat of domination of their economies by foreign investors, it is understandable, therefore that this category of states should emerge with a mixed bag of compensation standards. Most standards espoused by developing states, however, ignore the sensitive yet legitimate concerns made on the compensation issue by Girvan. He is disturbed by the following:

> "After World War I, Germany made reparations to the victorious Allies for the destruction of life and property for which it was held responsible; after World War II, it paid the State of Israel in recognition of its responsibilities for the crimes visited upon the Jewish race. Yet who has compensated the African peoples for the millions seized and killed in the service of European slave trade, or for the land, cattle, and minerals expropriated by European colonization and the millions who died in the process? What restitution have the aboriginal peoples of Americas and Australia received for the compensation of their country by the white settlers? And what recompense do the descendants of the Incas, the Aztecs, and the people of India now enjoy for treasure looted from them by the European nations?"[79]

While their colonial history makes them wary of Girvan's concerns, their strong need for foreign capital makes it less practicable for them to advance those concerns. Hence, we see that, unlike socialist states, most developing states agree that compensation payment is a requirement of international law. Other developing states like those of Latin America insist, however, that compensation payment is a matter of national jurisdiction. Seen among some developing states is their support for the traditional standard of prompt, adequate and effective. Others have emerged with different standards, of which the most notable are the

book value notion and excess profits.[80] That different standards should be espoused by developing states instead of a single standard is, as already stated supra conditioned by their different political, economic and legal systems and how they perceive private foreign investment as a threat to their sovereignty.

Endnotes : Chapter One.

1. J.C. Bender, "Ideological Components of International Legal Disagreements" (1968), 1 N. Y. J. Int'l. L. Pol. 245. Refer as well to O.J. Lissitzyn, "International Law in a Divided World", in W.W. Bishop, International Law : Cases and Materials (1971) at 20.
2. J. Viner, "The Intellectual History of Laissez Faire" (1960), 3 J. L. Econ. 45, at 48.
3. Ibid.
4. Ibid.
5. Ibid.
6. H.A. Rommen, "The Legacy of Greece and Rome", in The Natural Law (1964) at 16.
7. Id., at 17.
8. J.W. Jones, Law and Legal Theory of the Greeks (1956) at 198.
9. A. Watson, The Law of the Ancient Romans (1970) at 1.
10. H.F. Jolowicz, Historical Introduction to the Study of Roman Law (1967) at 142.
11. F.A. Mann, "Outlines of a History of Expropriation" (1959), 75 Law Q. Rev. 188, at 189-190.
12. Viner, loc.cit., note 2.
13. I. Seidl-Hohenveldern, "Communist Theories on Confiscation and Expropriation. Critical Comments" (1958), 7 Am. J.Comp.

L. 541, at 542.

14. C.F. Randolph, "The Eminent Domain" (1887), 3 Law Q. Rev. 314 at 315.
15. Ibid.
16. E. Gilson, The Christian Philosophy of St. Thomas Aquinas (1957) at 314.
17. Ibid.
18. O. Gierke, Natural Law and the Theory of Society (1958) at 96.
19. Ibid.
20. Ibid.
21. Ibid.
22. Ibid.
23. Id., at 96-104.
24. Id., at 101.
25. Id., at 103.
26. Id., at 104.
27. As cited by Kennedy, "The Utilitarian Model of the Role of Private Law in Economic Change", in F. Snyder, Materials on Law and Development (1973) at 68-69.
28. Id., at 70.
29. Gilson, op.cit., note 16 at 315.
30. H.J. Berman, Law and Revolution (1983) at 527-558.
31. Ibid.
32. For arguments advanced in support of foreign investment, see K. Short, "Australian Investment in Indonesia: the Case Against" in K.J. McLeod and E. Utrecht, eds., The ASEAN Papers (1972) at 126-146.
33. D.A. Lapres, "Principles of Compensation for Nationalized Property" (1977), 26 Int'l Comp. L. Q. 97, at 98-99.
34. Id., at 99.
35. Ibid.
36. W. Friedmann, Law in a Changing Society (1959) at 65.

37. Ibid.

38. Seidl-Hohenveldern, loc. cit. note 13.

39. Article 4 appears in and was taken from E.L. Johnson, An Introduction to the Soviet Legal System (1969) at 106.

40. J.N. Hazard, Communists and Their Law (1969) at 171-172.

41. Friedmann, op.cit. note 36 at 89 citing Harding, in Free Man Versus His Government (1958) at 106.

42. As quoted by J.N. Hazard, et al., The Soviet Legal System (1969) at 383.

43. H. Kelsen, The Communist Theory of Law (1955) at 1.

44. As quoted by Kelsen, id., at 53.

45. From Karl Marx and Engels as quoted by I. Lapenna, State and Law: Soviet and Yugoslavia Theory (1964) at 11.

46. J.N. Hazard, "Soviet Property Law" (1944-1945), 30 Cornell L. Q. 466 at 467.

47. Hazard, op.cit., note 42, at 384.

48. Refer to Article 20 of the Basic Principles of Civil Legislation of USSR. Article 20 was taken from E.L. Johnson, op.cit., note 39, at 106.

49. Ibid.

50. Id., at 107.

51. Ibid.

52. Id., at 106 and 108.

53. See Hazard, op.cit., note 42, at 388, 389.

54. Id., at 389.

55. Ibid.

56. See Lapres, supra, note 33.

57. L.I. Brezhnev, The Great October Revolution and Mankind's Progress (1977) at 7-8.

58. Lapres, supra, note 33.

59. Portugal, though presently regarded as a developing state, was once a strong colonial power. Mozambique and Brazil are two former Portuguese colonies.

60. A. Sawyerr, "Relations of Dependence and the Papua New Guinea-Australia Trade Agreement", D. Weisbrot,et al., Law and Social Change in Papua New Guinea (1982) at 259-279.

61. Developing States may be economically divided, ranging from the poorest countries like Ethiopia, Bangladesh, Mali and others (World Development Report 1984, The World Bank) to some rich OPEC countries (United Arab Emirates, Kuwait or Saudi Arabia), which do not need foreign capital. See J.W. Howe, and the staff of the Overseas Development Council, The U.S. and the Developing World (1974) at S.

62. Taiwan's open door policy to foreign investment is obvious in ts Statute for Investment by Foreign Nationals in IX ICSID Investment Laws of the World at 31. Instead of outlining the standard on which compensation for take-over is to be determined, as is usually the practice of most states, Article 16 of the Act specifically precludes the state from exercising its sovereign power to take over an investment that has at least 45 per cent foreign holding. The state may only exercise its power to nationalize, expropriate or requisition after a twenty year period has elapsed.

63. The South Korean Law for the Establishment of Free Export Zone in IV ICSID Investment Laws of the World at 42 indicates the circumstances and conditions in which the state, through designation of "Free Export Zones" is opening its arms to attract foreign investment. The Act specifically provides that where an area is designated as a Free Export Zone, "the application of pertinent laws and regulations shall be waived or relaxed in whole or in part."

64. L. Turner, Multinational Companies and the Third World (1973) at 17. Turner refers to this period as "The Bad Old Days of Naked Force".

65. Id., at 16.

66. M. Gluckman, Ideas and Procedures in African Customary Law

(1969) at 55-59. The author shows that rights in land existed and continues to exist in African customary law. In his study of the Kapauku Papuans of West Irian, now Irian Jaya, L. Pospisil, Anthropology of Law: A Comparative Theory (1971) at 274-335 acknowledges the existence of land and other property rights among this people.

67. P. Eaton, "Melanesian Land Reform: The Plantation Acquisition Scheme" (1980), 8 Melanesian L. J. 134 at 135.

68. See J. Beasant, The Santo Rebellion: An Imperial Reckoning (1984), Chapters 1, 2 and 3 on "The Land of the Holy Ghost", "The Rising Tide", and "Landsharks and Libertarians", resp.

69. Eaton, supra, note 67.

70. Beasant, supra, note 68.

71. Ibid.

72. Although traditional landowners are often blamed for allowing plantations to economically deteriorate because of their lack of plantation management skills, most plantations were already declining in productivity. Their original owners, in anticipation of the loss of their property, ceased to reinvest, and aimed to maximize their short term profits at the expense of the long term viability of the plantation. Most important, however, the primary reason by the traditional land owners for the efforts to regain possession of the properties was not in order to work the plantations to generate profit. Their much more basic concern was to regain control over the land on which the plantations stand, land for which they received little or no compensation when taken over by foreigners. For the Papua New Guinean, the value of land extends far beyond economic considerations, and he is therefore incapable of putting a price tag thereon. (pers. communications, Zollinger, M., Planner, Manus Provincial Government, PNG.)

73. Turner, op.cit., note 64, at 17.

74. K. Short, "Australian Investment in Indonesia: The Case Against" in K.J. Mcleod, and E. Utrecht, eds., The ASEAN Papers (1972) at 126-146.

75. Ibid.

76. Ibid.

77. Turner, op.cit., note 64, at 45.

78. Id. at 45-46.

79. N. Girvan, "Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint", in R. Lillich et al., The Valuation of Nationalized Property in International Law vol. 3 (1975), at 150.

80. M. Sornarajah, "Compensation for Expropriation: The Emergence of New Standards" (1979), 13 J. World Trade L. 108

Chapter 2 : DEFINITIONS AND DISTINCTIONS.

The terms nationalization, expropriation, requisition and confiscation have more often than not been used interchangeably. For example, where property is nationalized, expropriated or requisitioned and no or little compensation is paid, such property has often been said to have been confiscated. Nationalization, expropriation or requisition without compensation, however, is not confiscation. One will also find that the standard for requisition has often been advanced as the compensatory requirement for nationalization and expropriation. In reality, however, requisition is a distinct institution. If one factor is common to all four concepts, it is that they all involve taking of private property by the state in exercise of its sovereign power. Collectively as well, they are lawful takings of property under international law. Consequently, they should not be used interchangeably, by reason of their sharing of one or more common characteristic, nor should they be confused with unlawful takings.

Any interchangeable usage or confusion in usage of the terms is due in no small part to the existing ideological frameworks within which private property and individual rights owe their different levels of existence or non existence. Vakil captured this in his address to the International Congress of Jurists in 1955, when he said:

> "... there is a basic difference in the approach of democratic countries and the totalitarian states. In the former, nationalization or socialization is for the public welfare and

> the public interest; in the latter, the taking is for the state so as to establish and carry out the state's complete omnipotence. In the totalitarian countries, the state is exclusively supreme and individuals are wholly subservient to this ideology of complete state supremacy."[1]

Another reason stems from the fact that these different concepts of taking of property are not in themselves rooted in the legal language of many domestic jurisdictions. In the United States, for instance, any such taking of property is pursued in satisfaction of the "doctrine of the power of eminent domain".[2] In other nations, other collective notions that cover all four categories of takings are used.[3] To help us know what we mean when reference is made to any of the notions, it is necessary that we address ourselves to the elements of each notion of taking of property. Before we begin to do that, however, we need to address the nature of the confusion regarding usage of the terms and we also need to understand why this situation exists.

A. The Nature of the Problem.

Taking over of private foreign property has developed into a problem of international proportions because of the emergence of the Eastern Bloc states and developing states. The coming into existence of these two state groupings has resulted in the introduction of different concepts, legal and otherwise, that serve to protect and enhance the interests of the two groups. Not unexpectedly, those concepts have come into conflict with those already in place and supported by the Western Bloc states.

Until the Russian nationalization measures of 1917, a take over of private property was a take over corresponded by strict liability which the taking state had to satisfy.[4] There was no pressing need then to legally categorize takings of property into different headings so as to determine liability arising therefrom. Consequently, we find that even today "nationalization" and "expropriation" are not terms of art in the domestic legal domain of a good number of Western Bloc states.

The English case of Benin v. Whimster[5] confirms the foregoing observations. In that case, the Court of Appeal in determining whether sequestrated property, subsequently, undersold, constituted nationalization of the property. First, let us acquaint ourselves with the facts. A compensation agreement was concluded between Egypt and England in 1971. The former contracting state undertook, in accordance with the agreement, to pay a lump sum of 2,100,000 British Pounds to the latter, as compensation for all British owned property affected by Egyptian nationalization measures. British subjects who had fallen victim to the Egyptian measures were entitled to submit their claims to the Foreign Compensation Commission, charged with distributing the compensation money in satisfaction of the treaty of 1971 and the Foreign Compensation (Egypt) Order of the same year. The applicants (the Benin family) whose property had been sequestrated and subsequently undersold, claimed compensation, representing the difference between the full value of their undersold property and the undersold value.

Mindful that nationalization nor expropriation is a legal terminology in their legal jurisdiction, the three presiding justices restricted their construction of nationalization to the treaty and the Order. Lord Denning and Ormond L.J. were of the view that nationalization is capable of two constructions because, in the English jurisdiction at least, nationalization and expropriation are not legal terms of art. If nationalization is understood as a distinct concept of taking of property, it is understood on the basis of restricted construction, "limited", as Lord Denning put it, "to property actually taken over by the state". If, however, nationalization is understood in the context of expropriation, then it is understood on the basis of a broader construction.

Roskill L.J., the remaining justice, differed materially in his understanding of nationalization and expropriation. For him, the word nationalization is a general word and of wider import than expropriation. This is obvious from the following words of his:

> "Not every acquisition of property by the state can, I think, be designated 'nationalization". Take, for example, the case of compulsory acquisition of land for a motorway or for an airport. I doubt whether that land was 'nationalized'. On the other hand, I think that, where such land was compulsory taken for its full market value, it might be said as a matter of ordinary use of language, that that was expropriated. But neither word is a term of legal act; and in any agreement between governments one would not expect to find references to 'confiscation or expropriation' or used which carry some perjorative meaning. One would expect more general words to be used such as 'nationalization'; and that is just what one finds in the present case." [6]

Nationalization, according to the foregoing, embraces takings of an expropriatory or confiscatory nature as well as other takings such as sequestration as in the case. Expropriation is a notion which ordinarily refers to acquisition of a limited nature, followed by compensation payment based on the market value of the expropriated property. Roskill L.J.'s attempt at associating nationalization with confiscation must, however, be rejected on the same basis that Fawcett's was rejected.

The Benin v. Whimster case offers three basic observations which go to provide evidence of the problem of defining nationalization and expropriation. One, nationalization is a distinct notion which refers exclusively to acquired property that remains vested in the state or its agencies. Two, expropriation is of a narrow import, distinct from nationalization. It refers to takings of a limited nature, supported by compensation payment based on the market value notion. Finally, nationalization is of a broad import, covering expropriation or alternatively, expropriation is of a wider construction and it includes nationalization. If we accept observations one and two, we would support the notions as distinct from each other. On the other hand, we might be convinced to support the third observation which suggests that the wide construction of one notion covers the other.

Why then have changes in the composition of the international com-

munity given rise to the definitional problem of take over of private foreign investment? There are two inter related answers to this issue. One, the nature of takings has changed. Takings pursued by Eastern Bloc states and developing states, unlike those undertaken by Western Bloc states, have been sweeping of which their purpose is to effect massive economic reforms. Takeovers of a sweeping or general nature like those undertaken by Russia, Mexico, Chile, Bolivia, Iran and Libya quickly come to mind. Sweeping or general takeovers as argued by the said states and supported by some writers, are different from limited or individual takeovers.[7] Consequently, continues the argument, a tate's obligation to pay compensation should be assessed differently. Subjection of a state's obligation to pay compensation to the nature of a takeover as pushed by Eastern Bloc states and developing states has given rise to the need to have takeovers defined into different categories.

Their push toward defining takeovers into different categories with different obligations arising therefrom does not hide the fact that their interests would be well served, to the detriment of investors from Western Bloc states and their home states, if their definitions be accepted internationally. Defining takeovers into different categories is therefore a means to an end. The end being to lessen or abolish a state's obligation to pay compensation, depending of course on the nature of the taking. The different attempts to define nationalization and expropriation should be seen in this context.

Defining takeovers has been and is still a problem because courts and lawyers have paid little or no attention to the functional realities behind the different attempts to define nationalization and expropriation. This unfortunate lack of awareness has resulted in the economic realities of a takeover not being taken account of by judges and lawyers in thier attempts to define the takeover. Consequently, the definitional attempts have not been consistent with the common economic interest of the international community. A definition of nationalization and expropriation must be one that allows for the free flow of capital and technology and, at the same time, allow for the peaceful co-existence of states.

Why has the issue of compensation given rise to the definitional problem? There are no simple answers to this question. For our purpose, however, we need to know that on one hand the economies of developing states are in the hands of private foreign investors because they do not have the capital capacity, specialized manpower and technology with which they can develop and control their economies. Incapacitated by their lack of the said factor inputs, developing states and their own investors have been frustrated by their inability to compete against foreign investors so as to assume control over their own economies. Faced with this dilemma, some developing states have taken over foreign investments in their attempt to control their own economies and because of their lack of capital they have argued that compensation for nationalization be satisfied on the basis of different considerations,

not that of prompt, adequate and effective. For example, Mexico has argued that compensation be subject only to the dictates of its domestic legal system[8] while Chile, under Allende, requested that excess profit deductions be made against the investors' written down book value.[9] In its dispute with Libyan American Oil Co., Libya argued that compensation be restricted to the investor's written down book value.[10]

Although using different arguments to support their positions, the objective sought is the same for all three states. Their arguments aim toward lessening or escaping their obligation to pay compensation. Arguments used, in debates on the provisions of the U.N. General Assembly resolution 1803 (xvii), by Eastern Bloc states and developing states do little to hide this fact.[11] The same is true of arguments advanced by the same groups in their push to have the provisions of Article 2 of the Charter of Economic Rights and Duties of States adopted by the U.N. General Assembly.[12] Their argument that a state's sovereign right to take over foreign property should not be restricted by conditions or sovereign obligations is obvious in the words of Article 2 of the Charter.

On the other side of the definitional problem and the compensation issue are, private foreign investors and the Western Bloc states from which they come. It is true that the economies of developing states are under the control of foreign investors and it is also true that a large number of these investors generate "excessive profits" which their

developing host states would like to have a stake in. These are factors which developing states use as justification for the need to have their obligation to compensate lessened or avoided. What is not appreciated by developing states and therefore ignored by them is the fact that the position assumed by a private foreign investor in a developing state's economy and the profit margin he is able to realize within are achieved in the face of enormous investment risks, risks which he is less likely to face in his home state.

A private foreign investor in a developing state is always exposed to the risk of political instability, the risk of passage of new laws that would cut into his profit margin, the risk of being taken over by the state and risks associated with his type of investment. Notwithstanding these risks, private foreign investors have continued to inject capital, specialized manpower and technology into developing states with the expectation of getting high returns on their investments. Investors will only invest in high risk ventures if the returns are high. Would it, therefore, be reasonable that these investors should receive less than what they should rightfully get? Obviously, the answer to this issue is in the negative.

In fact it is within the long term interests of developing states, developed capitalist states and their investors that private foreign investors be compensated in satisfaction of their full entitlements. This would give foreign investors the confidence they need to make them con-

tinue to inject their capital and technology, which developing states are in desperate need of, into such states. As well, being paid their full compensatory entitlements does compensate a private investor, in a small way, for willing to subject his investment to risks that are not usually prevalent in his home state or other developed capitalist states.

It is in the long term interest of the international community, therefore, that the definitional dilemma is settled by ensuring that it satisfies the long term interest of the international community and further that it is conducive to allowing for the peaceful co-existence of all states. The long term interest of the international community being that definitions must allow for the free flow of capital, specialized manpower and technology. To achieve this, the definition of nationalization must require that a nationalized private foreign investor should receive his full entitlement to compensation.

In order to make our analysis of the issue of compensation for nationalization sharply focused, we need to define other forms of take over as well. Categories of take overs falling outside the realm of this paper would therefore be isolated from our analysis of the issue of our primary concern.

B. Nationalization and Expropriation.

Nationalization and expropriation are terms which have been continuously used in reference to the same sovereign right to take property and the obligations arising therefrom. One needs only to make reference to the three volumes of The Valuation of Nationalized Property in International Law, edited by Lillich,[13] to realize the extent to which the terms and their legal substance have been accepted as justification or rejection of their international law status in the same vein. This, however, does not help us determine whether or not the notions are the same in form and substance, different in form, but the same in substance or different in form and substance. In trying to understand the scope and legal nature, one can not avoid stumbling on similar, different and conflicting descriptions of the two notions. Some descriptions portray them as different institutions and therefore should be understood as distinct notions. Others describe them as of essentially the same legal substance, while there are those that refer to one as a species of the other.

The High Court of Tokyo is known to have stated that nationalization is a species of the process of expropriation.[14] It accepted expropriation as the generic process, made up of two species. One, where property is taken by the state and its continuing exploitation remains with the state or any of its agencies, such property is nationalized. The other, where acquired property is not vested in the state or its agencies, such acquisition is not nationalized. Friedman was also of the understanding that expropriation is of two categories. One of which

he referred to as individual expropriation and the other being general expropriation (nationalization). In the former category, compensation payment is a requirement. However, in the latter any compensation payment therefor is ex gratia.[15]

If one hopes to find clarity by making reference to Fawcett, one becomes dismayed at discovering more confusion and uncertainty. For, according to Fawcett, if nationalization is a species of expropriation, it should also be accepted as a species of confiscation. "In either case", he stated, "the property may after the taking be vested in the state or an agency of the state, that is to say nationalized; or it may be redistributed to other private persons."[16] The obvious point of separation, where nationalization becomes a species of expropriation or confiscation, is compensation payment. Fawcett's position suggests clearly that where nationalization is followed by compensation payment, it is a category of expropriation but where no or little payment is made, it is a category of confiscation. The latter categorization of nationalization by Fawcett should be rejected for two reasons which will be elaborated later. For now it is enough to know that nationalization without compensation is not confiscation, it remains nationalization and a victim of any such action continues to have a valid claim for compensation payment. Confiscation, on the other hand, is a distinct notion, used in reference to the taking of illegal property or property used for illegal purposes. Any such taking by the state is done in exercise of its police powers and naturally compensation payment is not expected.

The definitional problem is further compounded by reference to the opinions of other writers. For Wortley expropriation is the generic process of taking of property constituted by three species, of which one is nationalization. The three classes of taking under expropriation are in the following order:

> "(i) Expropriation by law for purposes of public utility against adequate and prior compensation. This is expropriation in its classical form, and is often referred to as 'expropriation' pure and simple.
>
> (ii) Expropriation when adequate compensation cannot be payable in advance is usually, but not necessarily, called 'requisition'; it is justified by some special urgency.
>
> (iii) Nationalization of whole industries, which may fall into either of these categories." [17]

Wortley stated further that "the word 'nationalization' is not a term of art, but it usually signifies expropriation in pursuance of some national political program intended to create out of existing enterprises, or to strengthen, a nationally controlled industry" and that it "differs in scope and extent rather than its juridical nature form"[18] classical expropriation and requisition. We take issue with Wortley on one point. Expropriation or nationalization without adequate compensation is not requisition as requisition is a distinct notion which differs not only in scope and extent but also in its legal nature. Consequently, it is misleading to refer to expropriation and nationalization without adequate compensation as requisition. In any event it is important to note that according to Wortley, expropriation and nationalization may

differ in form, but in legal substance, however, they are of identical nature. On the question of compensation payment, both require the satisfaction of prompt, adequate and effective compensation.

Others disagree with Wortley. They are of the view that nationalization is neither a species of expropriation nor is expropriation a species of nationalization. The two notions are different from each other even though they may share many common characteristics. One advocate of this view stated it in the following words:

> "Nationalization has many features in common with expropriation, but is generally recognized as a separate legal category. In nationalization there are fundamental changes in the socio-economic structure of the state, changes which involve the transferring to public ownership of assets that are valuable to the development of the community. The state assumes responsibility over and continues activities that were formerly in private hands. In such cases the state is said to have a broader discretion in determining the amount of compensation that would be permissible in a case of expropriation." [19]

Unlike the foregoing view, Vakil accepted nationalization as a category of expropriation. Yet, unlike Wortley and showing support for the foregoing view, he argued that nationalization must be construed differently from strict cases of expropriation. "Expropriations", stated Vakil, "as part of a general welfare scheme of socialization or nationalization, must be treated on a different basis from a normal expropriation of an individual's property by the state for particular narrow needs, and a modification of the strict Rule of Law would be permissible in such a case." [20]

Apart from socio-economic transformation brought about by nationalization and nationalization as vehicle for pursuing a general welfare scheme, nationalization has been said to possess a distinct legal nature which allows it to enjoy domestic law immunity. Katzarov is known to have argued these points in the following language:

> "In its legal essence nationalization is clearly an executive and legislative act belonging to the category of those which are known as 'supreme executive acts' which are not subject to any judicial control. It amounts to a unilateral act which does not require the acceptance of anyone, still less the agreement of the party interested or affected. It would therefore be more correct to speak of 'a unilateral sovereign act'. The unilateral character of an act of nationalization does not, moreover, constitute an independent quality, but arises out of the fundamental quality which it possesses of being a supreme act of government which is not subject to control by municipal law."[21]

Consequently, we are led to infer from Katzarov that compensation for nationalization is a matter of the taking state's discretion. In this respect, payment may range from no payment to full payment. Katzarov's discretionary nature of compensation payment concurs with that of Friedman [22] and Murphy, Jr.[23]. On the other hand are those writers who have stated that compensation is not a discretionary requirement, it is an obligation that must always be satisfied by the nationalizing state. Like Vakil, Morris stated that nationalization may only be performed "in return for compensation,"[24] but such compensation should not be based on the market value notion as used in expropriation. Wortley pointed us in another direction, having insisted that compensation for nationalization and expropriation are to be based on the same standard of prompt, adequate and effective . .

In essence, therefore, we discover compensation as the root of the problem. Different descriptions of the two notions have been advanced as justification for non payment, partial payment or full payment. The Rapporteur of the 1958 International Law Association Conference on nationalization, Professor Seidl-Hohenveldern, was spot on when he said:

> "I am aware that the problem of the amount of indemnity is the corner stone of the whole problem."[25]

Consequently, any distinction between the two notions is of no material importance to us for several reasons. First, writers, domestic courts and even official representations of states have used and understood one term to include the other. Second, the same sources have also gone as far as advancing and accepting compensation standards for expropriation to justify compensation for nationalization. Third, descriptions that identify the notions as distinct from each other, in essence, are attempts to justify non or partial compensation payment. Forth, the overwhelming bilateral treaty practice of states indicates, more importantly, that any distinction between the notions is of little relevance because, call it nationalization or expropriation, the same obligations are to be satisfied by the taking state.

The treaty practice of states is evidenced by the these examples. In the agreement between Switzerland and Singapore in 1973[26], Article 4 states that:

> "Neither contracting party shall take any measure of expropria-

> tion, nationalization or dispossession, either directly or indirectly, ... unless the measures are taken in the public interest or unless they are authorized by an Act of Parliament in force at the time of the approval of the investment, as the case may be, on a nondiscriminatory basis, and under due process of law provided that effective and adequate compensation is made therefore. Such compensation shall be paid without undue delay to the person entitled thereto and shall be freely convertible and transferable."

Again, in the United Kingdom - Indonesian agreement of 1976, [27] Article 5(1) states that :

> "Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party and against compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall be made without undue delay, shall be effectively realizable and shall be freely transferable."

Almost identically phrased as Article 5(1), supra is Article 7(1) of the Sri Lankan - South Korean agreement of 1980. [28] Even the Chinese - Romanian agreement of 1983 [29] made no attempt at separating obligations arising from nationalization and expropriation. Article 4(1) of the agreement stated that:

> "The investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated or subjected to any other measures having similar effect except for the public interest under a legal procedure and against compensation. Such compensation shall be effectively realizable, freely transferable and be made without undue delay."

According to the protocol to the agreement, the amount of compensation "must be equal to the real value of the investments at the date of expropriation." The phrase "any other measures having similar effect" must unquestionably cover acts of nationalization. Consequently, for Romania or China to nationalize the other's property is for the nationalizing state to assume obligations, identical to those assumed for expropriation.

The four treaties exemplify the general trend of all treaties reprinted in the investment treaty series of the International Centre for Settlement of Investment Disputes, covering treaties from 1960 to 1984. In view of the obvious willingness of most states (developed capitalist, socialist and developing), notwithstanding their differences in ideology and interests, toward accepting both institutions as having identical substance in their treaty practice together with the other reasons already stated and in view of compensation being the root of the definitional problem, we shall use and understand the two notions in the same spirit. That is to say, when one notion is used, it is used on the understanding that it also covers the other.

C. Requisition.

While the other institutions of lawful taking of property result in permanent transfer of the private owner's ownership rights to his property, requisition does not. Unlike nationalization, expropriation

and confiscation, it "is a process by which a state takes usage or possession of, or the property in, chattels and sometimes in land."[30] A victim of such process, while denied enjoyment of his property during the period in which the property is in the possession and use of the state, does not depart with his ownership rights thereto during that period. Consequently, when the purpose for which the property was requisitioned is satisfied or is no longer in need of the property, the owner regains possession and use thereof.

The sovereign power of the state to requisition private property is justified by its urgent need to use such property in its attempt to rescue the nation or part of it from an emergency.[31] This right is corresponded by an obligation which Whiteman describes in the following language:

> "... such a right is accompanied by a duty to make appropriate compensation to the owner. Frequently, what is stated to be the value of the property requisitioned is paid at the date of requisitioning or at some subsequent date. When the price paid represents the value of the property requisitioned, no international wrong occurs and, hence, a claim for damages does not arise."[32]

From the foregoing, certain elements can be easily identified as constituting the process of requisitioning of property. They are: (a) temporary taking into possession and use of private property; (b) such taking is motivated by an emergency or urgent need; (c) compensation, based on the full value of the property, is paid to the owner for the period of requisition and (d) the property reverts back to the owner

after the emergency or urgent need has passed or no longer needs usage of the property.

All these factors are found, expressed or implied, in the petroleum concession agreement between Egypt, the Egyptian General Petroleum Corporation (EGPC), General Petroleum Corporation and the Egyptian petroleum Development Co. Ltd.[33] Article XIX of the agreement describes Egypt's sovereign right and corresponding obligation to requisition in these words:

> "(a) In case of national emergency due to war or imminent expectation of war or internal, the GOVERNMENT may requisition all or part of the production from the Area obtained here under and require both parties to the Agreement to increase such production to the utmost possible maximum. The GOVERNMENT may also requisition the oil field itself and, if necessary, related facilities.
>
> (b)...
>
> (c)...
>
> (d) In the event of any requisition as provided above, the GOVERNMENT shall indemnify in full EGPC and CONTRACTOR for the period during which the requisition is maintained, including:
>
> 1. All damages which result from such requisition.
> 2. Full payment each month for all petroleum extracted by the GOVERNMENT less the royalty share of such oil.
>
> However any damage resulting from enemy attack is not within the meaning of this sub-paragraph (d). Payment hereunder shall be made to the CONTRACTOR in US Dollars remittable abroad."

Similarly phrased is Article XVII of the Egypt-Egypt General Petroleum

Corporation - ESSO: Concession Agreements for Petroleum Exploration and Production [34] which states:

> "(a) In case of national emergency due to war or imminent expectation of war or internal causes, the Government may requisition all or part of the production from the Area obtained hereunder and require the Operator to increase such production to the utmost possible maximum. The Government may also requisition the oil field itself, and, if necessary, related facilities, processing plants and refineries, if any.
>
> (b)...
>
> (c)...
>
> (d) In the event of any requisition as provided above, the Government shall indemnify in full EGPC and ESSO for the period during which the requisition is maintained, including (1) all damages which result from such requisition, (2) full payment each month of the costs and expenses of ESSO as defined in Article V of this Agreement and the reasonable export market value of ESSO's and EGPC's share of crude oil produced as provided in paragraph (b) of Article V of this Agreement. However, any damage resulting from enemy attack is not within the meaning of this paragraph (d). Payment hereunder shall be made to ESSO in U.S. Dollars remittable abroad."

As requisition, obviously, does not involve transfer of ownership rights in property to the state, "their continued retention after the need has passed will be an unlawful act..." [35] The Permanent Court of Arbitration held, for instance, in 1922 that not only was the United States obligated to pay full compensation for usage of Norwegian owned ships during the war but, as well, the U.S.A. had to pay "damages for unlawful retention of title and use of the ships after all emergency ceased." [36] Similarly, if requisitioned property is subsequently sold to another party, as was in the Bois v. Blum case[37] before the French Court of Cas-

sation, the buyer does not acquire good title and is liable to the owner in damages.

D. Confiscation.

The taking of property, effected by the domestic laws of the state, without payment of due compensation to the dispossessed, runs contrary to international law and therefore constitutes an act of confiscation.[38] Acceptance of this view by Campbell, J. in The Rose Mary case renders it open to cover the following categories of taking:

(i) nationalization of private property without compensation payment to the dispossessed;

(ii) expropriation of private property without compensation payment to the dispossessed; and

(iii) requisitioning of private property without compensation payment to the dispossessed.[39]

Payment of compensation or non payment thereof are therefore the dividing lines between nationalization, expropriation and requisition, and confiscation.[40]

Confiscation as understood by Campbell, J. finds support in the works of some writers, two of whom are Fawcett and Hecke. "Confiscation, then," according to Fawcett, "is the taking of private property by the state without payment of compensation to the divested power ..."[41] It

is a contradiction to "the premises on which any legal system must rest, in which private property is a part; it is a denial, in fact, of the right of property."[42] Hecke adds support in similar terms. "By confiscation" as he defined the term, "is meant the taking of property without adequate compensation, by whatever method it may be carried out or cloaked." [43] Again, as similarly stated by Fawcett, Hecke stated that "nationalization, a word commonly used ... with regard to industrial takings, may be either confiscation or expropriation according as compensation is or is not given." [44]

Properly defined or described, the process of confiscation in fact bears little resemblance to the view advanced by the likes of Campbell, J., Fawcett and Hecke. Contrary to their view, confiscation of private property in fact falls within the confines of lawful takings. While it is true that confiscation involves the taking of private property, in return for which the taking state pays no compensation, it is not accurate to say that it covers acts of nationalization, expropriation and requisition where no compensation is made. In nationalization, expropriation and requisition cases, where a victim thereof receives little or no compensation payment, he is entitled, subject to his relationship with the taking state, to claim for compensation or the balance of his full compensation entitlements if he is paid less than the total value of his claim. Hence, reference to such cases as confiscatory nationalization, confiscatory expropriation, confiscatory requisition or confiscation must be construed in the aforementioned context

and not be confused with confiscation.

Confiscation, pure and simple, is an institution "familiar to most legal systems" and which is exercised by police power in "punishing a man, or a corporation, for a crime. In so far as this power is exercised within the confines of a state over property in its effective control, taking by way of legal penalty may, as Groitus recognized, be just as legitimate a method of expropriation as is taking by eminent domain." [45] Not only is the right of each state to try and punish "aliens for all infractions of its penal laws committed inside its territory" recognized in international law but international law is said to impose an international obligation on all states "to punish aliens for the crime of piracy on the high seas..."[46]. The process of confiscation may therefore be pursued against property used or to be used in the commission of criminal activities within the territorial jurisdiction of each state and against pirates on the high seas.

The Argonaut and the Jonas H. French claims case [47] best exemplifies the foregoing. In that case, Canadian authorities seized boats and seines belonging to two U.S. owned fishing vessels, the Argonaut and the Jonas H. French. The seizures were effected because the boats and seines were illegally used in fishing within Canadian territorial waters. Subsequent to their seizure, a Canadian court ordered that the boats and seines be confiscated by reason of their engagement in illegal fishing within Canadian territorial jurisdiction. The British-American

Claims Arbitral Tribunal, in rejecting the owners' claim for indemnity, stated inter alia that:

> "It is a universally recognized principle of international law that a State has jurisdiction over sea-fishing within its territorial waters, and is entitled to apply thereto its municipal law, and to impose in respect thereof such prohibitions as it may think fit." [48]

As seizure of the boats and seines, subsequented by their confiscation, was exercised in pursuance of Canadian law, the owners did not incur a compensable loss at international law.

Not only is it inaccurate to say that a confiscatory act is contrary to the requirements of international law but one should not venture as far as to say, as did Fawcett, that confiscation "is a denial of the right of property." Understood in the context just explained, confiscation is a penal process used by the state in suppressing certain criminal activities so that its citizens and foreign citizens in its jurisdiction are protected from being denied enjoyment of their rights. For example, confiscation of implements used for stealing cars protects the rights of car owners. It may be said, and rightly so, that confiscation is an exception to the requirement of compensating a person deprived of ownership or beneficial rights in his property." [49]

E. Unlawful Takings.

Lawful regimes of taking of property are distinguishable from those

that are categorized as unlawful or illegal. While lawful takings, as has been discussed, are exercised subject to certain conditions and recognized at international law, unlawful takings on the other hand arise out of a breach of a treaty or internationalized contractual obligations. Where a state, in entering into a treaty with another state or an internationalized contractual agreement with a private foreign investor, surrenders its right to nationalize or expropriate the foreigner's investment but subsequently does so, it is said to have unlawfully taken the foreigner's property. The Chorzów Factory case[50] best illustrates unlawful takings arising out of a breach of a state's treaty obligations. In unlawful takings arising out of a breach of a state's internationalized contractual obligations, however, any such taking is visited on a private foreign investor if it is not legally effective under the host state's law. If, on the other hand, a taking, though in breach of a state's contractual obligations, is pursued in satisfaction of an effective piece of legislation, it is a wrongful yet lawful taking. No where is this more evident than in BP Petroleum v. The Libyan Arab Republic[51] and the other arbitral awards referred to and analyzed in Chapters 5 and 6.

Differences between lawful and unlawful takings may be further determined in their available remedies. Except for confiscation of property, the state in exercising its sovereign power to nationalize or requisition property is required at international law to honor its corresponding obligation of compensating victims of such takings. Nationalization

and requisition, "as...exercise of territorial competence" are therefore "lawful, but the compensation rule makes" their "legality conditional."[52] As remedy for his losses a victim of such takings who receives no or little compensation may file a claim for compensation payment.

The victim of an unlawful taking is entitled to claim for specific performance or restitutio in integrum. Although "specific performance normally is not afforded against a State in the national sphere,"[53] its availability as a remedy lies in the good faith observance by the state of its obligations under the agreement entered into with the foreign investor. Schwebel makes this point in the following words:

> "Good faith observance of international contracts imports performance of the terms of the contract by both parties. Where there is a breach of contract, the remedy to repair it may be specific performance - especially where it is the only remedy which can repair it effectively. If a state, as is sometimes the case, lacks the capacity to pay the damages it would be obliged to pay were monetary compensation required, it may be said that good faith requires the contract to be performed specifically."[54]

Restitutio in integrum as another available remedy, at international law, for a victim of an unlawful taking finds justification in the Chorzow Factory case of 1928. It was in that case that the Permanent Court of International Justice in pursuing to define principles from which reparations to victims of the Polish takings be determined, referred to restitutio in integrum in the following language:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible,

> wipe out all the consequences of the illegal act and probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." [55]

Although generally accepted as remedies open to victims of unlawful takings, "there is no explicit support for the proposition that specific performance, and even less so restitutio in integrum, are remedies of public international law available at the option of a party suffering a wrongful breach by a co-contracting party." [56] Specific performance is not to be construed as requiring the party in breach to specifically perform its obligations so breached, rather it entails a duty on the party in breach to pay damages.[57] Similarly, the notion "of restitutio in integrum has been employed merely as a vehicle for establishing the amount of damages." [58]

This chapter demonstrates clearly that takeover of property may be effected lawfully (nationalization, requisition or confiscation) or unlawfully (unlawful taking) by a state. From our analysis of the different forms of takeover of property, it is obvious that each category of taking carries therewith different legal consequences which should not be confused with that of others. It is also obvious from our analysis that, legally and economically speaking, nationalization and expropriation cannot and should not be treated as distinct concepts of takeover of property with different legal consequences. To accept them as distinct from each other is to expose private foreign investors to greater investment risks. So much so that, developing economies would become less viable for such investors to invest in. At the root of the defini-

tion problem is the issue of compensation. Generally, Eastern Bloc and developing states argue that little or no compensation should be paid. Conversly, private foreign investors and their home states argue that adequate compensation should be paid. What is obvious from our analysis of the definitional dilemma is that nationalization or expropriation of private foreign property must be satisfied by compensation payment that allows for the peaceful co-existence of all states and the continuing free flow of capital and technology. The primary objective of this work is to identify a compensationframework that satisfies the said functions. In so doing, we shall restrict our study to nationalization or expropriation type takeovers.

Endnotes : Chapter Two.

1. N.B. Vakil, Limits of State Interference with Civil Rights (1955) at 3.
2. Id., at p.4.
3. Ibid.
4. Refer to note 1 of the Introduction.
5. Benin v. Whimster (1981), 60 I. L. R. 113.
6. Id., at 123-124.
7. Refer to notes 15 and 21, infra.
8. Refer to note 130 of Chapter 4.
9. Refer to our analysis of "unjust enrichment" in Chapter 5.
10. Libyan American Oil Co. v. The Libyan Arab Republic: Award of the Arbitral Tribunal (1982), 62 I . L . R 141.
11. Refer to our analysis of U.N.G.A. resolution 1803 (xvii) in Chapter 6.
12. Refer to our analysis of the Charter in Chapter 6.
13. R.B. Lillich, ed. The Valuation of Nationalized Property in International Law vols. 1-3, (1972-1975).
14. Anglo-Iranian Oil Co. v. Indemitzu Kosan Kabushiki Kaisha,

(1953), 20 I. L. R. 305.

15. S. Friedman, Expropriation in International Law (1953) at 213, cited in B. Cheng, "The Rationale of Compensation for Expropriation" (1958-59), 44 Groitus Transactions 267.

16. J.E.S. Fawcett, "Some Foreign Effects of Nationalization of Property" (1950), 27 Brit. Y. B. Int'l. L. 355.

17. B.C. Wortley, Expropriation in Public International Law (1977) at 24.

18. Id. at 36.

19. See note 14 of C.F. Murphy, Jr. "Limitations upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization", in Lillich ed., The Valuation of Nationalized Property in International Law vol. 3 (1975), at 54.

20. Vakil op.cit. note 1, at 7.

21. K. Katzarov, "The Validity of the Act of Nationalization" (1959), 22 Mod. L. Rev. 639.

22. Refer to note 6, supra.

23. Refer to note 14, supra.

24. J.H.C. Morris, The Conflict of Laws (2nd ed. 1980) at 319.

25. Refer to Professor I. Seidl-Hohenveldern's address, in The International Law Association, Report on the Forty-Eight Conference: New York (1959) at 132.

26. The agreement is reprinted in International Centre for Settlement of Disputes, Investment Treaties vol. 1 (hereafter referred to as ICSID Investment Treaties. vol. 1 or 2).

27. The agreement is reprinted in ICSID Investment Treaties vol. 2.

28. The agreement is reprinted in ICSID Investment Treaties. vol. 2 Article 7(1) states that:

> "Investment of nationals or companies of either Contracting Party shall not be na-

tionalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest until the date of payment, shall be without delay, be effectively realizable and be freely transferable."

29. The agreement is reprinted in ICSID Investment Treaties vol. 2.

30. Wortley, op.cit. note 12, at 30 citing Sir Henry Duke in The Meandros [1925] P. 61, at 65.

31. Emergencies include times of war, civil unrests, economic emergencies and natural disasters.

32. M.M. Whiteman, Damages in International Law vol. II (1976) at 900.

33. The concession agreement is reprinted in P. Fischer, A Collection of International Concessions and Related Instruments: Contemporary Series vol. 1 (1975) at 194. Article XIX appears at 276, 278.

34. The concession agreement is reprinted in (1975) 14 Int'l Legal Material 915. Article XVII appears at 931.

35. Wortley, op.cit. note 12, at 32.

36. Norway and United States (Requisition of Shipbuilding Contracts Case) in (1919-1922), 1 Annual Digest of Public Inter-

national Law Cases 189 at 190.

37. Bois v. Blum, (1958), 26 I. L. R. 724.

38. Anglo-Iranian Oil Co. v. Jaffrate [1953] 1 W.L.R. 246. The contention advanced by the plaintiff company, see p. 252, and supported by J. Campbell, see p. 253.

39. Ibid.

40. Fawcett, op.cit., note 7.

41. Ibid.

42. G. Van Hecke, "Confiscation, Expropriation and the Conflict of Laws" (1951), 4 Int'l L. Q. 345.

43. Ibid.

44. Fawcett, loc.cit., note 7 stated that in either confiscation or expropriation "the property may after the taking be vested in the State, that is to say, nationalized... ."

45. Wortley, op.cit., note 12, 41 at 39 he categorized confiscation into three divisions:

> "(1)When there is a forfeiture or a fine to punish orsuppress crime;
>
> (2)When property is seized by way of taxation;
>
> (3)When loss is indirectly caused by the territorial State imposing legislation restricting the use of property, thereby confiscating or limiting rights normally enjoyed by an owner."

All three categories are said to be lawful.

46. W.E. Beckett, "The Exercise of Criminal Jurisdiction over Foreigners" (1925), 6 Brit. Y. B. Int'l. L. at 45.

47. The Argonaut and the Jonas H. French Claims Case, in (1919-1921) 1 Annual Digest of Public International Law Cases 176.

48. Ibid.

49. For other exceptions to the compensation rule, see I. Brownlie, Principles of Public International Law (1973) at

521.

50. The Chorzow Factory Case [1928] P.C.I.J. Ser. A, no. 17.

51. BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic, 53 Int'l L. R. at 297.

52. Brownlie, op.cit., note 44, at 518.

53. S.M. Schwebel, S.M., "Speculations on Specific Performance of a Contract Between a State and a Foreign National," in The Rights and Duties of Private Investors Abroad (1965), at 201, 210. The quote was taken from the opinion of the tribunal in the BP v. Libya dispute, op.cit. note 46, at 335.

54. Ibid.

55. Chorzow Factory [1928] P.C.I.J. 47, Ser. A, no. 17.

56. Opinion of the Tribunal in the BP v. Libya dispute at 347.

57. Ibid.

58. Ibid.

Chapter 3 : TREATIES.

A private foreign investor finds his investment in legal relation with two states, his home state and the state wherein his investment is located to do business. In his relationship with the host state, a foreign investor is granted rights to conduct his business activities so as to generate profit for himself on one hand and to help develop the host state's economy on the other. As well, private foreign investment has an important role in the economic development of its home state. In order that the interests and rights of the foreign investor and interests of the home state are safeguarded against abuse by the host state, legal frameworks for treatment and protection of foreign investment have been concluded multilaterally, bilaterally and between private investors and their host states. As many private foreign investors have been and will continue to be subjected to takeover bids by their host states, many such legal agreements contain general guidelines from which issues of compensation payment are to be settled.

A. Multilateral Agreements and Arrangements.

Several attempts were undertaken after the second World War in negotiating a multilateral treaty for treatment and protection of private foreign investment. [1] Most, however, never materialized into legally effective agreements. Their failure owes much to their being construed

either as pro private foreign investment or as pro capital importing states. Where an attempt is generous in upholding and protecting the rights and interests of private foreign investors, it easily attracts the support of capital exporting states while at the same time rendering itself unattractive to acceptance by capital importing states. Alternatively, where an attempt provides no substantive protection of private foreign investment, it fails to gain the support of capital exporting states while opening itself to the backing of developing states. Those negotiated attempts that failed to mature into effective legal instruments easily fall into one of the said categories.

On March 24, 1948 the Charter of the International Trade Organization was signed in Havanna, Cuba. The Charter, in Articles 8 to 15, adopted certain general rules for "the treatment and protection of foreign investment in the contracting parties". For example, in Article 11 (1)(b), capital importing states are precluded from pursuing "unreasonable and unjustifiable action injurious to the rights and interests of foreign investors". Article 12(2)(a)(ii) obligates capital importing states to "give due regard to the desirability of avoiding discrimination as between investments". Yet with protection of foreign investment under the Charter subject to several qualifications and exceptions, and the obligation of capital importing states dependent on construction of general terms as 'reasonable', 'just', 'appropriate', 'unreasonable' and 'unjustifiable', the Charter was viewed as granting no substantive protection for foreign investment. [2] Consequently, it

suffered by not attracting the needed support of the U.S.A.

Although clearer and more elaborate than the Charter, the Economic Agreement of Bogota of May 2, 1948 was just as disastrous. [3] Article 25 of the Agreement recognizes the right of each state to expropriate foreign property if any such taking is non discriminatory and is followed by compensation payment based on the traditional standard of prompt, adequate and effective. But subjection of foreign capital to national law by Article 24 renders the requirements of Article 25 and other protective measures under the Agreement meaningless for the foreign investor and his home state. Equal treatment and protection of capital, foreign and domestic, under the domestic law of the host state by virtue of Article 24 leaves foreign investors at the mercy of their host states. Depending on the treatment and protection standards available in their national law, foreign investors may find their investments subjected to standards below minimum international law standards. For these reasons, the Bogota Agreement failed to mature into a legally effective multilateral treaty.

Two other subsequent attempts, the 1949 draft International Code of Fair Treatment for Foreign Investments that was drafted by the International Chamber of Commerce and the 1957 draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries that was drafted by the German Society to Advance the Protection of Foreign Investments, failed as well. [4] Article 3 of the 1957

Draft Convention provides that:

> "No Party shall take measures against nationals of another Party to deprive them directly or indirectly of their property except under due process of law and provided that such measures are not discriminatory or contrary to undertakings given by that Party and are accompanied by the payment of just and effective compensation. Adequate provision shall have been made at or prior to the time of deprivation for the prompt determination and payment of such compensation, which shall represent the genuine value of the property affected, be made in transferable form and be paid without undue delay."

Clearly, the Article is not restricted to actual taking of property through nationalization, expropriation or requisition as is apparent from its reference to direct or indirect deprivation of foreign property. Hence, state regulation of property in the sense of it being heavily taxed, which results in its indirect deprivation falls within the bounds of Article 3. This is an example, among others, of why the 1957 Draft Convention fell into disfavour with the capital importing states. Like it, the 1949 drafted International Code of Fair Treatment of Foreign Investments, was dismissed by capital importing states as being more protective of rights and interests of foreign investors while providing little substantive consideration to those of developing states.

The foregoing failed attempts did not kill other suggestions from emerging. These suggestions were motivated by the same need on both sides, capital exporting and capital importing states, that motivated the foregoing attempts. Dictated by their interests, both parties saw the need to attract and protect foreign investment. The message from

the two 1948, the 1949 and the 1957 attempts is loud and clear. Acceptance of an agreement can only be negotiated if a proposed agreement is not substantively one-sided. The speech, delivered in the meeting of the Economic Commission for Asia and the Far East in Malaysia on March 5, 1958, by the Prime Minister of Malaysia proposed for adoption of such an agreement. He stated:

> "I am aware that many countries represented here already attach importance to creating the right conditions to attract such private capital and this subject has been discussed on many occasions sponsored by this Economic Commission. His Majesty's Government in this country has certainly always made its stand clear on this subject, but I wonder whether we should not all go further than these individual statements and purely national measures.
>
> I wonder whether it should not be a powerful incentive to the attraction of private capital to Asia of those countries, which decided as a matter of public policy that they wished to attract such capital, were to come together through channels provided by the United Nations economic organizations such as this, and were to draw up, in consultation with representatives of potential lender countries, an International Charter by which they would agree to regulate their treatment of foreign private capital. I will not attempt to elaborate this morning the details of such a Charter. As I see it, it would have the object of assuring potential lenders that their just rights and interests would be fully respected and protected; it might also indicate to them the part they would be expected to play in promoting the development of both the human and natural resources in the receiving country; and last, but by no means least, it would remove any fears that private foreign investment interfere with the sovereignty and true national interests of the receiving country. Such a Charter would, of course, be a purely voluntary one open to signature by any country interested in promoting the international flow of private capital. But I should hope that our neighboring countries in South East Asia in particular would be willing to take a lead in this matter. For as I have said before: we and our neighbors in South East Asia have so many common problems that if we are to progress we must work together ever more closely - perhaps through the aegis of some special committee or working party established by this Commission.
>
> But if, as I believe to be the case, we need more capital

> both public and private, I cannot help but think that if some Charter such as that which I have suggested could be drawn up, it would constitute a powerful inducement to private enterprise in other countries of the world to lend to those less developed countries which they know had publicly subscribed to it." [5]

Capital exporting states, for example the United Kingdom, had a Parliamentary Report published on the issue, also recognized "a substantial and growing ... need for a code which would be mutually advantageous to both borrowers and lenders to be embodied in a mutual agreement." [6]

It was in 1959 that another serious attempt at negotiating such an agreement was pursued. The attempt was led by Dr. Abs of West Germany and Lord Shawcross of Great Britain. Their efforts led to formulation of the Abs-Shawcross Draft Convention on Investment Abroad. [7] On the question of compensation, Article 3 of the Draft Convention requires satisfaction of the traditional standard of prompt, adequate and effective for expropriation of private property. Like all previous unsuccessful negotiated attempts, the Abs-Shawcross Draft Convention makes no specific mention of nationalization of property and obligations arising therefrom. The words of Article 3 of the Abs-Shawcross Draft Convention, drafted in identical language as Article 3 of the 1957 Draft Convention, would have similar, if not identical construction. Consequently, the notion of direct deprivation of property must cover acts of nationalization as well as those of expropriation and requisition. Covered as well are indirect measures of deprivation of foreign owned property, like loss of property through regulatory means, sometimes referred to as creeping nationalization or creeping expropriation and

losses incurred due to currency devaluation because of a state's monetary reform laws. It is obvious as to whose interests and rights Article 3 of the Abs-Shawcross Draft Convention, like the 1949 draft International Code of Fair Treatment of Foreign Investments and Article 3 of the 1957 draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countris, is most protective of. In attempting to overly protect the interests and rights of foreign investors, the Abs-Shawcross Draft Convention, like its two predecessors, has had to overly compromise the rights of capital receiving states. For example, a state's adoption of new monetary reform measures which result in devaluation of its currency is a sovereign right of all states. Persons, nationals and foreigners, who fall victim to such laws do not incur a compensable loss at international law. Article 3, however, attempts to reverse the situation by making such losses compensable. As a result of it being heavily protective of foreign investors' rights and interests, the Abs-Shawcross attempt failed to attract the signature of developing states. [8]

Failure to conclude a global treaty, acceptable by borrowing and lending states, affirms the present international position on what the acceptable standard of compensation is. All post World War Two negotiated attempts show where the two sides to the private foreign investment problem and compensation issues arising therefrom stand. For capital exporting states, the traditional compensatory standard is the only acceptable standard. To subject the traditional standard to domestic law

as was the case in the Bogota Agreement is unacceptable. For capital importing states, however, compensation based on the traditional standard is unrealistic and therefore unacceptable. These conflicting stands by both sides on the compensation issue and other issues relating to treatment and protection of private foreign investment make it difficult for the two sides to negotiate a mutually acceptable agreement. Consequently, states that share similar or identical economic or regional interests find it easier and more meaningful to conclude agreements with those they can find common ground.

The Organization for Economic Cooperation and Development (OECD), whose membership is predominantly developed capitalist states, accepts protection of private foreign investment as one of its great concerns. Being capital exporting states, members of OECD are primarily concerned about protection of the rights and interests of private foreign investors, not the interests of capital importing states. On the question of compensation for nationalized private foreign investment, OECD's stand is clear. Members of the Organization accept and subject themselves to the requirement that nationalization of foreign investment may only be pursued upon satisfaction of five conditions, one of which is payment of prompt, adequate amd effective compensation. Article 3 of OECD's Draft Convention on the Protection of Foreign Property of July, 1962 requires payment of an amount calculated from the traditional standard of compensation as satisfying a nationalizing states obligation to compensate under international law. [9] The words of the Article read in the

following:

> "No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with:
>
> (i) The measures are taken in the public interest and under due process of law;
>
> (ii) The measures are not discriminatory or contrary to any undertaking which the former Party may have given; and
>
> (iii) The measures are accompanied by provisions for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto."

Although the Draft Convention was subsequently modified, the modified version of 1967 espouses the same compensatory requirement, using identical language, in Article 3. [10] If there is uncertainty regarding Article 3's adoption of a specific compensation standard, clarification provided by OECD to the Article indicate clearly the adoption of prompt, adequate and effective compensation. [11] As is only too obvious, Article 3 of the OECD Draft Conventions bears almost identical substance to Article 3 of the 1957 draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries and Article 3 of the Abs-Shawcross Draft Convention. If there is any difference in their substance, it is the fact that OECD, in its notes and comments to Article 3 of its Draft Conventions, provides a restrictive construction of indirect deprivation of property to "any measures taken with the intent of wrongfully depriving the national concerned of the substance of

his rights and resulting in such loss (e.g. prohibiting the national to sell his property or forcing him to do so at a fraction of the fair market price)." [12] Since indirect deprivation of property in Article 3 of the two preceding Draft Conventions had not been so qualified by their drafters, the notion of indirect deprivation in those conventions is susceptible of a broader import. In any event, like the previous attempts, implied recognition of the sovereign right of each state to nationalize foreign investment by Article 3 of the Draft Convention of 1962 and the modified Draft Convention of 1967 would be meaningless to a developing state as the right is as stated, supra, conditional on five counts. A developing state would construe Article 3 as an attempt to choke it from exercising its sovereign right of nationalization. Its (Article 3's) legal effect, however, extends to members of OECD and is limited to that membership.

A different legal framework for treatment of investments is found in the American Convention on Human Rights of November 22, 1969, signed by Chile, Columbia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay and Venezuela. [13] Where his property is nationalized by the state, a divested owner is entitled, to receipt of compensation under Article 21(2). Article 21(2) provides that:

> "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and accroding to the forms established by law".

And as every person is "equal before the law" and every person is "entitled, without discrimination, to equal protection of the law" under Article 24, it follows that payment of just compensation is based on the nationalizing states domestic law. Adoption of the Calvo doctrine of equality into the Convention is not unexpected as the standard has taken root in the jurisprudence of the region to which parties to the agreement belong. A private foreign investor whose home state is not a party to the Convention and whose property is nationalized by a party thereto is, however, not covered thereunder. Payment he receives as compensation for his loss depends on his legal relation with the nationalizing state.

A subregional group, made up of states that are parties to the Cartegna Agreement of May 22, 1969 on Andean integration espouse the same legal framework. [14] While fully aware of the important role "foreign capital and technology can play" [15] in developing their economy, Andean member states, by virtue of Article 50 of the Andean Foreign Investment Code, call for subjection of foreign capital to treatment no less or no more favorable than that accorded national investors. The words of Article 50 provides support for Calvo in the following:

> "Member Countries shall not grant to foreign investors any treatment more favourable than that granted to national investors."

Equality of treatment makes compensation for nationalized private foreign investment dependent on the applicable standard of compensation as

determined by the taking state's domestic law. While adoption of the Calvo standard of equality is not rejection of compensation based on the traditional compensation standard, it does not guarantee making of such payment. The equality principle leaves foreign investors at the mercy of their host state and given the capital capacity of Andean states, compensation for nationalized property would more likely than not fall short of the traditional standard of compensation.

Clearly visible in this discussion on multilateral agreements are certain observations. As aforementioned, where a negotiated instrument is substantively one-sided, either in favor of foreign investment or interests of capital importing states, it succeeds in attracting support from the side it is most generous to but fails to attract the same from the other. Of the issues most difficult to negotiate, compensation for taking of foreign property has been and will continue to be one at the multilateral level. While both sides agree that compensation be paid to one whose investment is nationalized, an agreement on what the applicable standard from which payment is calculated has been and continues to be the basis for disagreement. Developed capitalist states have shown in multilateral negotiations that they will not compromise the traditional compensatory standard for one that is lower. For example, Article 25 of the Bogota Agreement of May 2, 1948 called for payment of prompt, adequate and effective compensation but subjection of Article 25 to national law by Article 24 rendered the traditional standard under Article 25 meaningless. Consequently, the Bogota Agreement

failed to get the full support of developed capitalist states. Failure to conclude a multilateral agreement between the sides to the investment problem has led to conclusion of agreements between states that agree on the same standards of protection and treatment accorded foreign investors. Hence, it is not surprising to see that for OECD members, compensation for nationalized foreign investment is to be followed by payment based on the standard of prompt, adequate and effective while Andean members agree among themselves that compensation for nationalization is an issue of national jurisdiction.

The observations made by the United States State Department in 1957 and again in 1959 ring true even in present international conditions. Not contrary to our own observations, the U.S. State Department stated back then that:

> "The experience of the Department of State over many years has convinced us that the bilateral treaty of friendship, commerce, and navigation offers the most practical means of affording treaty protection to American investors abroad. Multilateral negotiations have been found to produce unsatisfactory results, and the reasons are not difficult to perceive. There are great variances among nations as to the degree to which they are prepared to bind themselves legally to accord fair treatment, even among those which in fact accord fair treatment in practice. Some countries with federal constitutions, including Australia, Canada, and the United States, have special problems which limit the commitments they can undertake. Efforts at general uniform arrangements tend to break down over the differences among individual countries and their varying legal systems and economies. Consequently, bilateral negotiations, during which adjustments can be made to take care of individual differences, may be expected to produce the best results as far as United States interests are concerned.
>
> We have come to these conclusions after three major multilateral attempts to provide a uniform system of protection for

> international investment. Each resulted in failure. In 1929, an international conference met at Geneva under League of Nations auspices, to consider a carefully prepared draft convention on the treatment of foreigners and foreign enterprises. Because of the reservations each country felt obliged to attach, the effectiveness of the proposed convention was so reduced that the project was abandoned. A second attempt was the section on economic development in the abortive ITO Charter, which, in order to accommodate the varying views of participating countries, equivocated on certain fundamental principles, including the standard of compensation in case of the expropriation of property.
>
> Differences between legal systems, between national policies and differences as to economic interests created in each case insuperable obstacles to the establishment of uniform principles applicable to each of the many countries concerned. Experience over the past few years in the U.N. with resolutions designed to encourage private investment, which have stimulated strong reactions against any forthright declaration of principle, further indicate the futility of multilateral efforts under present conditions." [16]

What is evident from our observations and substantiated by those of the U.S. State Department is that, given the varying degrees of respect for private property, given the different compensation standards that flow from the varying degrees of respect for private property, and given the different economic, political and legal systems prevalent in the international community, it has been impossible and it would have been unrealistic for the capital importing and capital exporting states to adopt one of the different standards as being of universal international law application. Emerging from what appears to be a chaotic situation is the only available and practical solution to the problem. That is, if there is a compensation framework that can:

a) transcend the differences of states;

b) maintain the peaceful coexistance of all states;

c) guarantee and maintain the sovereign right of a state to be different from other states if it so chooses; and

d) guarantee the free movement of capital and technology,

it can only be a neutral compensation framework that is based on neutral principles of law. And as we shall see in Chapter 5 and more so in Chapter 6, such a compensation framework has already assumed universal prominence in the practice of states.

B. Bilateral Agreements.

While conclusion of a multilateral investment treaty between developed capitalist, developing and socialist states was fruitless in all negotiated attempts, the same is not true of bilateral investment treaties. On a bilateral basis, developed capitalist, some developing and a few socialist states have been able to achieve, at least in form, what they failed to conclude multilaterally. The fact that well over two hundred bilateral investment treaties were concluded between 1960 and 1984, seen in the investment treaty series and the investment laws of the world series of the International Centre for Settlement of Investment Disputes (ICSID), attests to the willingness of states to enter into bilateral agreements concerning promotion and protection of investments. States entering into such agreements have also been able to negotiate a standard from which compensation for nationalization is to be determined and which is binding on the parties.

The treaty practice of developed capitalist states shows where they stand on the compensation for nationalization issue. Bilateral investment treaties concluded between these states will most likely than not adopt the standard of prompt, adequate and effective. For instance, the bilateral treaties of friendship, commerce and navigation concluded between the U.S.A. and other developed capitalist states, example with West Germany and Japan, refer to the traditional standard as basis for making compensation payment.[17] Another such agreement between the U.S.A. and Czechoslovakia, before it turned socialist, required payment of "adequate and effective compensation ..." [18]. Although socialist states have strongly advocated the position that there is no international law requirement to pay compensation for nationalized private property, some have entered into bilateral treaty arrangements calling for compensation payment. The treaty practice and domestic law of some developing states, on the other hand, show that while some developing states reject the traditional compensation standard others give support thereto. A look at the treaty series and the investment laws at the world series of ICSID helps to substantiate the foregoing observations.

West Germany was able, from 1960 to 1984, to conclude over thirty bilateral investment treaties of which most were with developing states. In its concluded treaty with Malaysia in 1960, both contracting parties accepted the obligation to pay compensation in these general terms:

"The investments of nationals or companies of either Contract-

> ing Party in the territory of the other Contracting Party shall not be expropriated except for a public purpose, nor shall they be expropriated without prompt, adequate and effective compensation which shall be freely transferable between the territories of the two Contracting Parties. The legality of any such expropriation and the quantum of compensation shall be subject to review by due process of law in the territory of the Contracting Party in which the investment has been expropriated." [19]

One sees in another investment treaty between West Germany and Tanzania, concluded in 1965, the adoption of the same standard for calculating compensation. [20] While not specifically imposing the obligation to pay prompt, adequate and effective compensation, the treaty implies clearly in Article 3(2) that the traditional standard of compensation is to be satisfied, using these words:

> "Investments by nationals or companies of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall represent the equivalent of the investment expropriated; it shall be actually realisable, freely transferable, and shall be made without delay. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and the giving of such compensation. The legality of any such expropriation and the amount of compensation and the time during which it should be paid shall be subject to review by due process of law."

The same standard, described in identical language, is found in the treaty of 1971 between West Germany and Mauritius. [21] Two other examples of treaty adoption of the prompt, adequate and effective standard between West Germany and other states are the treaty of 1977 with Syria [22] and the one concluded with Papua New Guinea in 1980. [23] Article 4(2) of the West Germany-Syria agreement has implied adoption of the standard which is apparent in these words:

> "Investments by nationals or companies of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for the public interest and against compensation. Such compensation shall be equivalent to the value of the investment expropriated; it shall be actually realisable, freely transferable and shall be made without delay. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and giving of such compensation. The legality of any such compensation and the amount of compensation shall be subject to review by due process of law in the country where the investment has been made."

While express adoption of prompt, adequate and effective appears in Article 4(2) of the agreement with Papua New Guinea in these words:

> "Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalised or subjected to any other measure the effects of which is tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment expropriated immediately before the date the expropriation or nationalisation was publicly announced. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be actually realisable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of nationalization, expropriation or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization, or comparable measure and the amount of compensation shall be subject to review by due process of law."

Although adoption of the traditional standard promotes the security of its national investors in states with which it has entered into treaties, West Germany's domestic law requires compensation to be calculated "in a just balancing of the interests of the community, and the parties". [24] West German treaty practice is therefore not representative of its actual position in the compensation issue. A state,

party to a treaty with West Germany, that nationalizes German owned investments may use the conflicting positions of West Germany's treaty practice and domestic law in its effort to negotiate payments below the traditional standard if West Germany insists that the amount to be paid is the market value of each nationalized investment. Unlike West Germany, however, the treaty practice of other developed capitalist states runs consistent with their domestic law.

Like West Germany, the United Kingdom was able to negotiate acceptance of the traditional compensation standard with other states. The investment treaty between the United kingdom and South Korea of 1976 for the promotion and protection of investments, for instance, specifically requires, in Article 5(1), the calculation of compensation based on the traditional standard in these words:

> "Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph." [25]

Except for a few treaties which either have implied adoption of the

standard of prompt, adequate and effective or adoption of another standard, most treaties to which the United Kingdom is a contracting party contain express provisions requiring usage of the traditional standard as basis for satisfying the obligation to pay compensation for nationalization.[26] The few exceptions, for example, Article 4(1) of the U.K.-Romania treaty of 1976 have these words:

> "The investments of capital of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except in the public interest, under due process of law and against compensation. Such compensation shall amount to the value of the capital on the date of expropriation, shall be effectively realized, be freely transferable and made without delay. Not later than the date of expropriation, a procedure shall be established to determine the amount and method of payment of compensation. Upon the request of the investor affected, the amount of compensation shall be subject to review under due process of law, in accordance with the principles set out in this paragraph, by a competent tribunal acting judicially in the country in which the investment has been made. The compensation once finally established shall incur interest for the period of any undue delay in making payment."

Obviously, Article 4(1), supra, speaks of a different compensation standard, not that of prompt, adequate and effective. While it is apparent that the contracting parties require payment of compensation to be prompt, and effective, the fact that they agree to have the amount to be paid determined pursuant to the taking state's law and procedure makes the compensation framework under the agreement different. Article 5(1) of the U.K.-Indonesia treaty of 1976 states on the other hand that:

> "Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or ex-

> propriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party and against compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation ..., shall be made without undue delay, shall be effectively realisable and shall be freely transferable. Appropriate provision shall be made for the determination and payment of such compensation. The legality of any expropriation and the amount and method of payment of compensation shall be subject to review by due process of law."

Speaking clearly for themselves, the words of Article 5(1) speak of no other standard but that of prompt, adequate and effective.

Bilateral investment treaties, entered into by other developed capitalist states, not unlike the U.K. and West German practice, also provide express or implied acceptance of prompt, adequate and effective as the compensation standard. The Denmark-Indonesia agreement of 1968 [27] expressly provides that:

> "(1) Neither Contracting Party shall take measures of expropriation or of nationalization or any other measures the effect of which, either directly or indirectly, is to dispossess nationals or corporations of the other Contracting Party of their investments, except for the public benefit and against compensation, and not being contrary to existing obligations. The legality of such expropriation, nationalization or measures as aforesaid shall be subject to review by due process of law.
>
> (2) If either Contracting Party expropriates or nationalizes investments of nationals or corporations of the other Contracting Party, or if it takes any other measures the effect of which, either directly or indirectly, is to dispossess such nationals or corporations of their investments, it shall provide prompt payment of effective and adequate compensation.
>
> (3) Such compensation shall represent the commercial value of the investments at the time of expropriation, nationalization or at the time of taking any other measures as aforesaid; it shall be actually realisable and freely transferable, and shall

> be made without undue delay. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalisation or the taking of such other measures as aforesaid for determination and payment of such compensation."

Specific espousal of the same standard, in identical language, appears in Article 4 of the treaty between Norway and Indonesia. [28] Similarly, the Singapore-Switzerland treaty of 1973 expressly requires that:

> "Neither Contracting Party shall take any measure of expropriation, nationalization or dispossession, either directly or indirectly, against the investments of nationals or companies of the other Contracting Party unless the measures are taken in the public interest or unless they are authorised by an Act of Parliament in force at the time of approval of the investment, as the case may be, on a non discriminatory basis, and under due process of law provided that effective and adequate compensation is made therefor. Such compensation shall be paid without undue delay to the person entitled thereto and shall be freely convertible and transferable." [29]

Express acceptance of the standard is also found in the U.S.A.-Senegal [30], U.S.A.-Haiti [31] and U.S.A.-Zaire [32] treaties. Article 3 of all three agreements, using almost identical language, require payment of prompt, adequate and effective compensation. For example, in the U.S.A.-Senegal agreement the parties agree that:

> " 1. No investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the other Party or subjected to any other measure or series of measures, direct or indirect, tantamount to expropriation, ... unless the expropriation:
>
> (a) is done for a public purpose;
> (b) is accomplished under due process of law;
> (c) is not discriminatory;
> (d) does not violate any specific provision on contractual stability or any specific provision expropriation contained in an companyany concerned and the Party making the expropriation; and

(e) is accompanied by prompt, adequate and effective compensation.

Compensation shall be equivalent to the fair market value of the expropriated investment. The calculation of such compensation shall not reflect any reduction in such fair market value due to either prior public notice or announcement of the expropriatory action, or the occurrence of the events that constituted or resulted in the expropriatory action. Such compensation shall be paid without delay, shall be effectively realisable, shall bear current interest from the date of the expropriation at a commercially reasonable rate, and shall be freely transferable at the prevailing market rate of exchange on the date of expropriation."

Implied acceptance of the standard is found in Article 4 of the Italy-Malta treaty of 1967 which states that:

"Investments by nationals and companies of either of the two Contracting Parties in the territory of the other Contracting Party, and all related profits, may not be expropriated except in the public interest and only against payment of indemnity equal to the value of the property expropriated. Such indemnity shall be paid without delay and shall be immediately transferable in convertible currency without any limitation." [33]

As well, implied adoption of the standard of prompt, adequate and effective is found in Article V of the Netherlands-South Korea treaty of 1974 [34], Article 5(1) and (2) of the Belgo-Luxembug Economic Union - South Korea treaty of 1974 [35] and Article V of the Netherlands-Egypt treaty of 1976. [36]

These investment treaties more than merely affirm the position of developed capitalist states on the question of compensation for nationalization. As well, they should not be seen as mere evidence of the superior bargaining power entertained by developed capitalist states over other states. It is generally accepted that most, if not all,

bilateral investment treaties concluded between developed capitalist and developing states have adopted the compensation standard supported by developed capitalist states because of their superior bargaining power in the foreign investment equation. [37] If one restricts oneself to this, one is restricting oneself to a general observation. A generalization which if understood conversely is to the effect that all developing states, in turning to developed capitalist states for investment so as to achieve a faster rate of economic development, have had to submit to terms dictated by developed capitalist states. As much as developing states may have wanted to accept lower protection standards than those agreed on, their desperate need for foreign capital, giving them an inferior bargaining power, allowed them no option but acceptance of prompt, adequate and effective. As terms of the treaties concluded between countries from the two sides do more to affirm and protect the rights of private foreign investors over the interests of developing states, one is more likely to restrict one's observations of the treaties to the foregoing.

However, using their lack of bargaining power as basis for acceptance of the traditional compensation standard by developing states is misleading. While it may be so in a good number of treaties between the two sides, it is not the case in all. A few bilateral treaties, contracting parties to which are developing states, show that some developing states support the traditional compensation standard as well. For example, implied support for the standard is evident in the Iraq-Kuwait

treaty of 1964 [38]. Article 4 thereof provides that:

> " Neither of the two contracting parties may expropriate the investments owned by natural and legal persons belonging to the other party and invested within its borders except in the public interest and return for a just and immediate compensation; the value of the compensation shall be equal to that of the expropriated investments at the time of expropriation. The compensation shall be paid as soon as such investment are assessed; the time taken up by such assessment shall not exceed one year. The value of the compensation shall be transferred in the same currencies as those in which they were provided for investment."

Support is also found in the Singapore-Sri Lanka treaty of 1980 [39]. Article 6 of the agreement expressly provides that:

> " (1) Investments of nationals or companies of either Contracting Party in the territory of the other Contracting Party shall not be expropriated or nationalized except for any purpose authorised by law and against adequate, effective and prompt payment of compensation.
>
> (2) Such compensation shall represent the market value of the investments involved on the date of expropriation or nationalisation."

Express adoption of prompt, adequate and effective compensation is again found in the agreement of 1980 between Sri Lanka and South Korea. [40] Article 7 of the agreement provides that:

> "(1) Investments of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation ... in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest until the date of payment, shallbe made without delay, be effectively realisable and be freely transferable.

> The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to a prompt determination of the amount of compensation either by law or by agreement between the parties to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.
>
> (2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guaratee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares."

Support for the traditional standard of compensation is again apparent in a more recent agreement between Kuwait and Pakistan, concluded in 1983. [41] Article 4 of the agreement provides that:

> "Neither Contracting State may take measures of nationalization, expropriation or confiscation against the approved investments in its territories owned by investors of other state, except for reasons of public interest and against a just and prompt compensation, the amount of which shall be equal to the value of the investments at the time of such action.
>
> Evaluation of such investments shall be done within a period of 12 months from the date of nationalization, expropriation or confiscation. Remittance of the amount of compensation shall be made in the the same currency or currencies brought in for purpose of approved investment within 6 months."

Adoption of prompt, adequate and effective in bilateral investment treaties between these developing states and developed capitalist states would have been effected by their mutual support for the standard, not because of one side's bargaining strength over the other.

Even the domestic law of a number of developing states show that their position in the compensation issue is with developed capitalist states. The Constitution of Mauritius, for instance, specifically requires the state to satisfy the standard of "prompt payment of adequate compensation" [42] when it nationalizes property. Papua New Guinea is another example but, unlike Mauritius, its constitution leaves the matter of compensation for nationalized private foreign property at the mercy of its parliament. [43] Section 19(1)(c) of the Lands Acquisition Act of Papua New Guinea requires that where "land has been in production for not less than five financial years ... at the date of acquisition" compensation payment therefor is to be based on "the product of the average annual net profit received in relation to the land over the five financial years ... and the prescribed factor of the land". [44] This compensation formula no doubt requires payment of the market value of land taken. Consequently, developing states whose domestic law espouse prompt, adequate and effective as their standard for determining compensation accept subjection to the standard in bilateral treaties with developed capitalist states because of their support for it, not because they were forced to accept it.

Like developing states, some socialist states in need of foreign capital and technology have also turned to developed capitalist states. Again, like developing states, they have had to guarantee by virtue of treaty provisions that a foreign investor whose investment is nationalized receives compensation payment. Recognition or acceptance of the

obligation to pay compensation for nationalized property by socialist states is evident not only in their treaty relations with developed capitalist states but also with developing states and even with each other. According to the ICSID investment treaty series, Romania concluded, from 1976 to 1983, sixteen treaties, of which eight were with developed capitalist states, seven with developing states and one with China. In the same treaty series, Yugoslavia is seen as a contracting partner with four states (France, Netherlands, Egypt and Sweden) and China with three (Sweden, West Germany and Romania). All these treaties, including the Czechoslovak-Polish treaty of 1958 [45] and the Czechoslovak domestic law (Act 38 of 1959) [46], recognize the need to pay compensation for loss of investment or property. Although no single compensation standard can be identified as evident in all bilateral treaties to which these states are contracting parties, those different standards on the basis of which Romania, Yugoslavia and China have agreed to be bound by reflect the flexibility of these states in their treaty practice concerning the compensation issue. As well, these treaties, especially the Czechoslovak-Polish treaty of 1958 and the Romanian-Chinese treaty of 1983, dismiss any generalization to the effect that all socialist states support the position that compensation is not a condition of nationalization. [47] A look at some of these treaties helps to highlight these observations.

The United Kingdom-Romanian treaty of 1976, [48] in Article 4.1, requires a nationalizing contracting party to pay compensation which

amounts to the value of capital at the date of taking and that such payment be "effectively realisable, freely transferable and made without delay". Although these requirements for determining and making compensation payment seem at first glance to be no different to the traditional requirements of prompt, adequate and effective, only two of them are but not the other. The terms "effectively realisable, freely transferable and made without delay" impose a duty on the parties to ensure that compensation payment is prompt and effective. The amount to be paid, however, is to be determined in accordance with the nationalizing state's domestic law. Hence, determination of the amount to be paid cannot be said to be based on the traditional requirement of adequate compensation. Subjection of the amount of compensation to each contracting partner's law leaves an investor at the mercy of the host state. While a Romanian investment in United Kingdom would be paid an amount calculated on the basis of adequate compensation and the market value notion, a United Kingdom investment in Romania would, most likely than not, expect an amount based on an inferior criteria to adequate and market value. Any possibility of this happening to a United Kingdom investor appears to be remedied by reference of any disagreement on the amount calculated for payment to ICSID. [49] But as ICSID's concern over any such reference would center on whether or not the amount calculated by Romania was reached in satisfaction of its domestic law, a United Kingdom investor contesting the amount may, subject to Romanian law, still receive an amount below adequate compensation.

No different is the compensatory framework found in the Romanian-Egyptian treaty of 1976 [50]. Article 3.1 of the treaty provides that:

> "Capital investments made by investors of a Contracting Party on the territory of the other Contracting Party cannot be expropriated except for public utility and against compensation. The compensation must be equal to the value of the investment at the time of the expropriation, effectively realisable, freely transferable and paid without delay. an adequate procedure for determining the amount and manner of payment of the compensation shall be established at the time of the expropriation at the latest. The amount of compensation may be revaluated by the court having jurisdiction in the country where the investment has been made, at the request of the Concerned Party. If a dispute between an investor and the Contracting Party on whose territory the investments have been made, regarding the amount of compensation, still exists after the final award of the national court, either Party shall be entitled to refer the dispute, for conciliation and arbitration, to the International Centre for Settlement of Investment Disputes, in accordance with procedure laid down in the convention concluded in Washington on March 18, 1965."

Like the U.K.-Romanian agreement, supra, any disagreement concerning an amount so calculated may be referred to ICSID by Eygpt or Romania. [51] But as discussed in the treaty relationship between U.K. and Romania, any such reference would concern ICSID with whether or not the disputed amount was determined in satisfaction of the nationalizing state's domestic law.

Except for one or more treaties, the one with Sri Lanka for instance, [52] the other bilateral investment treaties to which Romania is a contracting party provide basically the same requirements for satisfying the obligation to compensate and, except for the treaty with China, [53] the same settlement process with respect to a disputed compensatory

amount. For example,Article 4.1 of the Italian-Romanian treaty of 1977 provides that:

> "Investments of capital by investors of either Contracting Party shall not be nationalized, expropriated orsubjected to measures equivalent to nationalization or expropriation in the territory of the other Contracting Party, except in the public interest as announced by due process of law, and against compensation.
>
> Said compensation shall amount to the real value of the expropriated capital on the date of the expropriation, shall be effectively realisable upon the act of transfer of ownership, shall be paid without delay, and shall be freely transferable without delay in a convertible currency.
>
> At the request of the investor affected the amount of compensation shall be subject to review by the competent court in the country where the investment was made, by due process of law and in conformity with the principles set forth in the present Article.
>
> If any dispute between the claims of an investor of one of the Contracting Parties and those of the other Contracting Party concerning the amount of compensation shall continue to exist notwithstanding exhaustion of the procedures and remedies provided in the the legislation ofthe country where the capital was invested, the Parties shall be entitled within two months following exhaustion of such internal remedies to submit the dispute for conciliation or arbitration in conformity with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on March 18,1965.
>
> If the amount of compensation finally determined is higher or lower than the amount of compensation paid at the time of expropriation, the difference shall be paid or refunded without delay, and shall be freely transferable without delay in a convertible currency.
>
> In the event of a delay in the compensation payments referred to herein,the payee shall also be entitled to interest for the period of the delay." [54]

The Romanian-Pakistani treaty of 1978, [55] the West German-Romanian treaty of 1979 [56] and the one with Denmark of 1980 [57] are other examples of such treaties. In the agreement with Pakistan, both parties agree that:

"Investments of capital made by the investors of one Contracting Party in the territory of the other Contracting Party cannot be expropriated but only in public interest and against a compensation according to due process of law. Such compensation must correspond to the value of the investment on the date of expropriation, it must be effectively achievable, freely transferable and paid without undue delay.

At the time of expropriation or prior to it, a proper procedure shall be prescribed to establish the amount and the method of payment of compensation. The amount of compensation may be subject to review by due process of law.

If a dispute between an investor and the Contracting Party in the territory of which the investment was made, concerning the amount of compensation, continues to exist after the final award of the national tribunal, each of them is entitled to submit the dispute for conciliation or arbitration, according to procedure provided by the Convention opened for signature at Washington on March 18, 1965, to the International Centre for Settlement of Investment Disputes." [58]

In the agreement with West Germany, the parties adopted these compensation requirements:

"(1) Investments by investors from either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for the public benefit and in exchange for fair compensation. Such compensation shall be actually realisable and freely transferable and shall be paid without delay. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. The procedure for determination of the compensation shall conform to the laws of the Contracting Party in whose territory the investment has been made.

(2) The legality of any expropriation measures within the meaning of point 2(b) of the Protocol to this Treaty shall at the investor's request be reviewed through the legal channels of the Contracting Party concerned:

(a) in the Federal Republic of Germany in all cases;
(b) in the Socialist Republic of Romania only in those cases in which expropriation is not governed by law or decree of the Council of State or Presidential Decree.

(3) The amount of the compensation shall be reviewed through the legal channels of the Contracting Party concerned. If upon conclusion of the legal proceedings differences of opinion ex-

ist between the investor and the Contracting Party concerned with respect to the amount of the compensation, they may, provided the investor agrees to the institution of conciliation and arbitration proceedings, submit such differences of opinion to the International Center for the Settlement of Investment Disputes in accordance with the procedure set forth in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States submitted for signature in Washington on March 18, 1965. Any request for institution of proceedings under this Convention shall be submitted within two months following the effective date of the decision resulting from the legal proceedings." [59]

In the agreement with Denmark, both states agreed to be subjected to the following requirements:

"(1) Neither Contracting Party shall take measures of expropriation or any other measures having a similar effect except for the public interest under due process of law and against compensation. Such compensation shall amount to the value of the investment on the date of expropriation, shall be effectively realisable, freely transferable and made without delay.

The amount of compensation shall be subject to review by due process of law, within the juristiction of the Contracting Party where the investment has been made. The compensation once finally established shall incur interest for the period of any undue delay in making payment.

(2) If any dispute between an investor of one Contracting Party and the other Contracting Party concerning the amount of compensation continues to exist after the exhaustion of remedies available in the territory of the Contracting Party in which the investment was made, either party to the dispute shall be entitled to submit the case for conciliation or arbitration in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18th March, 1965." [60]

The requirements of the three treaties, like those in the treaties with the United Kingdom and Egypt, are to be construed in accordance with the taking state's domestic law, not that of an investor's home state nor that of another jurisdiction. In essence therefore the amount

to be paid by virtue of such treaty relations is dictated by domestic law requirements while the terms "effectively realisable, freely transferable and paid [made] without delay" which refer to the time and manner of payment, require payment to be prompt and effective. It is by reason of these compensatory requirements that the framework for compensation payment as espoused by the Romania-Chinese treaty of 1983 is no different.

What emerges here is a compensatory standard though possessing two elements, prompt and effective, of the traditional compensation standard and would result in some instances of compensation payment identical to payment based on the traditional standard, is different thereto nonetheless. Whether or not the amount to be paid corresponds to the traditional requirement of adequate compensation is a matter of national jurisdiction. Depending on the domestic law of a nationalizing state, an amount calculated for payment may be based on the requirement of adequacy, as in the case of United Kingdom, or it may fall short of the requirement as in the case of West Germany. [61] Subjection of the amount of compensation for payment to the domestic law of each contracting party means a lack of uniformity in calculating the amount to be paid among the states that are bound by the requirement. Any attempt to accept this compensatory framework as identical to or in support of the traditional compensation standard would be erroneous.

Compensation payment, the amount of which is a matter of national

jurisdiction and which is to be prompt and effective is not the only basis for Romania's satisfaction of its treaty obligations to compensate. The treaty with Sri Lanka exemplifies Romania's willingness to be bound by the traditional standard of prompt, adequate and effective. [62] Article 6 of the agreement provides that:

> "1. Investments made by investors of one Contracting Party shall not be expropriated or subjected to other measures having an effect similar to expropriation ... in the territory of the other Contracting Party except in accordance with duly constituted legal procedures for a public purpose and against prompt, adequate and effective compensation, which shall amount to the actual value of the investment on the date of expropriation. Such compensation shall be freely transferable and paid without delay. On the date of expropriation a proper procedure shall be established to determine the amount and method of payment of compensation.
>
> 2. From the moment it has been definitively established, the compensation shall determine payment of interests for any period of unjustified delay in making payment.
>
> 3. Where one Contracting Party expropriates the assets of a company legally incorporated or constituted in its territory and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph 1 of the present Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation to these investors in respect of the shares they own."

Yugoslavia's treaty practice on the compensation for nationalization issue is as flexible as that of Romania. In its treaty of 1977 with Egypt, [63] Yugoslavia's apparent acceptance of the obligation to pay compensation with determination of the amount subject to domestic law is obvious in these words of the agreement:

> "Each Contracting Party undertakes obligation to pay off prompt and effective compensation to the nationals and to the economic organisations of the other Contracting Party the investments of which suffer loss in its territory owing to non-commercial

risks.
... The measure with which the right of nationals and of economic organisations of the other Contracting Party is deprived or restricted simultaneously determine and pay off the compensation." [64]

This compensatory standard, which requires determination of amount by domestic law and the payment of which is to be prompt and effective, is also found in the West German-Chinese treaty of 1983. [65] Article 4(1) of the agreement provides that:

> "Investments of investors of one Contracting Party shall enjoy protection and security in the territory of the other Contracting Party. Investments of investors of one Contracting Party may be expropriated in the territory of the other Contracting Party only if this is in the publuic interest, by due process of law and against compensation. Compensation shall be made without undue delay and shall be effectively realisable and freely transferable."

Although Article 4(1) of the treaty only makes reference to the need for compensation to be "made without undue delay", prompt, and to "be effectively realisable and freely transferable", effective, the fact that domestic law by virtue of Article 8 is accepted as governing investments makes domestic law the basis for determining the amount to be paid. Yugoslavia, unlike China which restricts itself to this compensatory framework, has shown that it too, like Romania, is willing to be treaty bound by the traditional compensation standard.

Acceptance of the traditional compensation standard by Yugoslavia is seen in the Yugoslav-Netherlands treaty of 1976 [66] and the Yugoslav-Swedish treaty of 1978. [67] Article 3 of the latter treaty expressly adopts the traditional standard as is obvious in these words:

"Neither Contracting State shall take any measures depriving, directly or indirectly, nationals or companies or companies of the other Contracting State of an investment unless the following conditions are complied with:

(a) the measures are taken in the public interest and under due process of law;

(b) the measures are not discriminatory; and

(c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be freely transferablebetween the territories of the Contracting Sates."

Although not as specific in its adoption of the traditional standard, Article 4 of the former treaty implies subjection by both parties to the standard, in these words :

"Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

a) the measures are taken in the public interest and in conformity with the laws and regulations of the respective Contracting Parties;

b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;

c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country of which those claimants are nationals and in the currency of that country".

All these bilateral treaties provide valuable insights into the compensation issue. They bring to focus, inter alia, the fact that there exists no single standard of compensation to which all states (developed capitalist, developing and socialist) willingly bind themselves. To illustrate the point, let us look at the treaties reprinted by ICSID and

specifically mentioned in this part of the study. Of the 33 bilateral investment treaties mentioned, 14 contain express adoption of prompt, adequate and effective compensation, 9 contain provisions for payment of prompt and effective compensation, of which the amount is to be determined in accordance with the taking state's domestic law. As for the remaining 10, our assumption is that they possess implied adoption of the traditional standard of compensation. Such an assumption is based on the fact that the remaining treaties require, in clear terms, payment to be prompt and effective. As well, the amount to be paid thereunder depend on construction of such vague terms as "genuine value", "equivalent to the value", "represent equivalent value" and others. One obvious construction of such terms is that they refer to nothing more than the requirement that compensation be adequate in the sense of market value. However, notwithstanding our acceptance of the terms as making reference to adequacy of compensation payment, the terms are vague and broad enough to allow for their construction to encompass other valuation criteria like the written down book value notion. Consequently, it is necessary to separate such agreements from those that expressly espouse satisfaction of compensation payment on the basis of prompt, adequate and effective.

It is generally accepted that developed capitalist states are the chief defenders of the traditional standard of prompt, adequate and effective. Their treaty practice affirms their support for the standard while indicating that there are those who are also flexible in accepting

a compensatory framework that exposes their investors to receipt of compensation based on an inferior standard. Some socialist states on the other hand have demonstrated in their treaty practice that, contrary to the socialist position of rejection of compensation as a condition of nationalization, they are not only willing to pay compensation based entirely on domestic law as evidenced by the Czechoslovak-Polish treaty of 1958 but also to compensate, the amount of which is determined by domestic law, promptly and effectively and to also pay compensation on the basis of the traditional standard. The position of developing states on compensation is better understood as well because of these treaties. For one thing, not all developing states reject the traditional standard and for another, not all such states that entered into bilateral investment treaties with developed capitalist states submitted to the requirements of prompt, adequate and effective because of their inferior bargaining power.

According to one jurist, however, adoption of these different compensation standards in treaties does not qualify them as international law standards. "There is", according to Fitzmaurice, "no such thing as ... international treaty law, though there are particular international treaty rights and obligations. The only 'law' that enters into these is derived not from the treaty creating them, or from any treaty, but from the principle pacta sunt servanda - an antecedent general principle of law. The law is that the obligation must be carried out, but the obligation is not, in itself law ...". [68] Consequently, the different

compensation standards found in the treaties referred to and discussed are not, by virtue of those treaties, standards of international law, rather, they are different compensatory rights and obligations arising from those instruments. Where a contracting party, entertaining and bound by any of those compensatory rights and obligations, nationalizes investments owned by nationals of a contracting partner that is conferred corresponding rights and obligations by the same treaty, then, the international law rule of pacta sunt servanda requires the nationalizing party to specifically perform whatever compensatory obligation it is required to satisfy by the treaty in effect. [69]

It is obvious therefore that compensation standards espoused by treaties and concession agreements, which will hereafter be discussed, depend on the principle of pacta sunt servanda to be of international law effect, not because their (compensation standards) adoption in treaties make them international law standards. Notwithstanding this reality, the treaty practice of states remains important and useful in the determination of universal international law norms. As we shall see in Chapter 6, even United Nations bodies value the need to refer to treaties when pursuing to codify rules of international law that emerge from the practice of states. Emerging from our analysis of more than thirty bilateral investment agreements is the same observation that became apparent in our inquiry into multilateral agreements and arrangements. That is, if a compensation framework of universal application is to ne pieced together from the bilateral agreements so covered, it can

only be a neutral framework.

C. Concession Agreements.

Before engaging in any discussion on concession agreements and the issue of compensation, it is necessary to justify inclusion of concession agreements with treaties. As well, it is important that we be wary of our usage of the term because it is susceptible of more than one import. Now to the merits of including concession agreements and the compensation issue under the general heading of treaties.

Unlike treaties which only states and international organizations can create, concession agreements are the creation of non-state entities on one hand and states on the other. Hence, when such an agreement is referred to as a state contract [70], it is understandable. The term state contract, however, is misleading for it suggests that the legal effect of concession agreements is rooted in the domestic law of the state party or that of the non-state party. In other words, concession agreements do not fall within the enclaves of international law. The positivist position that accepts international law as the exclusive legal domain of sovereign states, to the exclusion of non-state entities, affirms the foregoing. Consequently, any attempt to include concession agreements and the question of compensation in this chapter appears to be easily without basis. Even if the parties undertake to

have their concessionary rights and obligations regulated by international law, the positist view would unmercifully dismiss any such undertaking. The positivist view, however, is not immune from changes of the post World War II period [71]. Not only has the personality of international organizations changed since World War II, but today, as pointed out by Sornarajah, "as a result of human rights movement, the status of the individual are accepted in modern international law". [72] Hence, the positivist view must yield to these changes.

While a concession agreement is not a treaty, its status as "the child and companion" of a treaty merits its inclusion in this chapter [73]. More importantly, being the single "most important species of instruments between states and foreign individuals" [74] and whose legal effect, no different to that of a treaty's, is founded on the general principles of acquired rights and pacta sunt servanda [75] warrants a discussion thereof on compensation under the general heading of treaties. It is accepted that although concession agreements do not entertain identical legal status as treaties, a violation of which is contrary to international law, concession agreements are nevertheless instruments of international law. A number of arguments have been strongly advanced for international law regulation of concession agreements.

Schwebel is noted for his defense of the international law status of concession agreements [76]. His chief arguments are summarized in the

following order :

a) The non-state party to such an agreement is a citizen of another state that may exercise diplomatic protection on behalf of the non-state party when his rights under the agreement are violated by the state party. In so doing, international law is introduced into the relationship.

b) Acceptance and recognition of the rights of foreign individuals at international law has resulted in making the foreign individual a subject of international law. Hence, it would be ridiculous to accept a foreign individual as a subject of international law on one hand while at the same time dismissing a concession agreement which he concludes with a state, another subject of international law, as outside of international law.

c) The general principles of acquired rights and pacta sunt servanda are widely accepted notions which easily transform a concession agreement into an instrument of international law. Where the contracting parties agree, for example, to have their rights and obligations regulated under in-

ternational law, would such an agreement not qualify as an instrument of international law by virtue of the said principles?

d) As socialist investments are essentially public, they automatically fall within the confines of international law. Hence, a concession agreement involving socialist investment is an international law agreement. Capitalist investments on the hand are essentially private. The formalist view of private investment in a concession relationship is that a concession agreement of this nature is outside of international law. Consequently, a violation thereof is not a violation of international law. However, if we accept this view, we would be using international law as vehicle for upholding the basis of socialist ideology while at the same time using it as a device to loosen the foundation on which capitalism rests, i.e. private ownership of property.

Seen from the aforesaid context, it is accepted that concession agreements possess "quasi-international character" [77]. Any reference to such agreements as "quasi-international agreements" is easily understandable.

[78] Other sources prefer usage of "transnational economic contracts" [79] while different terms have been used else where [80]. While not possessing the general import of concession agreements, quasi-international agreements and transnational economic contracts, according to their users, refer to concession agreements of an economic development nature. Both terms are therefore to be understood as terms, though different, that refer to the same species of concession agreements called economic development agreements. [81] As this category of concessions has given rise to claims for compensation payment internationally, it shall be our exclusive area of concern on the issue of compensation. Consequently, concession agreements, used hereafter, refers strictly to economic development agreements.

Although concession agreements, as do treaties, date back to pre-1648 [82], this segment of the discussion shall be restricted to the post World War II period. If we begin looking at concessions from 1648 to the contemporary period of international law development, not only would such an exercise be tedious, but it would add no great substance to the central issue of our concern. As well, and more importantly, developing states are now the main grantors of concessions to foreign investors and since most of these states became sovereign states after World War II, [83] it is only reasonable and expedient that this period be the ambit within which concessions and the issue of compensation be discussed.

That developing states should be the predominant grantors of conces-

sions is not unexpected. Their economic survival is dependent on their natural resources and as the economic development of those resources is only attainable through injection of capital, technology, specialized manpower and other input factors that they desparately lack, many have, consequently, had to attract foreign input of those items [84]. Concession agreements have therefore been one of the vehicles through which a private foreign investor, granted the necessary rights by a state, injects his financial, technological and other necessary resources, aimed at developing the economic power latent in the natural resources of the state, into the state" [85].

The fact that investors from developed capitalist states are the chief recipients of concessions from developing states is one key factor which helps define the relationship between the two groups of states. [86] It is by virtue of concession agreements that private foreign investors are able to secure access to raw materials and other natural resources for their home states. Hence, not only is it of economic importance for the foreign investor that the grantor state continues to observe its obligations under a concession agreement, but the economic benefits of adherence by the grantor state flows into the investor"s home state as well. Clearly, possession of natural wealth without the capacity to transform such wealth into consumer goods makes it difficult for developing states to economically develop and fully exploit their resources. On the other hand, being in possession of the means to convert natural resources and raw materials into useable goods because of

their industrial power, not only do developed states (capitalist and socialist) have the capacity to transform natural resources to consumer commodities but their industrial power assures them of "continuing access to large supplies of raw materials and basic commodities, including foods, timber, metals and other minerals and adequate water resources." [87] Hence, for the investor's home state, non violation of concession arrangements by the host state is encouraged because non violation guarantees "a continuous flow of raw materials necessary for (its) indusries." [88] It is obvious therefore that this category of agreements are not only important to the domestic economies of parties to such agreements but they are just as important "to the functioning of the international economy... International Law has recognized this fact in rules which harmonize the reasonable interests of the national sovereign with those of the international society." [89]

Arising out of a relationship between parties to a concession agreement are important legal concerns. The question of compensation is an issue which is fundamental to such agreements. [90] Like all issues of major importance, compensation depends on the negotiated and concluded terms of concession agreements. As parties to an investment relationship arising out of concessions are at liberty to negotiate a compensatory framework that is mutually acceptable to both sides, there exists no single compensation standard to which concessionaires and their grantor states agree to be subjected. A compensation standard so adopted is not generally representative of the grantor state's position on the

compensation issue nor that of the foreign investor's home state. For one reason, it is because the parties possess different and, at times, conflicting interests. A concluded and binding agreement is a documentary evidence of the degree to which each party has consented to compromise its position with respect to issues pertaining to the relationship. Consequently, a compensation framework so adopted would not necessarily be the position supported by one or both parties without the influence of the other. For another reason, the conclusion of a concession agreement is not based exclusively on the domestic law of the grantor state nor that of another state. It is based on "the principle of pacta sunt servanda and other general principles of law to which the parties submit themselves..." [91] As a result, parties to all concession agreements are not restricted to adoption of any particular compensation standard. A look at a number of tribunal decisions regarding specific concession agreements and compensation payment flowing therefrom, in Chapters 5 and 6, easily substantiate these factors.

Endnotes : Chapter Three.

1. S.D. Metzger, International Law, Trade and Finance (1962) at 156-168.
2. R.N. Gardner, "International Measures for Promotion and Protection of Foreign Investment" (1960), 9 J. Pub. L. 176 at 82. Gardner observed that the Charter "did more to affirm the right of underdeveloped countries to interfere with investments than the right of the investors themselves".

3. Ibid.
4. J.A. Kronfol, Protection of Foreign Investment (1972) at 32.
5. See U.N. Economic and Social Council Office Rec., 26th session, Supp. No. 2, at 24 (DOC. E/3102) (1958).
6. Kronfol, op. cit., note 4, at 33.
7. G. Schwarzenberger, "The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Comment" (1960), 9 J. Pub. L. 147.
8. A. Larson, "Recipients' Rights Under an International Investment Code" (1960), 9 J. Pub. L. 172. He is critical of the Abs-Shawcross Draft Convention for its insensitivity to the interests of capital-importing states.
9. See OECD Draft Convention on Protection of Foreign Investment as reprinted in (1962) 2 Int'l. Legal Materials 241.
10. The modified OECD Draft Convention on Protection of Foreign Investment is reprinted in (1968), 7 Int'l. Legal Materials 117.
11. Id. at 127.
12. Refer to note 9, supra, at 249-250.
13. The American Convention on Human Rights is reprinted in (1970) 9 Int'l. Legal Materials 99.
14. The Cartagena Agreement was signed, on May 26, 1969, by Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela while participating in negotiation of the Agreement did not sign. The Agreement is reprinted in (1969) 8 Int'l. Legal Materials 910.
15. The Andean Investment Code as of November 30, 1976 is reprinted in (1977) 16 Int'l. Legal Materials 138. See Declaration 1 of the Code.
16. As cited in S.D. Metzger, "Multilateral Conventions for the Protection of Foreign Investment" (1960), 9 J. Pub. L. 133, at 143.
17. These treaties are discussed and parts thereof cited in F.V.

Garcia-Amador et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974) at 55.

18. Ibid.

19. Refer to Article 4(1) of and the protocol to the West Germany-Malaysia treaty of 1960 re the Promotion and Reciprocal Protection of Investments. The treaty is reprinted in 1 Investment Promotion and Protection Treaties (1960-1974) compiled by ICSID. This treaty series shall hereafter be referred to as ICSID Investment Treaties vol.1 or vol.2 as the case may be.

20. The West Germany-Tanzania treaty of 1965 re the Encouragement and Reciprocal Protection of Investments is reprinted in ICSID Investment Treaties vol.1.

21. The West Germany-Mauritius investment treaty is reprinted in ICSID Investment Treaties vol.1. See Article 3(2) which is of identical language to Article 3(2) of the West Germany-Tanzania treaty.

22. The West Germany-Syria investment treaty is reprinted in ICSID Investment Treaties vol.2 (1975-82).

23. The West Germany-Papua New Guinea investment treaty is reprinted in ICSID Investment Treaties vol.2.

24. See Article 14 of the Basic Law as cited by M. Rheinstein in his letter to Professor B.A. Wortley, October 23, 1957. The letter is reprinted in (1958) 7 Am. J. Comp. L. 86. Its domestic legal requirement of "balancing of the interests of the community, and the parties" in a just manner explains West Germany's position in accepting what appears to be an implied, not express, adoption of the traditional compensation standard.

25. The U.K.-South Korea investment treaty is reprinted in ICSID Investment Treaties vol.2.

26. Over 17 of the 22 bilateral investment treaties, reprinted in ICSID Investment Treaties vol.2, to which U.K. is a contract-

ing party, specifically obligate the parties to satisfy their obligation to pay compensation for nationalization using the traditional standard of prompt, effective and adequate.

27. The Denmark-Indonesia investment treaty is reprinted in ICSID Investment Treaties vol.1. Refer to Article 4(2).

28. The Norway-Indonesia investment treaty of 1969 is reprinted in ICSID Investment Treaties vol.1.

29. The Singapore-Switzerland investment treaty is reprinted in ICSID Investment Treaties vol.1.

30. The U.S.A.-Senegal investment treaty of 1983 is reprinted in ICSID Investment Treaties vol.2.

31. The U.S.A.-Haiti investment treaty of 1983 is reprinted in ICSID Investment Treaties vol.2.

32. The U.S.A.-Zaire investment treaty of 1984 is reprinted in ICSID Investment Treaties Vol.2.

33. The Italy-Malta investment treaty is reprinted in ICSID Investment Treaties vol.1.

34. The Netherlands-South Korea investment treaty is reprinted in ICSID Investment Treaties vol.1. Article V states that:

> "Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:
>
> (a)the measures are taken in the public interest and under due process of law;
>
> (b)the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;
>
> (c)the measures are accompanied by provisions for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected

and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country of which those claimants are nationals and in convertible currency."

35. The Belgo-Luxemburg Economic Union-South Korea investment treaty is reprinted in ICSID Investment Treaties vol.1. Article 5 states that:

"(1)The nationals or legal persons of one Contracting Party may not be deprived, either directly or indirectly, of the property or enjoyment of their investments, goods, rights and interests situated in the territory of the other Contracting Party, unless the following conditions are complied with:

a) the measures are taken in the public interest and by a legal procedure in accordance with international law;

b) they are neither discriminatory nor contrary to a specific engagement;

c) they are accompanied by provisions for the payment of full compensation.

(2)The amount of such compensation shall represent the actual value of the affected goods on the date on which the measure was taken; it shall be paid to the persons entitled thereto and shall be freely transfered without delay."

36. The Netherlands-Egypt investment treaty is reprinted in ICSID Investment Treaties vol.2. Article V states that:

"Neither Contracting Party shall take measures, such as nationalisation, confisca-

tion or sequestration etc., depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

(a)the measures are taken in the public interest and under due process of law;

(b)the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;

(c)the measures are accompanied by provisions for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country of which those claimants are nationals and in the currency of that country."

37. See the "Foreword" by R.R. Baxter, in R. Lillich ed., The Valuation of Nationalized Property in International Law vol.2 (1973) at IX.

38. The Iraq-Kuwait investment treaty is reprinted in ICSID Investment Treaties vol.1.

39. The Singapore-Sri Lanka investment treaty is reprinted in ICSID Investment Treaties vol.2.

40. The Sri Lanka-South Korea investment treaty is reprinted in ICSID Investment Treaties vol.2.

41. The Kuwait-Pakistan investment treaty is reprinted in ICSID Investment Treaties vol.2.

42. Refer to the Constitution of Mauritius, in ICSID Investment Laws of the World vol. 5.

43. See s. 53 of the Constitution of Papua New Guinea.

44. The implications of s. 19 of the Lands Acquisition Act are discussed by P. Eaton, "Melanesian Land Reform: The Plantation Acquisition Scheme" (1980), 8 Melanesian L. J. 134, at 136-142.

45. A. Drucker, "Compensation Treaties Between Communist States" (1961), 10 Int'l. Comp. L. Q. 238.

46. Ibid.

47. The compensation treaty between Czechoslovakia and Romania, signed on August 3, 1960 and subsequently ratified by the parties on March 24, 1961, recognizes the need to pay compensation. See A. Drucker, "Compensation Treaties between Communist States: An Addendum" (1961), 10 Int'l. Comp.L. Q. 904.

48. The U.K.-Romania investment treaty is reprinted in ICSID Investment Treaties vol.2.

49. Refer to Article 4.2 of the Treaty.

50. The Romania-Egypt investment treaty is reprinted in ICSID Investment Treaties vol.2.

51. Refer to Article III. 1 of the Treaty.

52. Refer to note 59, infra.

53. The Romania-China investment treaty is reprinted in ICSID Investment Treaties vol. 2. Article 4 states that :

> "(1)The investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated or subjected to any other measures having a similar effect except for the public interest under a legal procedure and against compensation. Such compensation shall be effectively realizable, freely transferable and be made without undue delay. (2)Upon the request of the interested party, the amount of compensation can be reassessed by a tribunal or other competent

body in the country in which the investment has been made.

(3)If a dispute concerning the amount of compensation between an investor of one Contracting Party and the other Contracting Party in the territory of which the investment has been made, the dispute shall be settled by the two Contracting Parties in accordance with the provisions of Article 9 of the present Agreement, if the investor has made such a request through his Government."

54. The Italy-Romania investment treaty is reprinted in ICSID Investment Treaties vol.2.

55. The Romania-Pakistan investment treaty is reprinted in ICSID Investment Treaties vol.2.

56. The Romania-West Germany investment treaty is reprinted in ICSID Investment Treaties vol.2.

57. The Denmark-Romania investment treaty is reprinted in ICSID Investment Treaties vol.2.

58. See Article 4.1 of the Italy-Romania Treaty.

59. See Article 4(1) of the Romania-Pakistan Treaty.

60. See Article 4(1) of the Denmark-Romania Treaty.

61. See Article 14 of the Basic Laws, supra, note 24.

62. The Sri Lanka-Romania investment treaty of 1981 is reprinted in ICSID Investment Treaties vol.2. See Article 6.1 of the treaty.

63. The Egypt-Yugoslavia investment treaty is reprinted in ICSID Investment Treaties vol.2.

64. See articles 3 and 4 of the Treaty. As well, refer to articles 6 and 7.

65. The West Germany-China investment treaty is reprinted in ICSID Investment Treaties vol.2.

66. The Netherlands-Yugoslavia investment treaty is reprinted in ICSID Investment Treaties vol.2.

67. The Sweden-Yugoslavia investment treaty is reprinted in ICSID Investment Treaties vol.2.

68. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", in D.J. Harris, Cases and Materials on International Law (1979) at 41. Refer as well to C. Parry, The Sources and Evidences of International Law (1965) at 34.

69. T.O. Elias, The Modern Law of Treaties (1974) at 40. Refer as well to A.D. McNair, The Law of Treaties (1961) at 493.

70. R.Y. Jennings, "State Contracts in International Law" (1961), 37 Brit. Y. B. Int'l. L. 156.

71. M. Sornarajah, "The Myth of International Contract Law" (1981), 15 J. World Trade L. 187.

72. Ibid. Also see W.P. Gormley, The Procedural Status of the Individual Before International and Supranational Tribunals (1966) and "The Individual in Public International Law", in F.M. van Asbeck, International Society in Search of a Transnational Legal Order (1976) at 207.

73. C. Parry, "Foreword" to P. Fischer, A Collection of International Concessions and Related Instruments (1976), at xiii. There is no doubt that if it were not for investment treaties that were already in effect, a good number of concession agreements would not have been forthcoming. For example, by way of illustration, the fact that developed capitalist state A concluded an investment treaty with developing state B would encourage investors from state A to negotiate concession arrangements in their area of business interests with state B. Hence, Parry's reference to a concession agreement as "the child and companion" of a treaty is apt.

74. Id., at xvii.

75. Jennings, op.cit. note 70, at 173-179.

76 S.M. Schwebel, "International Protection of Contractual

Agreements" (1959) Am. Int'l. L. Soc'y. Proc. 266 at 267-268.

77. Refer to Fischer, supra, note 73, at xvii.

78. A. Verdross, "Quasi-International Agreements and International Economic Transactions" [1964], Y.B. World Aff. 230.

79. J. Cherian, Investment Contracts and Arbitration (1975) at 16

80. D.N. Smith, and L.T. Wells, "Mineral Agreements in Developing Countries: Structures and Substance" (1975), 69 Am. J. Int'l. L. 560 at 561.

81. Verdross, op.cit., note 78, at 233 and Cherian, loc.cit.

82. Parry, supra note 73.

83. Even in their colonial status, a good number of developing states were already granting concessions to investors from their colonial powers. See S.K.B. Asante, "Restructuring Transnational Mineral Agreements" (1979),73 Am. J. Int'l. L. 335 at 338.

84. A.C. Page, "Transnational Mining Contracts," in N. Horn and C.M. Schmitthoff, The Transnational Law of International Commercial Transactions vol.2, (1982) at 223.

85. Cherian, op.cit., note 79, at 1.

86. T.W. Walde, "Transnational Investment in the Natural Resources Industries" (1979), 11 Law Pol'y. Int'l. Bus. 691 at 692.

87. K.S. Carlston, "International Role of Concession Agreements" (1957-58), 52 NW. U. L. Rev. 618 at 623.

88. Sornarajah, op.cit., note 71, at 188.

89. K.S. Carlston, "Concession Agreements and Nationalization" (1958), 52 Am. J. Int'l. L. 260, at 279.

90. P. Fischer, "Preface" to G. Loibl, Comprehensive Index to a Collection of International Concessions and Related Instruments (1982) at v.

91. Verdross, op.cit., note 78, at 234. Refer as well to Lord McNair, "The General Principles of Law Recognized by Civilized Nations" (1957), 48 Brit. Y. B. Int'l. L. 1.

Chapter 4 : PRACTICE OF STATES.

Not all practice of states constitute customary international law. The creation of a custom of universal international law application is dependent on whether or not "a general practice accepted as law is"[1] evident in the practice of states. In this respect, it is obvious form the preceding chapter that the general practice of states regarding compensation for nationalization of private investment, evidenced by their treaties and agreements with each other and with private investors, is that prompt and effective payment be made. The two conditions, prompt and effective, are unquestionably recognized universally. What remains a universal chaos is the huge problem of attempting to identify a single valuation framework or standard for determining the amount of compensation to be paid.

Before any attempt is made at identifying a compensation standard of universal application, it is important to note that customary international law is of two categories. Consequently, if one restricts oneself to the assumption that any standard other than that which is capable of universal application is outside of international law, one wrongly assumes that customary international law is that which can only be applied universally. Such a position would overlook the fact that regional or local customary law also falls within the confines of international law. The Asylum case [2] and the case concerning Rights of Passage over Indian Territory [3] recognize regional or local customary law as being an in-

tegral part of customary international law as well. In the former case, the International Court of Justice (ICJ) stated clearly that regional customary law is created "in such a manner that it has become binding on the" [4] states in dispute. Proof of such law, according to the court, is ascertainable through "a constant and uniform usage practiced by the states in question..." [5]. In the latter case, India's objection to the creation of local custom between two states was founded on the contention that such custom can only be established through the long and continuing practice of more than two states, but the I.C.J. ruled differently. The court saw no "reason why long continued practice between two states accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two states". [6] It is obvious therefore that if state A has constantly supported the standard of prompt, adequate and effective compensation in its economic interaction with state B and state B has constantly done the same with state A, then any compensation dispute between them would be settled in satisfaction of prompt, effective and adequate.

The question of primary significance to ask when faced with a compensation dispute is whether there exists a binding local or regional compensation framework between the parties. The test to be applied is, creation by "a constant and uniform usage" or a "long continued practice" between the parties in dispute. If, for instance, one of the disputing party is Russia and the other is the U.S.A., then obviously no compensation standard of a regional nature exists. However, if one is

the U.S.A. and the other is Canada, then a regional compensation standard exists and must therefore be applied in settling the dispute. It is only where a regional standard is not identifiable may a standard of universal application be determined and applied. Any determination of universal nature is clearly of secondary consideration. However, in view of the fact that most compensation disputes arise between capital importing states and private foreign investors from the chief exporters of capital with both sides not supporting the same compensation standard, it means that the determination of a universal compensation framework, though secondary, is more important in international law practice than one of regional application.

Whether or not consciously designed to keep pace with the different ideological blocs and interest groups in present international society, there is no denying that international law acceptance of regional customary practice has done just that. In so doing international law has recognized, accepted and accommodated the existence of the different global factions. What has always been difficult to resolve and the subject of extensive speculation is when there is a dispute between two or more states belonging to different global factions. This is the point where compensation for nationalization becomes controversial. For example, where one state is developed capitalist and the other is socialist. Their positions on compensation is as obviously different as night and day. Given their extreme and conflicting positions, how is a compensation dispute between states in such positions settled by virtue

of practice of states? Differently worded, how do we identify a compensation standard of universal applicability?

Difficult as it is, we hope though that the:

(a) decisions of courts and tribunals;

(b) official claims or representations of states; and

(c) negotiations leading to compensation

will help serve two purposes. One, identify regional compensation standards and, two, identify a compensation framework of universal application.

A. Decisions of Courts and Tribunals.

Municipal courts and tribunals have voiced and will continue to voice the legal position of their states on compensation. For this reason their judgments and representations on compensation claims ought to be seen as truly representative of the legal position of their states on the compensation issue. Judicial holdings in developed capitalist jurisdictions have generally been supportive of the requirement that compensation payment be prompt, adequate and effective. The much celebrated case of Anglo Iranian Oil Co. (AIOC) v. Jaffrate (Rose Mary) [7] in rejecting the Iranian Nationalization Law as confiscatory and contrary to international law, upheld the position supported by developed capitalist states by stating that prompt, adequate and effective compen-

sation had to be satisfied. Campbell J., the presiding judge, found Iran to have not satisfied the three conditions of compensation and consequently held that the crude oil found in Rose Mary as remaining the property of AIOC.

In a socialist legal jurisdiction, like that of the Soviet Union for example, treatment of nationalization of private investment would be different. As discussed in the first chapter, private investment is illegal in a legal system as that of Russia. Consequently, where such investment is taken over it is confiscated, not nationalized, and therefore the owner receives no compensation. Obviously, any contention from Eastern Bloc states to the effect that compensation payment for private investment is not a legal requirement rests on the fact that according to their legal jurisprudence such investment is illegal. Illegality therefore is the foundation on which non payment of compensation for a taking of such investment is justified. Hence, any taking of such investment is an act of confiscation. The situation changes when private foreign investment is invited in by virtue of a concession agreement or special legislation which gives to such investment a legal status. Where any such lawful investment is taken, it is nationalized, not confiscated, and the position of non payment of compensation finds little,if any, or no justification.

Caught between these extreme positions on compensation payment are developing states. Their domestic courts and tribunals have been a

source in which we are able to determine where they stand on compensation and if their interaction with each other, with developed capitalist states or socialist states has created any compensation standard of a regional nature. Latin American states, with the Calvo doctrine rooted in their legal jurisprudence, must rank as a group of states that have created and continued to support a criteria for determining compensation payment that is of a regional international law character. Apart from the impact of the Calvo doctrine on compensation in Latin American jurisdictions, other developing state jurisdictions espouse different criteria for determining compensation payment which may or may not enjoy the status of regional customary law. One such standard is based on the book value notion. Let us now return and begin by looking at and discussing the practice of courts and tribunals of developed capitalist states, then socialist states and last but not least that of developing states.

As already stated, using the Rose Mary case as an example, if there is one compensation standard which is perceived by developed capitalist states as the requirement of international customary law, it is the standard of prompt, adequate and effective. Canada's case law shows Canada's support for the standard. For example, in the case of R.V. Thomas Lawson and Sons Ltd. [8] the court ruled that adequate compensation be paid, using the market value notion as basis for determining the amount to be paid. Adequate compensation in the sense of market value, according to the court, is "the amount of money which a purchaser will-

ing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the "property" was adapted and might in reason be applied". [9] Acceptance of market value in R.V. Thomas Lawson guided the court in another Canadian case to accept the purchase offer of $14,000, made by Woyewidka and accepted by Rekush prior to expropriation by an instrument of the state, as the market value of the property which Rekush should receive as compensation payment. [10] It is not surprising therefore that the Ontario Law Reform Commission, in one of its reports, should advance the same requirements for determining compensation payment on the basis of the market value notion. [11]

The application and determination of market value is not as easy as is projected by the Rekush case, especially where a prior offer of purchase has not been communicated to the owner of an investment taken over by the state. Or, where a prior offer has been made but not accepted. In such instances of taking, no single valuation variable is used. In Great Britain, for instance, different variables are used in determining the market value of agricultural land, urban property, movables, business and stock and shares. [12]

Like Canada and Great Britain, the U.S.A. supports the same standard. Its case law is very clear on this. Obviously, prompt, adequate and effective compensation payment is a legal obligation which has long been rooted in the jurisprudence of the country. In the case of Banco

Nacional de Cuba v. Sabbatino [13] before the District Court of the Southern District of New York, for example, it was held that Cuban Nationalization Laws violated international law for three reasons, of which one was that the laws made no mention of the need for Cuba to adequately compensate the victims of its nationalization measures. The United States Foreign Claims Settlement Commission (FCSC), in its ruling on the status of a promise of future payment, stated that such promise must not be illusory nor must it fall below the standard of prompt, adequate and effective [14]. Perhaps, the position of the U.S.A. on compensation is best described by the Court of Appeals in Banco Nacional v. Sabbatino when it stated that:

> "The right to just compensation in return for property taken by the Government is certainly well established in American jurisprudence. It is even protected in the Constitution, Amend. V. Therefore, it is likely that any taking of one's property without provision for adequate compensation is contrary to the public policy of this forum..." [15]

One finds, as well, in U.S.A. case law that depending on the category of property, corporeal or incorporeal [16], its use and location, different variables are used in determining adequate compensation in the sense of the market value of the property taken. In the Standard Oil Company Claim [17], FCSC, in determining adequate compensation of the claimant's rights and interests in a concession area, based its valuation on a downward adjustment of the analytical or engineering method for appraisal that is used by the oil industry in estimating the value of hydrocarbon reserves in the U.S.A. and throughout the world. Using the method, without adjustments, the claimant's rights and interests

were valued at U.S. $ 17,483,522. When downwardly adjusted, however, the figure rested at U.S. $ 12,240,000. As for all underdeveloped concession areas held by Standard Oil, they were rejected as having no predictable value and were held to be of no compensable loss.

In another claim's case, FCSC relied on a different valuation criteria. It accepted the balance sheets (book value) submitted by the claimant company as basis for valuating the nationalized assets of the company [18]. Similarly, FCSC, in determining the fair value of shares affected by nationalization, accepted their purchase price of U.S. $ 1,327,714.59 which was consistent with their book value at the time of nationalization as the compensable value of the shares [19]. A different criteria was used, yet again, in valuating a different property. In the Chalifoux Claim, [20], "the face value of the bonds converted into dollars at the rate of exchange in effect at the date of repudiation" [21] was relied on. However, where "the bonds bore a guaranteed exchange rate", FCSC held that the claimant be paid the face value of the bonds converted into dollars at the guaranteed rate of exchange, not the prevailing rate when the bonds were repudiated. [22] On the other hand, where a claim for compensation is made many years after nationalization, more than one valuation variable is relied on. For example, forty years had elapsed before the Division World Missions of the Board of Missions of the Methodist Church lodged its claim for compensation payment. [23] When determining compensation, FCSC considered the "purchase prices, age and condition of the properties, appraisals, and values determined for

similar types of property in the same areas." [24]

Against the background of adequate compensation, in the sense of the market value of the nationalized property where there is a prior offer of purchase followed by an acceptance to sell or where there is no such offer and acceptance and therefore relying on different valuation variables to determine market value, are losses brought about by nationalization, directly or indirectly, which are not compensable. Once again, FCSC has been very instrumental in helping develop this area. Generally, it is recognized that creditors of a nationalized investment do not have an enforceable claim for compensation against the nationalizing state. In the European Mortgage Series B. Corporation Claim, [25], for instance, FCSC held that where a claim for compensation is a creditor claim against a state, in this case Hungary, that has nationalized the debtor's investment, such a claim is not enforceable at international law. This is to say, international law does not require a state to compensate a creditor upon its nationalization of the debtor's investment.

French case law espouses a contrary position. According to the Court of Appeals of Lyons, in Amsellem Partners v. Banque Nationale pour le Commerce et l'Industrie (Afrique) [26], where the state nationalizes an investment, it acquires the assets as well as the liabilities of the investment. Consequently, payment of compensation to a divested owner is based on the net assets of the owner after deduction of liabilities.

Creditors of the nationalized owner cease to be so. They become creditors of the state. The same is not true, however, where property is acquired by the state by reason of the owner's abandonment thereof. In this situation, the Court of Appeal of Paris held that any liability pertaining to the abandoned property is not succeeded by the state nor is the state required to compensate the owner. [27] Although appearing, at first glance, to be a great departure from the generally accepted position that creditor claims are not compensable, the French position and the exceptions to the generally accepted position provided by FCSC, infra, do complement each other.

According to FCSC, "if it can be shown that the loss of a debt claim for which indemnity is sought is in a direct causal connection with the action of a foreign Government, compensation may be awarded." [28] In this vein, where a bank depositor, as in the Tanglefoot Company Claim [29], Eagle Pencil Company Claim [30] and Guaranty Trust Company of New York Claim [31], falls victim to an act of nationalization, he is entitled to receipt of compensation based on his principal amount plus interest. In the Tanglefoot Company Claim, for example, the company, a depositor with the National City Bank of New York, fell victim to the Russian Nationalization Decree of December 27,1917. The National City Bank was precluded, by virtue of the said decree from withdrawing its assets in Russian banks. Consequently, the claimant company could not withdraw its deposits from the National City Bank because the bank's obligation to make payments had been frustrated by the nationalization measures of

1917. FCSC held that the causal effect of the Russian decree had amounted to a taking of the claimant's deposits and therefore the company had suffered a compensable loss equal to the principal amount of its deposits plus interest at the rate of six percent. The First National City Bank of New York, on the other hand and consistent with the Tanglefoot decision, had its compensation claim for losses suffered by its depositors rejected. [32] FCSC stated clearly, and rightly so, that it was the owners of the deposit, not the claimant bank, that had been victimized by the Russian nationalization measures.

Apart from the generally accepted rule that a creditor claim is non compensable except where a direct link is established between the creditor's loss and the nationalization measures of the state, other non compensable areas have also been identified. One such area, as already stated, involves undeveloped concession areas. FCSC has held such areas as having no predictable value and therefore are of no compensable loss [33]. As well, where rented apartment buildings are nationalized, as was the case in the claims by Turner [34] and Hartmann [35], loss of rent is not to be included in compensation payment. Another category of non compensable loss involves currency devaluation by virtue of the host state's monetary laws. Where devaluation of a state's currency is brought about by its foreign exchange laws, as in the Malan Claim [36], it is accepted as "an exercise of sovereign authority which does not give rise to a claim against that nation." [37] Consequently, FCSC held,in the Furst Claim [38], that any depreciation of bank deposits in a foreign state due

to that state's monetary reform law does not constitute an act of nationalization nor is it a compensable loss at international law. However, if, as was held by the French Coneil d'Etat in Re Keim [39], the real intent of the monetary reform, devaluation, is to dispossess, then a claim for compensation is valid. We should note though that the decision of the Coneil d'Etat was based on the Franco-Roumanian agreement of 1959 and, thus the exceptional nature of the decision.

Just as different valuation standards have been relied on in satisfaction of adequate compensation and market value, so have more than one variable been espoused as standards that satisfy, prompt and effective, the two remaining conditions. Like adequate, prompt and effective are descriptive and are of general import. Their generality and vagueness make them, like adequate, not susceptible of any rigid definition. Let us first look at the condition that payment be prompt. If there is anything clear about prompt, it is the fact that it concerns the time of payment. The old and outdated view, according to Dawson and Weston, anticipated prior or immediate payment of compensation "whether the deprivation be limited or extensive..." [40]. These requirements, prior and immediate payment, have been seriously challenged by case law and must now be regarded as obsolete. [41]

In the Norwegian Claims case, the court construed the requirement of prompt compensation to mean compensation in due time. [42] The tribunal, in settling the dispute between Germany and Rumania in 1928, was of the

opinion that "payment shall be made for the...property as quickly as possible..." [43] Providing yet another different construction of the term in the Norwegian Ship Owners claim, the court specified that payment should have been made at the latest day of the effective taking. [44] The three different constructions:

(i) payment in due time;

(ii) payment as soon as possible; and

(iii) payment at the latest day of the effective taking

not only lend no support for immediate or prior payment, they also make one fact clear. In concert, they lead one to the obvious conclusion that the requirement of promptness is one, not of rigidity but of flexibility. Its construction and application is subject therefore to circumstances peculiar to each individual case of nationalization. No where is this more obvious than in section 189 of the Restatement (Second) Foreign Relations Law of the United States which defines prompt compensation to "mean payment as soon as is reasonable under the circumstances in the light of the international justice." [45]

Recently, most nationalization or expropriation measures have been undertaken by developing states in pursuance of economic and social reforms. Their chronic capital shortage renders it impossible for these states to be subjected to immediate or prior compensation payment. A flexible interpretation of prompt, in light of their capital shortage situation, appears to be the only practical and reasonable solution. A

rigid application of prompt would not only be impractical, but it "would permit comprehensive reforms only at the price of financial crisis." [46] These consequences are avoidable pursuant to the observations of the International Law Commission:

> "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." [47]

With these factors in mind, the United Kingdom's determination of prompt compensation as presented in the Anglo-Iranian oil dispute appears reasonable, the U.K. advanced the position that prompt compensation would be satisfied if, first, the total quantum to be paid is promptly fixed. Second, allowance be made for interests on any late payments and third, the deprived property owner be given guarantees that satisfactorily enforce the making of deferred payments. Such guarantees would allow the deprived private investor, if he so desires, to "raise the full sum at once on the security of the future payment." [48] The U.K. formulae is not only fair and reasonable to the taking party, but the victim as well. Consistent thereto are the observations made by Dawson and Weston, who point to the fact that "deferred payment, with interest...is widely accepted as satisfactory in extensive wealth deprivations." [49] Acceptance of deferred or late payments with interest is also substantiated by two awards [50], wherein FCSC stated that "it was a settle principle of international law that interest was a proper ele-

ment of compensation and that equity and justice also required the payment of interest" [51]. As well, FCSC added that it "should run from the date when the claim arose, namely the date of the loss of property, until the date of payment ..." [52].

While prompt concerns the time within which payment ought to be made, effective compensation refers to the form payment should be made in. Generally, the form of payment must be capable of allowing the deprived party, if he desires, to reinvest it in the nationalizing state or elsewhere. [53] In the Anglo-Iranian oil dispute, the U.K. described effective compensation in the following:

> "The recipient of the compensation 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 purpose as he wishes.
> Money currency which is 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 must therefore be freely transferable from the country paying it and so far as the country's restrictions are concerned, convertible into other currencies." [54]

Apart from controlled or non-convertible currency, payment in bonds would likewise be considered as an ineffective measure. Its (bonds) ineffectiveness lies in the fact that by reason of subsequent devaluation, the value of compensation agreed on would be reduced, leaving the deprived private investor open to receipt of payment that is less in real terms. [55] Controlled or non-convertible currency, on the other hand, fails as an effective medium of payment because it is subject to severe under-evaluation "on the free international money market." [56]

Like payment in bonds, the value of compensation would be reduced, making the investor incur a loss in the payment. Depending on the amount to be paid, such a loss may run into thousands or millions of dollars.

Switzerland, first to avoid these forms of payments, entered into bilateral treaties with those states that nationalized Swiss owned private investments. "The arrangements", according to Doman, "contemplate compensation of Swiss claims in Swiss francs by earmarking a part of the export surplus of the nationalizing state in its bilateral commerce with Switzerland. Switzerland accepted deferred compensation for its nationals after obtaining a commitment from several nationalizing countries (for example, Czechoslovakia and Yugoslavia) to make payment in hard currency, i.e., Swiss francs." [57] France followed suit by securing similar arrangements. [58]

Payment in hard, free and convertible currency, while ideally acceptable as an effective form of payment, finds no comfort even among developed states. Canada, as pointed out by Dawson and Weston, "stated that if it were to take the property of American investors, compensation in United States dollars would not necessarily be forthcoming, nor did Canada agree that any local currency would be sufficient." [59] Treaties of friendship, commerce and navigation, concluded by the U.S.A. with West Germany and Japan make no mention of "an unqualified commitment to pay compensation, while the Japanese treaty specifies 'reasonable'

transfer of compensation subject to whatever exchange controls may be necessary to assure imports of goods and services essential to the welfare of the Japanese people". [60] Even FCSC has gone as far as stating, in the Garrow Claim, that where payment is adequate and paid in the taking state's currency, the condition of effective compensation is satisfied [61]. While there exists no specific form of payment generally accepted as constituting effective compensation, it is submitted that by general consensus, the payment in whatever form must be such that the derived investor is able to use it. [62] Hence, where possible, preference is given to payment in the investor's home currency. If this is impossible, then, it must be made in a form that is negotiable and transferable. Beyond this, however, effective compensation remains a notion of practical uncertainty. [63]

Acceptance of prompt, adequate and effective as being the only valid and enforceable compensation standard led two domestic courts: one in the Rose Mary case [64] and the other in Bernsetin v. van Heyghen Freres [65] to hold that a taking of foreign property without provision for payment of such compensation is outside of international law. Any such taking therefore does not confer good title to the nationalizing state. These cases had, however, up till August 1959, been the only cases espousing this view [66]. As much as renowned writers like Seidl-Hohenveldern would like domestic court practice to pursue the path of the two cases, Seidl-Hohenveldern was convinced nonetheless that, given the present structure of the international community (developed

capitalist, socialist and developing states) any decision in support of Bernsetin and the Rose Mary would not be respected by all states nor would it discourage other states from pursuing similar or indentical takings. [67] Evidence of this is already obvious in the Western Bloc countries where their domestic courts have rejected the reasonings of Campbell J. in the Rose Mary case [68].

While agreeing with Campbell J.'s decision, Upjohn J. in In re Claim by Helbert Wagg and Co. Ltd. [69] rejected his proposition that the domestic legislation of a state which does not provide for prompt, adequate and effective compensation is confiscatory, is applicable only to the nationals of that state, not foreign nationals therein, because such legislation is contrary to international law. After a careful review of British cases, Upjohn J. concurred with Vaisey J.'s decision in In re Banque Des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v. The Liquidator. [70] Campbell J.'s proposition was based on general principles espoused in Luther v. Sagor [71] and Princess Paley Olga v. Weisz [72], but as pointed out by Upjohn J. these cases "laid down principles of general application not limited to the nationals of the confiscating state". [73] Further evidence of this is seen in the following words:

> "Vaisey J. expressed the view that the general principle was not limited to nationals of the confiscating State. I respectfully agree with him, for it seems to me that on this question nationality must be irrelevant. If the principle be true in respect of a State in relation to its own nationals, it must surely be conceded in relation to those persons who, though not subjects of the State, nevertheless bring their movables within

> its jurisdiction for business or private reasons or for the like reasons enter into contracts governed by the law of the State, and in general enjoy the same benefits and protection and are subject to the same disadvantages and disabilities as subjects of the State." [74]

Adding further, Upjohn J. stated the following:

> "In my judgment the true limits of the principle that the courts of this country will afford recognition to legislation of foreign States in so far as it affects title to movables in that State at the time of the legislation or contracts governed by the law, or in the scarcely less difficult considerations of policy as understood in these courts. Ultimately I believe the latter is the governing consideration. But whatever be the true view, the authorities I have reviewed do show that these courts have not on either ground recognized any principle that confiscation without adequate compensation is per se a ground for refusing recognition to foreign legislation. That view is further supported by the authorities on exchange control legislation which I must now consider". [75]

Clearly, Upjohn J. while fully aware that any inferior compensation framework is contrary to the British support for prompt, adequate and effective compensation, conceded nonetheless by reason of British case law that the legislative creation and enforcement of an inferior standard by a foreign state is not outside of international law nor is it ineffective and inapplicable to British subjects in that state.

Support for the position taken in the Helbert Wagg case, against the Rose Mary and Bernsetin cases, is found in two Italian cases, a Japanese case and a West German one. The dispute between the Anglo-Iranian Oil Company Ltd. (AIOC) and S.U.P.O.R. Company [76], before the Court of Venice, resulted in rejection of AIOC's claim to ownership of crude oil, exported from its Iranian concession areas, in S.U.P.O.R.'s possession.

The Italian court stated that although the Iranian Nationalization Law of 1951-52 made no specific mention of the amount to be paid nor did the law require prompt payment, it was in conformity with Italian public order and international law . The court was satisfied that Iran's obvious willingness to pay compensation was a real commitment, not an illusion, as evidenced by the concrete measures taken to settle compensation payment. On appeal to the Civil Court of Rome, AIOC's claim was again rejected. [77] Again the court stated that Iran's nationalization measures were not contrary to any generally accepted principle of international law nor were they inconsistent with international public policy [78]. The measures were said to have been pursued in accordance with the rule of law in Iran and motivated by "reasons of the public interest in Iran and not for motives of persecution or confiscation or for political or discriminatory motives, and... they recognize the right of the expropriated foreign nationals to compensation." [79]

When AIOC again claimed ownership of crude oil from its Iranian concession areas before the High Court of Tokyo, its claim was just as unsuccessful. [80] Not only did the court hold the Iranian Nationalization Law to be valid but the law was also accepted as expressly stating Iran's commitment to compensate the British oil company for its rights and interests in accordance with the compensation framework described therein. The fact that compensation payment had yet to be made or that the law made no specific mention of the "amount, manner or time of payment of compensation" [81] were immaterial considerations because of the

"complexity and diversity of the interests involved"[82] which make it difficult to determine and make prompt payment. What was of material importance was that Iran had taken concrete steps toward making payment pending negotiations between itself, AIOC and its home state[83]. Again, in N.V. Verenigde v. Deutsch-Indonesische[84], the Court of Appeal of Bremen, in affirmation of the decision of its District Court, similarly found:

> "(i) that there was no generally recognized rule of international law which required the Court to treat as null and void and thus to refuse recognition to a foreign legislative enactment which was alleged to be contrary to international law;
> (ii) that accordingly, from the point of view of international law, Act No. 86 and the expropriation of the plaintiffs based on that Act must be recognized and given effect in Germany;
> (iii) ...
> (iv) that, as far as concerned the alleged failure of the Indonesian Government to pay compensation, the plaintiffs had failed to prove that the Indonesian Government was unwilling to pay such compensation, and in fact Act No. 86 itself provided for payment of compensation." [85]

In rejecting prompt, adequate and effective as the only valid standard of compensation under international law, the cases, from Helbert Wagg's case to Verenigde v. Deutsch-Indonesische, clearly espouse the validity of any inferior compensation standard subject to the condition that any such standard is consistent with the rule of law in the nationalizing state and international law. As well, the cases reject any idea that the standard of prompt, adequate and effective is one of universal customary international law. While it is accepted that prompt, adequate

and effective compensation is not the only valid standard in international law, issue is taken with the validity of any inferior standard in international law. The test for determining validity under international law should not rest on whether or not a standard is consistent with the rule of law in the nationalizing state. Instead, validity should be based on whether or not a standard has developed into a regional customary law by virtue of its long continued usage by the parties in dispute, i.e. - the nationalizing state and the victim's home state. If such a standard exists, it should be used in determining compensation payment, if none exists, recourse must be given to a standard with universal flavor.

There is no doubt that prompt, adequate and effective, being imbedded in the jurisprudence of Western Bloc countries, is a valid international law standard of a regional nature. Consequently, if a Canadian subject's investment were to be nationalized by the U.S.A., Great Britain or other Western Bloc states, compensation payment thereto would be satisfied on the basis of prompt, adequate and effective. The application of an inferior compensation standard would be of no effect in international law. Similarly, the contention by Eastern Bloc states that compensation payment is not a requirement of international law must be restricted in its application among those states. Another legal framework that is of a regional international law character, now rooted in the jurisprudence of Latin American states, is based on the Calvo doctrine. Its regional status in international law therefore restricts

its validity and application to and between its adherents. As well, another compensation framework, used by developed capitalist states to satisfy their requirement of adequate compensation and espoused strongly by a number of developing states as the only legitimate valuation criteria for determining compensation is based on the book value of a nationalized investment. Before making any judgmental representation on whether or not it is of a universal or regional character, or neither, let us first look at the two concepts, the Calvo doctrine and book value, respectively.

The Calvo standard, better known as the Calvo doctrine or clause and first espoused by Carlos Calvo of Argentina in 1868, emerged during the period when Latin American states felt their domestic economies were being subjected to extensive exploitation and abuse by North American and European investors. [86] It became a device for resistance against economic imperialism from these two regions by preventing their investors from avoiding domestic tribunals and seeking diplomatic support for their claims. [87] Founded on two nationalistic themes, "the doctrine," first, "insists on the strict abstention by other nations in what is held to be the sovereign and exclusive responsibility of the host state to adjudicate rights in respect of resources or conduct within their borders and compensation for their public takings" and second, it "argues for the subjection of foreigners to laws and judicial regimes of countries in which they are found or invest." [88] This legal nationalistic stand, now firmly cemented in Latin American ideology, has matured

into a basic principle found in the jurisprudence of that region. [89]

Examples of the doctrine's adoption are to be found in the domestic laws and investment agreements of its adherents. The Peruvian Constitution of 1933, in Article 17, provides that: "Mercantile companies, national or foreign, are subject, without restrictions, to the laws of the Republic. In every State contract with foreigners or in the concessions in the latter's favor, it must be expressly stated that they must submit to the laws and tribunals of the Republic and renounce all diplomatic claims." [90] Presenting another version of the doctrine, the Venezuelan Constitution states that: "Aliens in Venezuela have, without prejudice to what is provided in international conventions, the duties and rights that this Constitution and the laws grant to them, but neither the one nor the other may be greater than those of Venezuelans." [91] Similarly, the Andean Foreign Investment Code, in Article 50, requires that: "Member countries shall not grant to foreign investors any treatment more favorable than that granted to national investors." [92]

From these samples of the doctrine's espousal arise five common provisions that Wisely refers to as: "(i) submission to local jurisdiction; (ii) application of local law; (iii) assimilation of foreigners for purposes of local contractual arrangements; (iv) waiver of diplomatic protection by the foreigner's home state; and (v) surrender of rights under international law." [93] Thus, determination of compensation for the nationalized property of a private foreign investor falls within the

exclusive jurisdiction of the taking state's tribunals and the dictates of its laws. Depending therefore on the compensatory standard as provided in the taking state's applicable laws, the amount of payment expected by a deprived investor may range from no compensation to prompt, adequate and effective compensation.

Rejection of the Calvo requirements by the chief exporters of private investment rests on a number of arguments, of which: (i) foreign investors would be left at the mercy of their host state and they would in consequence thereof be open to treatment below minimum acceptable standards at international law; (ii) without the diplomatic protection of their home state, foreign investors would be left open and vulnerable to indiscriminate abuse by their host state; and (iii) the doctrine, in nationalization, expropriation and requisition disputes, makes a deprived owner susceptible to receipt of compensation payment way below what he would otherwise be entitled to under international law. Hence, instead of subjection to an international law standard of compensation payment, applied uniformly throughout the globe, investors would find themselves in a world of different compensatory standards. So much so that deprived private foreign investors may be required by their taking state to compensate it for its loss of profits suffered through tax avoidance and transfer pricing schemes instead of the common practice of receiving payment from the state. Beyond these legal arguments arises the economic concern that the Calvo doctrine only helps to create an investment climate of uncertainty and therefore unattractive to foreign

investment. Even where an adherent of Calvo, in its present domestic law, guarantees protection comparable to international law requirements that state cannot, with absolute certainty, guarantee that the same standard of protection will continue to prevail over succeeding governments. International acceptance of Calvo would lead to a great reduction of private capital and technological inflow to developing states from their client exporters. But the fact that foreign investors have continued to invest in Latin America, notwithstanding the Calvo doctrine, lends less credibility to concerns over its hindrance of foreign capital and technological inflow.

Seen from the perspective of its adherents, however, the Calvo standard allows them to exercise their sovereign rights without compromising them with outside pressures. The Calvo standard, in respect of nationalization of private foreign property, allows a state to take over such property, without being restricted to do so by having to compensate victims of nationalization according to other regional international law requirements. Without subjection to such international law requirements and in the absence of outside pressure, a state can pass appropriate laws, taking into consideration its capital capacity and upon nationalization of a foreigner's property pay compensation accordingly. As compensation payment would be determined in line with the taking state's capacity to pay, that state avoids financial disaster than if it were to pay an amount beyond its capacity. The standard would therefore allow developing states to pursue massive economic and social reforms.

Application of the Calvo standard, beyond theoretical arguments, has been less troublesome. It is a standard which is accepted and enforced between Latin American states themselves. States that reject the standard "have no cause to dispute it unless they consider that an injustice has been perpetuated on one of their nationals." [94] But denial of justice, although an exception to Calvo, is, however, a problematic concept at international law. Early attempts to identify denial of justice standards concluded "that foreigners were entitled to the same procedural and substantive safeguards as local nationals..." [95] In this context, the denial of justice concept adds further support for Calvo instead of being an exception thereto. [96] Nonetheless, outside of Latin America, the Calvo doctrine finds no recognition as a requirement of international law nor have its adherents succeeded in having it embodied in treaties with states outside of their region.

Although found in the practice of developed capitalist and developing states alike, the book value criteria has been applied differently. For developed capitalist states valuation based on book value must be such that it represents the market value of the nationalized investment. In order to achieve this, adjustments to an investment's written down book value become necessary. This position is, however, challenged by developing states in Latin America, the Caribbean, Africa and the Middle East, who argue that usage of the written down book value of an investment is the only legitimate method of determining compensation payment

for nationalized investments. In Latin America, legislation and government decrees have on many occasions made specific reference to adoption of book value as basis for determining the amount of compensation to be paid to a deprived foreign investor. [97] One such example is the statement on acquisition of two North American mining corporations which the President of Chile released in 1969. President Frei stated inter alia that:

> "The purchase price of 51 percent will correspond to the book value of both companies, as set by the Copper Corporation and the Internal Revenue Department...The book value of 31 December 1968 was approximately 197 million dollars and that will be updated to 31 December of this year." [98]

In its negotiations with Alcan (Canadian parent corporation) for majority participation in Demba (Guyanese subsidiary of Alcan), the Guyanese government initially proposed that valuation for Alcan's loss in Demba be based on "the written down book value for income tax purposes on 31 December 1969, with additions of value during 1970 other than by revaluations and reappraisals." [99] Subscribing to adequate compensation, however, Alcan valued its loss at U.S. $ 85 million. [100] Further negotiations led the parties to settle for U.S.$ 53,798,041 on 14 July 1971. [101] A settlement higher than written down book value yet lower than adequate compensation. In obtaining a 51 percent holding in each of two foreign owned mining operations in 1969, Zambia, using the book value standard, paid U.S. $ 300 million. [102]

The Yamani Participation Agreement as concluded by Saudi Arabia's Oil

Minister with foreign oil corporations in December 1972, though short lived, provided for a compensation framework that preferred adjusted book value over written down book value. [103] Although the adjusted book value framework makes the foreign oil investors susceptible to receipt of compensation payments lower than adequate compensation, it was nevertheless rejected by Iran and Libya as being four times more expensive for the taking state than written down book value. [104] Consequently, Libya, one of the Middle Eastern states that refused ratification of the Yamani Agreement, pursued its own nationalization program using written down book value as basis for determining compensation payment. [105]

Support for the written down book value standard by those developing states that have adhered to and espoused the standard in practice is not difficult to reason. Just as prompt, adequate and effective compensation serves to safeguard the interests of developed capitalist states and the institution of private property, peculiar thereto, the written down book value standard serves the interests of those developing states from having to pay enormous sums as compensation. Furthermore, while compensation payment based on other standards lower than the traditional standard are difficult to justify, written down book value payments are easier to justify, if not legally, then, economically. Another attractive aspect of book value to those that have used it is that valuation based on written down figures is easy to determine. Ovens points this out in these words:

> "Unadjusted or indicated book value as portrayed in a balance sheet at or close to valuation date is a simple matter, and it is usually easy to determine the excess of assets over liabilities and the net worth of the business in terms of accounting balances." [106]

How accurate valuation based on the written down book value standard is and how much a taking state pays as compensation are subject to the written down amounts given as value for a taken investment's assets and liabilities. Depending on those amounts, book value:

> "is increased by an increase in assets;
> is decreased by a decrease in assets;
> is decreased by an increase in liabilities;
> is increased by a decrease in liabilities."

As well:

> "If assets are overstated, then book value is greater than the fair [market] value of a company.
> If assets are understated, then book value is less than the fair [market] value of a company.
> If liabilities are overstated, then book value is less than the fair [market] value of a company.
> If liabilities are understated, then book value is greater than the fair [market] value of a company." [107]

Compensation payment, calculated through application of book value has generally been lower than payment based on market value because "under conditions of uncertainty," usually so in developing economies, foreign investors "have employed the 'modifying convention of conservatism'." [108] As errors in over stating the value of assets or under stating the value of "liabilities are more dangerous to the owners and creditors of a business than errors in the opposite direction," an investor in conditions of uncertainty will tend to understate the value of his investment's assets and overstate the value of its liabilities. [109] Consequently, foreign investors that use this accounting practice fall

victim to its usage when their investments are nationalized and book value is adopted to determine the amount of compensation therefor.

One chief contention against usage of written down book value is that if unadjusted it takes no account of future profits (calculated from profits an investment has generated prior to its taking) and the value of intangible assets (patents, copyrights, research and development, trademarks and good will). [110] If the notion of compensation for loss is to return a deprived investor to the position he enjoyed prior to deprivation of his investment, then, written down book value should be adjusted to include inter alia future profits and the value of intangible assets. [111] Applied in this direction, valuation based on adjusted book value would correspond to compensation payments equal to or near the market value mark. [112] Alternatively, where a nationalized investment has a poor recoverability rate because of its inability to generate profit, written down book value is adjusted differently. For example, in determining the compensation award for Revere Copper and Brass Inc. (RCBI), the American Arbitration Association (AAA) adjusted the retained earnings and losses of RCBI against the amount invested to arrive at the market value of RCBI [113]. This is how AAA's valuation [114] looked:

"Net investment per 6/30/74 Balance Sheet	$64,131,000.00
less write-down of Machinery Equipment and other productive facilities	$46,328,856.00
	$17,802,144.00
Less disallowance of tax benefits and imputation of interest charges	$12,434,000.00
	$ 4,237,000.00

	$16,671,000.00
Net investment at 6/30/74 after adjustments	$ 1,131,144.00

Had this been the trend in the practice of developing states as well, adjusted book value would have enjoyed a broader application in international law. So much so, that it would become a valuation criteria of universal application in international law.

As it is, however, there is no consensus among developed capitalist and developing states on how book value should be applied. Obviously, developed capitalist states prefer adjusted book value because it is consistent with their notion of compensation payment and their strong adherence to the sanctity of property. [115] The restricted preference of developing states to written down amounts in a corporation's books less taxes, royalties and other claims due to the host state is just as understandable.

Justification for written down book value rests on the argument that as amounts (assigned as value of assets and liabilities by the owner) on which tax and royalty payments to the host state are determined, it is reasonable that the same unadjusted values be used in determining the amount of compensation to be made. In light of the apparent positions taken by developed capitalist and developing states, on usage of the book value criteria, emerges a point where both sides concur which must be accepted as being of universal application in international law. It

is apparent that where the recoverability rate of a nationalized investment is very poor and therefore incapacitating it from generating profit, both sides do concur on the application of a downward adjustment of the investment's written down book value. This is evidenced by the compensation award of Revere Copper and Brass, Inc. and the position of developing states regarding deduction of taxes, royalties and other claims due to the state from the written down book value of the nationalized investment. Beyond this, however, where the nationalized investment has recovered its capital cost and is generating profit, there is no consensus ad idem between the two sides on how book value is to be applied. Consequently, in this situation book value breaks down into two regional standards. One, based on upward adjustments of book value, is restricted in application to and between its adherents. The other, based on the written down book value, is also restricted in its international law application to those who support it.

Several important observations did surface from the domestic and regional practice of states at this point. We saw the relegation of adequate compensation from its traditional international law status of universality to one of regionality. As well, we observed that as much as the Latin Americans would like to see Calvo enjoy a universal international law status, it in fact is only of regional international law application in compensation disputes between a Calvo adherent host state and a private foreign investor whose home state is also a Calvo disciple. The Eastern Bloc states, who generally argue that compensation

is not a condition of nationalization, support an extreme position that enjoys no legal justification where a nationalized private foreign investment enjoys the status of a legally constituted going concern prior to its take over. For this reason their position fails to have any relevance to this study because here we are concerned about compensating lawfully constituted private foreign business ventures, not illegal ones. Book value, the other compensation standard which is supported by developing and developed capitalist states for different reasons, is also of regional international law application. Most developing states that support the standard prefer application of written down book value figures while developed capitalist states prefer an upward or downward adjustment of the figures depending on an investment's ability or disability to generate profit.

In light of these different positions on compensation, as we shall also see in the official claims or representations of states, infra, and their portrayal of a state of shambles, the determination of a compensation framework of universal application appears impossible. Nevertheless, instead of saying the compensation issue is an international chaos and accepting it as such, this seemingly chaotic situation is itself a helpful guide that aids the determination of a compensation framework of universality. The different standards and the strong and continuing support of their adherents suggest in no uncertain terms, as was apparent in the preceding chapter, that the formulation of a universally accepted compensation framework ought to be based on the notion of

neutrality. Such a compensation framework must be one that acknowledges the sovereign rights of states and allows for the free flow of capital and technology. In short, it must be one that satisfies the principle of neutrality of international law as we shall see in the forthcoming chapters.

B. Official Claims or Representations of States.

Difficulty arises in this area of the discussion for the single reason that diplomatic correspondence and other official state representations on compensation are scarce. Consequently, it is impossible to develop any universal picture on how the policymakers of all or most states perceive the compensation issue and to determine whether or not their perceptions concur with the position of their municipal legal systems. Notwithstanding this dilemma, the available official representations of states, few as they are, if understood in the context of the regions they belong would best serve this chapter.

If there is one state whose official position on compensation has been made on more than a few occasions and consistently espoused, it is the U.S.A. This is explained by the U.S.A.'s strong adherence to the sanctity of property [116] which has come into direct conflict with acts of nationalization visited upon its nationals, more than any other state's, throughout the years. Just as its position on property has remained unchanged over the years, so has its official position on com-

pensation payment. This is evident from the days of Secretary of State Hull up to the present. When Mexico nationalized U.S. owned agrarian and oil properties from 1915 to 1940, diplomatic notes on compensation were exchanged between the U.S.A. and Mexico. The U.S.A.'s position in the dispute was well documented by Secretary of State Hull's note, dated July 21, 1938, which reads in part:

> "The taking of property without compensation is not expropriation. It is no less confiscation because there may be no expressed intent to pay at sometime in the future. If it were permissible for a government to take the property of the citizens of other countries and pay for it as and when in the judgment of the government, its economic circumstances and its local legislation may perhaps permit, the safeguard which the constitution of most countries and established international law have sought to establish would be illusory. Governments would be free to take property far beyond their ability or willingness to pay, and the owners thereof would be without recourse." [117]

When Sri Lanka took over U.S. owned investments without paying prompt, adequate and effective compensation, the U.S.A. retaliated by suspending aid to Sri Lanka. The U.S. Government statement on the suspension was to the effect that:

> "The Government of the United States... did not then and does not now contest the right of Ceylon (Sri Lanka), as a sovereign state to nationalize private property. However, when such property belongs to a citizen or a company of a foreign country, the payment of prompt, adequate and effective compensation is required by international law." [118]

Again, when Cuba nationalized over U.S. $ 1 billion worth of U.S.owned property, the U.S. presidential rejection of Cuba's nationalization measures was strong and consistent with past official representations.[119] The same position remained unchanged in the wake of

Chilean nationalization of its (U.S.) nationals' investment. Chile, in determining compensation payment based on written down book value less excess profits (calculated and applied retroactively) and other deductions, drew this response from the Secretary of State:

> "The Controller General of Chile announced his findings on October 11 that no compensation would be paid for the U.S. copper mining investments expropriated on July 16 except for modest amounts in the cases of two smaller properties.
>
> The United States Government is deeply disappointed and disturbed at this serious departure from accepted standards of international law. Under established principles of international law, the expropriation must be accompanied by reasonable provision for payment of just compensation. The United States had made clear to the Government of Chile its hope that a solution could be found on a reasonable and pragmatic basis consistent with international law.
>
> It appears that the major factor in the Controller General's decision with respect to the larger producers was the determination on September 28 of alleged "excess profits". The unprecedented retroactive application of the excess profits concept, which was not obligatory under the expropriation legislation adopted by the Chilean Congress, is particularly disquieting. The U.S. companies which are affected by this determination of the Chilean Government earned their profits in Chile in accordance with Chilean law and under specific contractual agreements made directly with the Government of Chile. The excess profits deductions punish the companies today for acts that were legal and approved by the Government of Chile at the time. No claim is being made that these excess profits deductions are based on violations of Chilean law. This retroactive determination has serious implications for the rule of law." [120]

Perhaps the U.S.A.'s official policy position is best described by two policy statements: one issued on January 19, 1972 [121] and the other on December 30, 1975 [122] The more recent policy statement of the two stated that:

> "There have been significant developments during the past year

> concerning foreign investments by U.S. private firms. The Secretary, at the 7th Special Session on September 1 and at CIEC December 16, emphasized the U.S. belief that foreign private investment can make a very substantial contribution to economic development. There have also been a number of actual or contemplated nationalizations involving U.S. firms, and ensuing settlement negotiations. In these circumstances, the Department wishes to reiterate pertinent U.S. policy.
>
> The President of the United States, in January 1972, drew attention to the importance which the United States attaches to respect for the property rights of its nationals. He stated that the policy of the United States concerning expropriatory acts includes the position that: "Under international law, the United States has a right to expect:
>
> - That any taking of American private property will be nondiscriminatory;
>
> - That it will be for a public purpose; and
>
> - That its citizens will receive prompt, adequate, and effective compensation from the expropriating country." [123]

Consistent with this policy is the undertaking that if prompt, adequate and effective compensation is not paid by the nationalizing state to U.S. subjects, the U.S.A. will cease continuance of bilateral economic assistance to the nationalizing state [124] as was effected against Sri Lanka. Renewal of U.S. assistance will only materialize if steps are taken by the nationalizing state to effect payment of adequate compensation. [125] On the other hand, assistance may not be discontinued if it is within the U.S.A.'s interest that discontinuance not be effected. [126]

The U.S.A's policy on compensation rests on two fundamental reasons. Firstly, as already stated, its perception of compensation is not only consistent with its respect for the institution of private property but

is also protective of individual rights and interests therein. [127] Seen from a global capitalistic perspective, a different reason is given which an official of the Department of State refers to in these words:

> "...there is also a large dose of enlightened self-interest, which recognizes that a world in which the legitimate aspirations of the developing countries are frustrated is not likely to be the kind of world we are comfortable living in. Further, we are convinced that substantial flows of private capital, with the technology, know-how, and management skills that accompany it, are essential to this development process. Government-to-government and multilateral aid also have a role, but it cannot substitute for those private resource transfers.
>
> Inadequately compensated expropriations constitute a major threat to those critical private investment flows. Private investors come from environments which private property rights are recognized and assured and will not continue to put their assets at risk in countries in which these rights are not respected." [128]

No doubt, the U.S.A.'s policy position is generally representative of the position of most other developed capitalist states. It is true that prior to the emergence of socialist states and decolonization of former colonies into the international fora, prompt, adequate and effective compensation was supported and applied "among and against Western" states. [129] Back then prompt, adequate and effective had an international law status of universality. While the position of Western Bloc states regarding compensation has remained unchanged, composition of the international community has seen drastic changes. With these changes have come different attitudes toward compensation payment. Consequently, adequate compensation has been relegated in status to one of regional applicability as an international law custom.

Challenges to prompt, adequate and effective have come from the states that do not share the same sentiments regarding private property or those that prefer settlement of compensation based on a different standard or arrangement. Latin American states, as we have seen, prefer settlement of compensation claims in accordance with the Calvo doctrine. Mexico's response to Secretary of State Hull on August 3, 1938 voiced its desire to settle U.S. claims according to Mexico's domestic law and legal procedure. [130] Further evidence of this practice in Latin America is seen in the Peruvian diplomatic note of November 28, 1968. [131] The note rejected the representation by the U.S. diplomatic note of November 8, 1968, urging Peru to pay prompt, adequate and effective compensation. Its position and that of other Latin American states is apparent in the words of its note:

> "In the first place, it is precisely in the exercise of this acknowledged right of every sovereign state to expropriate property within its own jurisdiction that the Government of Peru has proceeded to enact and enforce the Decree-laws 17065 and 17066, referred to by Your Excellency. From the recognition of this right, it follows that its exercise could not become the basis of diplomatic action, nor could such action be permitted by a Government which has lawfully exercised this right. The doctrinal and constitutional position of Peru in this respect, as is true also of the other Latin American nations, is clear and definite." [132]

As is now evident, not only is the Calvo doctrine rooted in the jurisprudence of Latin American states, it has also been espoused in the official correspondence of members of the region. Consequently, its applicability as a requirement of regional international law among Latin American states is unquestionable.

The official position of other countries, especially developing states remains unclear for want of availability of their official reaction to the problem of compensation. Reasons for this are twofold: one, accessibility to such information is difficult and, two, a good number of states have not been put in a situation where they have had to make their official position regarding compensation known. Nonetheless, there are those like Sri Lanka who would prefer negotiation of compensation by lump sum payment [133]. Such a preference, however, does not focus on particular compensation standards and therefore does not help in determining the status of specific standards. Consequently, we are left with having only covered prompt, adequate and effective compensation and the Calvo doctrine, and being further convinced about their regional international law character.

C. Negotiated Settlements.

The issue of whether or not negotiated settlement agreements fall within the ambit of Article 38(1) (b) of the Statute of the International Court of Justice appears settled by the ICJ in the Barcelona Traction case wherein the Court stated, as dictum, that such settlements, by reason of their peculiar circumstances, should be disregarded in determining customary law. [134] Support therefor was subsequently provided by the sole arbitrator in Texaco v. the Libyan Arab Republic when he dismissed lump sum payments and other negotiated settlements as

being outside of customary law development. [135] Instead, negotiated settlements should be categorized merely as "amicable settlements which have taken place having been inspired basically by considerations of expediency and not of legality." [136] However, like Lillich and Weston,[137] and Seidl-Hohenveldern, [138] we disagree with rejection of negotiated settlements, especially lump sum agreements, in determining the development of international law custom regarding compensation payment. In proceeding to substantiate our position, let us first explore the different arrangements concluded between parties to negotiated settlements.

It is true that negotiated settlements vary according to circumstances peculiar to each, resulting in difficulty of identifying a uniform practice of universal application. A sample of settlements concluded between respondent and claimant states or between respondent states and claimant investors reveals this. Poland agreed, after three years of negotiations with the U.S.A., to make a lump sum payment of U.S. $ 40 million in satisfaction of all U.S.A. claims against it. [139] Both state parties agreed to have payments made in yearly installments of U.S. $ 2 million spread over a twenty year period [140] and upon the coming into effect of the compensation agreement, all U.S.A. claims against Poland would be extinguished [141]. In the Canadian-Bulgarian settlement agreement [142], however, the total lump sum amount of Can. $ 40,000, to be paid by Bulgaria [143], was made within two months of the date of signature of the agreement [144]. A different settlement was negotiated between the U.S.A. and Rumania in 1960 [145]. Prior to conclusion of the

agreement the U.S.A. had blocked Rumanian owned assets in the U.S.A. valued at U.S. $ 22,026,370 and the United States Foreign Claims Settlement Commission had, by virtue of U.S.A. domestic law and international law, rendered 498 awards that it valued at U.S. $ 84,729,291 against Rumania [146]. Yet, when the lump sum agreement was signed, the U.S.A. had to settle for the amount of U.S. $ 24,526,370 which Rumania only had the outstanding amount of U.S. $ 2.5 million to pay in five annual installments [147]. But in the settlement agreement with Czechoslovakia in 1981 [148], the U.S.A., using its blockade of 18,400 kilograms of fine gold coins and bars owned by Czechoslovakia as bargaining leverage, was able to secure a significantly higher settlement of U.S. $ 81.5 million[149]. According to Lillich and Weston, these type of agreements, those that require payment "at the date of signature or entry into force of the Settlement Agreement" or "within a year (or months) thereafter", number over forty [150].

There are also those negotiated settlements that are silent on the amount to be paid, instead, they require satisfaction of payment based on receipt of "a percentage of the proceeds of exports by the respondent to the claimant state," usually covering a period of twenty eight years [151]. Poland and France, for example, agreed that as full settlement of all French claims, Poland should deliver 3,800,000 tons of high grade coal to France [152]. A different arrangement was reached between Peru and the U.S.A. regarding compensation for Marcona assets, nationalized by Peru. Although the parties negotiated a specific settlement of U.S.

$ 61,440,000 as the principal amount to be paid by Peru, satisfaction of the principal amount was based on a combination of cash payment of U.S. $ 37 million and the performance of a long term sales contract between Peru and Marcona [153].

Another category of settlement agreements are those, about nine, which "provide for the mutual waiver of claims...". [154] Article 1 of the Norwegian-Polish settlement agreement of 1955, for instance, states that:

> "The Polish Government and the Norwegian Government agree that the Norwegian assets in Poland as set out in Schedule A to the present Agreement and the Polish assets in Norway as set out in Schedule B to the present Agreement shall be set off against each other and that claims relating to these assets shall be considered as finally liquidated." [155]

In a West German case, the Court of Appeal of Berlin rejected the claim of a Hungarian national pursuant to the German-Hungarian Treaty of Peace which waived any compensation claim of Hungarian nationals against Germany. [156] Waiver of the right to compensation is not, however, a practice peculiar to negotiated settlement agreements. Individual states have also been known to have waived their national's claims against other states. The Austrian State Treaty (Individual Claim to compensation) case exemplifies this situation [157]. In that case the plaintiff, whose property had been expropriated between 1941 and 1944 by Germany, was promised compensation therefor. However, the promise was subsequently waived by Article 23(3) of the Austrian State Treaty of 1955 which reads:

"Austria, on its own behalf and on behalf of Austrian nationals, waives all claims against Germany and German nationals outstanding on 8 May 1945."

Arguing that such waiver had amounted to expropriation of her right to receipt of compensation from Germany, the plaintiff sought indemnity from Austria. While concurring that such waiver had amounted to expropriation of her right, the Supreme Court of Austria held that it did not, by itself, obligate the state to compensate her losses.

Outside of state to state negotiated settlements, which fall into any of the aforesaid categories, are settlements which have been negotiated between nationalizing states and nationalized foreign investors. Take the eleven U.S. owned and one British owned investments that were nationalized by Argentina on November 15, 1963 [158]. By 1967 all investors had managed to negotiate varying settlements with Argentina. For example, six of the U.S. investments concluded cash settlements ranging from U.S. $ 4 million to U.S. $ 42 million, while the British investment settled for U.S. $ 21.5 million. When Bolivia nationalized the Bolivian Gulf Oil Company assets on October 17, 1969, the assets were valued by Gulf at U.S. $ 120 million [159]. Bolivia's valuation of the assets, on the other hand, stood at U.S. $ 85 million. After negotiations which ended on September 10, 1970, Gulf and Bolivia compromised their positions by reaching a settlement of U.S. $ 95 million. Instances of state and foreign investor settlements occurred in other Latin American, some African, Middle Eastern and Asian states [160].

Against this background, it is not difficult to appreciate why the ICJ in Barcelona Traction and the sole arbitrator in Texaco v. The Libyan Arab Republic should reject negotiated settlements in the determination of international law custom and compensation payment. While it is true that the final outcome of negotiated settlements depend largely on "the political and economic judgments of the occasion" [161] and not on dictates of law, they should not be discarded as irrelevant in determining international law custom. To deny their relevance in the determination of international law custom is to do so on the basis of a narrow and simplistic understanding and appreciation of the reasons pertaining to their conclusion. When understood in totality with the compensation problem, one then begins to appreciate the fact that there is more to a lump sum agreement [162] and other negotiated settlements than being merely an instrument which reflects the political and economic will of the parties at the time it was concluded.

Lillich and Weston refer to two reasons that merit usage of negotiated settlements within the scope of Article 38(1)(b) of the Statute of the International Court of Justice in these words:

> "First, as post war arrangements, all are part of a process that has become in the last quarter century almost the sole decision making mechanism for resolving international claims controversies. They constitute, in short, virtually the sole indicator of contemporary international claims expectation and preference, and replace in importance the norm generating and clarifying influence of previous permanent and ad hoc international tribunals. Second, although flowing from their central conflict-resolving role and their consequent close and

> widespread scrutiny from foreign office to foreign office, the agreements display among themselves... a consistency of approach and unity of perspective that can only be described as reflecting a 'general practice'.[163]

Consequently, as submitted by Lillich and Weston:

> "The two observations alone... are sufficient to relegate the sui generis - lex specialis theory advanced in Barcelona Traction to the oblivion it deserves and to place the post war Settlement Agreements squarely within Article 38(1)(b) of the Statute of the International Court of Justice."[164]

Accepting the justifications by Lillich and Watson for the need to rely on negotiated settlements regarding the determination of international law custom, we must now focus our attention on why such settlements have come to dominate the resolution process of international claims. It is hoped inter alia that a better understanding of the issue of compensation payment will be realized as a consequence.

The fact that negotiated settlements, especially lump sum agreements, now dominate the resolution of international claims can be traced to at least one fundamental factor. Such settlements are more practical than other modes of resolving international claims which Younger alluded the British House of Commons to, in these words:

> "One was by setting up a Mixed Claims Commission which adjudicated on each claim between the claimants and the foreign government concerned. In a formal sense that was quite a suitable arrangement, but it has proved every slow in operation. In many cases the claimants have gone for years without receiving their money...
>
> The second way in which this has been dealt with in the past has been an agreement between His Majesty's Government and what I might call the debtor government as a result of which the lump sum for all British claims is agreed. That leaves the

> Government here to deal with the splitting up of the lump sum among the individual claimants here.
>
> ...There is a third way, which has not, I think now very much practical relevance... and that is the possibility of direct negotiation with the government concerned on each separate claim, but as the House will realize, at any rate where the claims are numerous, that is very rarely a practical procedure." [165]

With limitations on available remedies outside of domestic jurisdictions and the "fragility of international law", states have continued to accept negotiated settlements as being of practical attraction notwithstanding the fact that such settlements will, most likely than not, result in their receipt of less than the full value of their national's claims. [166] Partial compensation is to be expected in a negotiated arrangement because it is a resolution process through which conflicting views, interests and legal positions regarding compensation payment and the status of private property are more susceptible to compromise. Consequently, while parties to a lump sum agreement may walk away feeling a sense of loss for being unable to fully incorporate all their proposals into the agreement, they also leave with the satisfaction that they were able to get the other side to compromise their proposals as well.

Any bearing negotiated settlements have on compensation and international law custom, notwithstanding their apparent lack of identifying specific compensation standards, is important. Negotiated settlements have meant that instead of attempting to impose one's compensation standard on another, many states have shown that negotiation of a mutually acceptable settlement is one of the best neutral outcomes. [167]

Such settlements have been a vehicle through which different ideologies and interests have come to acknowledge each other's status and role in international law development. Consequently, the fact that partial compensation has been the rule in negotiated settlements rather than the exception is not surprising. [168] This apparent tendency is important in any attempt to determine universal customary international law regarding compensation because it has meant the relegation of the traditional compensation requirement of adequacy. As well, it has also meant the rejection of other standards, adhered to by states not in support of adequate compensation, [169] as being of universal international law application.

What is the significance of this general trend within the framework of this study? Clearly, lump sum agreements and other negotiated settlements provide further evidence of the erosion of adequate as a compensation requirement of universal application in customary international law. As well, negotiated settlements indicate strongly that the compensation positions of other states possess no status of universality in international law custom. Having alluded us to these observations, such settlements fail to espouse a single compensation standard which may be said to entertain a universal character in international law. Instead, we are left with the message that the requirement of adequate has been relegated to a status of regional applicability in customary international law. Similarly, other compensation standards, subject to the number of states and their long continued support therefor, enjoy the same status of regional customary international law. Last but not

least, negotiated settlements, especially lump sum agreements, have been and will continue to be one practical resolution process, dictated generally by political and economic considerations, which successfully mitigates the apparent problem of determining and applying a compensation framework which would be universally recognized and adhered to by all nations of the different factions within the international community.

Clearly, the success and domination of this resolution process are traced to the willingness of disputing states to compromise their different positions on compensation and conclude settlement agreements that are neutral. If there is any lesson to be learned from this, it is the obvious fact that a universally recognized compensation framework can only be one that is seen as being a tradeoff among the different compensation standards. This would give to it the air of neutrality it needs to be supported by developed capitalist, socialist and developing countries alike. Whether or not such a compensation framework exists in practice shall be addressed in the subsequent chapters.

Endnotes : Chapter Four.

1. Gihl, "The Legal Character and Sources of International Law" (1952), 1 Scandinavian Stud. L. 51 at 77.
2. [1950] I.C.J. Rep. 266.
3. [1960] I.C.J. Rep. 6.

4. The Asylum Case, op.cit., note 2, at 276-278.
5. Ibid.
6. The Case Concerning Rights of Passage over Indian Territory, op.cit., note 3, at 39-40.
7. AIOC v. Jaffrate, [1953] 1 W.L.R. 246.
8. R.v. Thomas Lawson and Son., [1948] Ex. C.R. 44.
9. Ibid.
10. R.v. Rekush and Woyewidka, [1948] 3 D.L.R. 160.
11. See the report by the Ontario Law Reform Commission, The Basis for Compensation on Expropriation (1972). At p.18, the report refers to an article which defines market value "simply... as the price at which a prudent owner under no compulsion to sell would sell to a prudent buyer under no compulsion to buy. Most property has a readily appraisable market value relating to its use and location."
12. J. Henry, "The Valuation of Nationalized Property in Great Britain", in R. Lillich ed., The Valuation of Nationalized Property in International Law vol. 1 (1972) at 86-92.
13. Banco Nacional de Cuba v. Sabbatino et al. (1967), 35 I. L. R. 2.
14. Wyman Claim (1970), 40 I. L. R. 97 at 101. Also see Szechenyi Claim (1966), 30 I. L. R. 139, wherein FCSC stated that compensation must not be less than the value of the property and that such payment must be effective.
15. The Sabbatino Case, supra note 13, at 12.
16. Dr. Sobhi Mahmassani, the sole arbitrator in Libyan American Oil Company and The Libyan Arab Republic: Award of the Arbitral Tribunal, reprinted in (1981), 20 Int'l. Legal Materials 1 at 53, referred to both types of property in these words:

> "It is well-known that property in its general meaning is of two kinds: corporeal and incorporeal. The first, by unanimous

opinion of jurists, covers all physical things, such as chattels, lends and various other things of material nature.

On the other hand, incorporeal property comprises all interests and rights which, though incapable of immediate material composition, may produce corporeal things or may be evaluated in financial and economic terms. In other words, incorporeal property includes those rights that have a pecuniary or monetary value".

17. Standard Oil Co. Claim (1966), 30 I. L. R. 176.
18. Singer Manufacturing Company Claim (1966), 30 I. L. R. 187.
19. General Electric Company Claim (1966), 30 I. L. R. 140.
20. Chalifoux Claim (1958), 26 I. L. R. 272.
21. Id. at 273.
22. Grant Claim (1958), 26 I. L. R. 273.
23. Division of World Missions of the Board of Missions of the Methodist Church Claim (1958), 26 I. L. R. 279.
24. Ibid., refer to note 3.
25. European Mortgage Series B. Corporation Claim (1966), 30 I. L. R. 122.
26. Amsellem Partners v. Banque Nationale pour le Commerce et l'Industrie (Afrique) (1970), 41 I. L. R. 272.
27. Banque Nationale pour le Commerce et l'Industrie (Afrique) (1970), 41 I. L. R. 266.
28. Refer to Note (1966), in 30 I. L. R. 131 as "taken from the Introduction to the 4th Semi-annual Report of the F.C.S.C. (1956)".
29. Tanglefoot Company Claim (1966), 30 I. L. R. 120.
30. Eagle Pencil Company Claim (1966), 30 I. L. R. 128.
31. Guaranty Trust Company of New York Claim (1966), 30 I. L. R. 134.

32. First National City Bank of New York Claim (1966), 30 I. L. R. 184.
33. Refer to note 17, supra.
34. Turner Claim (1958),26 I. L. R. 289.
35. Hartmann Claim (1958), 26 I. L. R. 291.
36. Malan Claim (1958), 26 I. L. R. 290.
37. Id., at 291.
38. Furst Claim (1971), 42 I. L. R. 153.
39. Re Keim (1972), 44 I. L. R. 102.
40. F.G. Dawson, and B.H. Weston, "Prompt, Effective and Adequate: A Universal Standard of Compensation?" (1961-62), 30 Fordham L. Rev. 727 at 736. Also see B.A. Wortley, Expropriation in Public International Law (1977) at 28-29.
41. Ibid.
42. The Norwegian Claims Case (1922), Hague Ct. Rep. (Scott) 66 as quoted in F.V. Garcia-Amardo et.al., Recent Codification of the Law of State Responsibility for Inquiries to Aliens (1974) at 56.
43. Refer to Garcia-Amardo et.al., ibid.
44. Reference was made to D.P. O'Connell, International Law vol. 2 (1965) at 857.
45. Relevant parts of the Restatement Law appear in H.J. Steiner, and D.F. Vagts, Transnational Legal Problems (1968) at 330-331.
46. Dawson and Weston, op.cit., note 40, at 737.
47. Ibid.
48. See the pleadings etc... [1951] I.C.J. Rep. 106.
49. Dawson and Weston, op.cit., note 40, at 739.
50. Proach Claim (1971), 42 I. L. R. 189 and American Cast Iron Pipe Company Claim (1970), 40 I. L. R. 169.
51. See Proach Claim, id, at 190.
52. Ibid.
53. Dawson and Weston, op.cit., note 40, at 739.

54. See the pleadings etc.. [1951] I.C.J. Rep. 106. Based on the quoted description, U.K. challenged the Iranian nationalization as having no specific criteria for the requirement of effective compensation to be satisfied.

55. N.R. Doman, "Compensation for Nationalized Property in Post-War Europe" (1950), 3 Int'l. L. Q. 323 at 329.

56. Ibid.

57. Ibid.

58. Ibid.

59. Dawson and Weston, loc.cit., note 40. S.J. Rubin, "Nationalization and Compensation: A Comparative Approach" (1950) 17 U. Chicago L. Rev. 458 also pointed this out. At page 461, he states that due to exchange difficulty some developed capitalist states define effective compensation "differently than does the United States. Thus, in the negotiation of the investment provisions of the Charter of the International Trade Organization, the view was stated by such countries as Canada that the power to take private property for public purpose could not be made conditional on the power to make payment to American investors in dollars - that is, in the currency of the investor."

60. R.N. Gardner, "International Measures for the Promotion and Protection of Foreign Investment" (1959), 53 Am. Soc'y. Int'l. L. Proc. 255, at 260.

61. Garrow Claim (1966), 30 I. L. R. 133.

62. Gardner, loc.cit., note 60.

63. Ibid.

64. See note 7, supra.

65. Bernsetin v. van Heyghen Freres (1947), 14 I. L. R. 11.

66. N.V. Vereenigde v. Deutsch-Indonesische (1963), 28 I.L. R. 24, at 28.

67. Ibid.

68. Ibid.

69. In re Claim by Helbert Wagg and Co. (1958), 22 I. L. R. 480.

70. In re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v. The Liquidator (1952), 1 T.L.R. 739.

71. Luther v. Sagor, [1921] 3 K.B. 532.

72. Princess Paley Olga v. Weisz, [1929] 1 K.B. 718.

73. Helbert Wagg's Case, supra, note 69 at 485.

74. Ibid.

75. Ibid.

76. AIOC v. S.U.P.O.R. Company (1955), 22 I. L. R. 19.

77. AIOC v. S.U.P.O.R. Company, id., at 23.

78. Id. at 42.

79. Ibid.

80. AIOC v. Indemitzu Kosan Kabushiki (1953), 20 I. L. R. 305.

81. Id. at 310.

82. Ibid.

83. Ibid.

84. See note 66, supra.

85. Id., at 24-25.

86. W.D. Rogers, "Of Missionaries, Fanatics and Lawyers: Some Thoughts on Investment Disputes in the Americas" (1978), 72 Am. J. Int'l. L. 1, at 3.

87. R.C. Wesley, "The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Factfinding" (1975), 7 Law and Pol'y Int'l. Bus. 813, at 818.

88. Rogers, op.cit., note 86, at 2-3. Reference is made of the first aspect of Calvo by P.C. Szasz, "The Investment Disputes Convention and Latin America" (1971), 11 Va. J. Int'l. L. 256, at 260. The second aspect of Calvo is based no doubt on the "concept of equality between nationals and foreigners," see J.R. Chiriboga, "International Arbitration" (1970), 4 Int'l. L. 801, at 804.

89. Rogers, op.cit., note 86, at 3. Also see F.G. Dawson and I.L. Head, International Law, National Tribunals and the

Right of Aliens (1971) at 174.

90. Article 17 of the Constitution of the Republic of Peru 1933, as quoted by Dawson and Head, ibid.

91. Article 21, paragraph 1, of the Venezuelan Constitution (1947), as quoted in note 7 of Rogers, loc.cit., note 86.

92. The Andean Foreign Investment Code as of November 30, 1976, reprinted in (1977), 16 Int'l. Legal Materials 138. Article 50 appears in p. 153.

93. Wesley, loc.cit., note 87.

94. G.J. Eder, "Expropriation: Hickenlooper and Hereafter" (1970), 4 Int'l. Law. 611, at 618-619.

95. Wesley, op.cit. at 826-827.

96. Ibid.

97. R.K. Goldman and J.M. Paxman, "Real Property Valuations in Argentina, Chile, and Mexico" in R. Lillich ed., Valuation of Nationalized Property in International Law vol.2 (1973), at 162.

98. See Chilean President's Statement on Negotiations for Government Acquisition of Anaconda Company Properties [June 26, 1969] as reprinted in (1969) 8 Int'l. Legal Materials 1073. Also quoted by Goldman and Paxman, supra, note 97, at 162.

99. I.A. Litvak and C.J. Maule, "Forced Divestment in the Caribbean" (1976-77), 32 Int'l. J. 501, at 505.

100. Id., at 526.

101. Id., at 527.

102. L.L. Rood, "Compensation for Takeovers in Africa" (1976), 11 J. Int'l. L. Econ. 521, at 526.

103. R.C. Wesley, "A Compensation Framework for Expropriated Property in Developing Countries" in R. Lillich ed., Valuation of Nationalized Property in International Law vol.3 (1975), at 6-7.

104. Ibid, see note 59. More accurate than written-down book value, adjusted book value takes intangible assets into

valuation depending on whether or not earnings have continued to rise or deteriorate. See page 17 of G. Ovens, "Valuing a Privately Owned Business," in The Canadian Institute of Chartered Accountants, The Valuation of Private Business and Professional Practice (1959).

105. See Libya: Law on Nationalization of Bunker Hunt Interests, reprinted in (1974), 13 Int'l. Legal Materials, 58-59 and the same's "Law on Nationalization of Oil Companies" in (1974), 13 Int'l. Legal Materials 60-63.

106. Ovens, supra, note 104, at 17.

107. J.S. McCosker, "Book Values in Nationalization Settlements" in R. Lillich ed., Valuation of Nationalization Property in International Law vol.2 (1973) at 37.

108. Id., at 41.

109. Ibid.

110. Id., at 49.

111. Id.,at 41. Also see D.A. Lapres, "Principles of Compensation for Nationalized Property" (1977), 26 Int'l. Comp. L. Q. 97, at 104. The value of intangible assets, though not capitalized and entered in a corporation's books, have not been precluded by U.S. courts when determining a corporation's net value - see FPC v. Natural Gas Pipeline, 315 U.S. 575 (1942) and Kimball Laundry Co. v. United States, 338 U.S. 1, at 19 (1949). It should be noted that these cases deal with domestic investors not foreigners. Refer as well to P.N. McCreary, "An Analysis of the Expropriation of the Properties of Soiedad Minera El Teniente by Chile in the Light of International Law Principles" in R. Lillich ed., Valuation of Nationalized Property in International Law vol.2. (1973). Book value limitations with respect to other assets not written down, especially in mining operations are discussed at pages 112-114.

112. Refer to "In the Matter of the Arbitration between Valentine

Petroleum and Chemical Corporation, and Agency for International Development" (1972), 44 I. L. R. 79, International Telephone and Telegraph Corporation Sud America v. Overseas Private Investment Corporation (OPIC) (1980), 59 I. L. R. 366 and Anaconda Company and Another v. OPIC (1980), 59 I. L. R. 406.

113. Revere Copper and Brass, Inc., and OPIC (1978), 17 I. L. M. 1321, (1980), 56 I. L. R. 258.

114. Id., at 1364.

115. See the "Statement by the President (U.S.A.): Press Release of October 17, 1964" as reprinted in (1964), 3 Int'l. Legal Materials 1074.

116. Ibid.

117. The quote is reprinted in H.J. Steiner and D.F. Vagts, Transnational Legal Problems (1968) at 320.

118. Refer to the "Government Statement on United States Suspension of Assistance to Ceylon (Sri Lanka)", as reprinted in (1963), 2 Int'l. Legal Materials 386.

119. Refer to note 115, supra.

120. Refer to "U.S.: Secretary of State's Statement on Chilean Nationalizations", as reprinted in (1971) 10 Int'l. Legal Materials 1307.

121. "U.S. Statement on Economic Assistance and Investments in Developing Nations", reprinted in (1972) 11 Int'l. Legal Materials 239.

122. "U.S. Department of State: Statement on Foreign Investment and Nationalization" reprinted in (1976) 15 Int'l. Legal Materials 186.

123. Ibid.

124. Refer to note 121, supra.

125. Ibid.

126. Ibid.

127. R.J. Smith, "The United States Government Perspective on Ex-

propriations and Investment in Developing Countries" (1976), 9 Vand. J. Transnat'l. L. 517 at 521.

128. Ibid.

129. R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property"(1981), 75 Am. J. Int'l. L. 553, at 558.

130. Steiner and Vagts, op.cit., note 117, at 321.

131. "Peru Diplomatic Note on Compensation for Expropriated Property", reprinted in (1968) 7 Int'l. Legal Materials 1262.

132. Id., at 1263.

133. Refer to the "Statement of the Government of Ceylon (Sri Lanka)", reprinted in (1963) 2 Int'l. Legal Materials 393.

134. Barcelona Traction Case, [1970] I.C.J. Rep. 3, at 40.

135. Texaco v. Lybian Arab Republic (1979), 53 I. L. R. 422.

136. Id., at 476. Refer as well to G.A. Christenson, "The United States-Rumanian Settlement Claims Agreement of March 30, 1960" (1961), 55 Am. J. Int'l. L. 617, at 634.

137. R.B. Lillich and B.H. Weston, International Claims: Their Settlement by Lump Sum Agreements Part I (1975), at 262. Part I of Lillich and Weston shall hereafter be referred to as Lillich and Weston, International Claims. Part I, The Commentary.

138. I. Seidl-Hohenveldern, "Austrian Practice in Lump Sum Compensation by Treaty" (1976), 70 Am. J. Int'l. L. 763.

139. The U.S.A.-Polish Agreement is reprinted in R.B. Lillich and B.H. Weston, International Claims: Their Settlement by Lump Sum Agreements. Part II (1975) at 227. Part II of Lillich and Weston shall hereafter be referred to as Lillich and Weston, International Claims. Part II, The Agreements. Refer to Article 1.A of the agreement. Refer as well to the article by Z.R. Rode, "The American-Polish Claims Agreement of 1960", (1961), 55 Am. J. Int'l. L. 452.

140. Refer to Article 1.B.

141. Refer to Article 4.

142. The agreement is reprinted in Lillich and Weston, International Claims. Part II, The Agreements, at 322.

143. Refer to Article 1.

144. Refer to Article 2.

145. The agreement is reprinted in Lillich and Weston, International Claims. Part II, The Agreements, at 217.

146. Christenson, op.cit., note 136, at 621-622.

147. Refer to Article 3 of the Agreement.

148. The Agreement is reprinted in (1982), 21 Int'l. Legal Materials 371.

149. Refer to Articles 1, 5, and 6. Refer as well to the article by V. Pechota, "The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes" (1982), 76 Am. J. Int'l. L. 639, for a better insight into the agreement.

150. Lillich and Weston, International Claims. Part I, The Comentary.

151. Id., at 212, refer as well to note 26.

152. The Agreement is reprinted in Lillich and Weston, International Claims. Part II, The Agreements, at 6. Refer as well to the British-Hungarian Settlement Agreement at 131.

153. Refer to Article 1 of the Peru-U.S.A.: "Compensation for Nationalized Assets of the Marcona Mining Company", reprinted in (1976), 15 Int'l. Legal Materials 392 Refer as well to D.A. Gantz, "The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property" (1977), 71 Am. J. Int'l. L. 474.

154. Lillich and Weston, International Claims. Part I, The Commentary, at 211.

155. The Agreement is reprinted in Lillich and Weston, Internaional Claims. Part II, The Agreements, at 123.

156. Restitution of Household Effects Belonging to Jews Deported From Hungary (German Case), (1977), 44 I. L. R. 301.

157. Austrian State Treaty (Individual Claim to Compensation) Case (1970), 40 I. L. R. 184. Refer as well to another Austrian case, Oesterr. Juristen-Zeitung, in (1970), 40 I.L. R. 184.

158. Refer to the U.S. Department of State Report on Nationalization, Expropriation, and other takings of U.S. and certain Foreign Property since 1960, in (1972), 11 Int'l. Legal Materials 84 at 90.

159. Ibid.

160. Id., from pp. 90-118. Refer as well to the: Caltex Ceylon Ltd. Agreement, reprinted in (1965), 4 Int'l. Legal Materials 1074; Esso Standard Eastern, Inc. Agreement, reprinted in (1965), 4 Int'l. Legal Materials 1079; and Shell Company of Ceylon, Ltd. Agreement, reprinted in (1965), 4 Int'l. Legal Materials 1084. Pursuant to Article 1(A) of all three agreements Ceylon (Sri Lanka) undertook to pay Rs.11,000,000, Rs.11,000,000 and Rs.33,000,000 respectively. In the Acquisition Agreement between Kuwait, BP and Gulf Oil Companies of 1975, reprinted in P. Fischer, A Collection of International Concessions and Related Instruments: Contemporary Series vol.2 (1981), at 133. Kuwait agreed to pay BP and Gulf the sum of U.S. $ 50.5 million with "interest calculated from 5th March 1975 to the date of payment..." See Articles 2 and 3 of the agreement.

161. Christenson, op.cit., note 136, at 634.

162. A lump sum agreement as defined by a former official of the U.S. Foreign Claims Settlement Commission is helpful:

> "[A] 'lump sum', 'en bloc' or 'global' settlement involves an agreement, arrived at by diplomatic negotiations 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 receiv-

ing the lump sum to distribute the fund thus acquired among claimants who may be entitled thereto pursuant to domestic procedure."

163. Lillich and Weston, International Claims. Part I, The Commentary, at 262.

164. Ibid.

165. As cited in R.B. Lillich, International Claims: Postwar British Practice (1967), at 1-2.

166. R.B. Lillich, International Claims: Their Preparation and Presentation (1962), at 3.

167. R.J. Smith, "The U.S. Government Perspective on Expropriations and Investment in Developing Countries" (1976), 9 Vand. J. Transnat'l. L. 517 at, 520.

168. In the English case of Benin v. Whimster, in (1981), 60 Int'l. Law Reports 113 at 119, the three presiding justices were alluded to the fact that the lump sum settlement made by Egypt to England pursuant to the compensation agreement of 1971 was not "enough to meet all the claims of property which has been truly nationalized". The lump sum agreement between the U.S.A. and Rumania, discussed earlier, is another example where the amount agreed for payment U.S. $ 24,526,370, was significantly less than the full value of the claims, U.S. $ 84,729,291. Another lump sum agreement which demonstrates partial payment is the one between the U.S.A. and Hungary wherein the parties settled for U.S. $ 22,218,614 to cover claims which the United States Foreign Claims Settlement Commission had valued at U.S. $ 80,296,047 - refer to R.B. Lillich, "U.S.-Hungarian Claims Agreement of 1974" (1975), 69 Am. J. Int'l. L. 534 at 538-539 and see note 39. There are also writers who have observed that lump sum agreements have generally resulted in partial compensation. Refer for example to: I. Seidl-Hohenveldern, "Report of the International Committee on Nationalization of Foreign Property" (1958), 48

Int'l. L. A. Rep. 184 at 90; F.V. Garcia Amador, "(Fourth) Report on State Responsibility", [1959] 2 Y.B. International Law Commission 1, U.N. Doc. A/GN. 4/119 (1959); E.J. Arechaga, "The Duty to Compensate for the Nationalization of Foreign Property" [1963], Y. B. Int'l. L. 2; M. Domk, "Foreign Nationalizations" (1961), 55 Am. J. Int'l. L. 585, at 609; D.R. Weigel and B.H. Weston, "Valuation upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation under International Law", in R. Lillich ed., Valuation of Nationalized Property in International Law vol.1 (1972) at 3, 8-11; G.T. Yates, "Postwar Belgian International Claims: Their Settlement by Lump Sum" (1973), 13 Vand. J. Int'l. L. 554, at 599-606; and G.N.J. van Wees, "Compensation for Dutch Property Nationalized in East European Countries" (1972), 3 Netherlands Y. B. Int'l. L. 62, at 66.

169. I. Seidl-Hohenveldern, "Austrian Practice in Lump Sum Compensation by Treaty" (1976), 70 Am. J. Int'l. L. 763 at 764.

Chapter 5 : GENERAL PRINCIPLES OF LAW.

The focal point of this chapter is to provide an analysis of those general principles of law, used in settling compensation disputes, and to determine if they have been and should be used in settling such disputes. Before pursuing this route, let us be reminded that the application of general principles of law in settlement of compensation disputes is resorted to where parties to such disputes, who do not support the same regional compensation framework, fail to strike a negotiated settlement. Those principles which have been used or advanced in settling compensation disputes and which, naturally, are of particular interest to us are:

(a) pacta sunt servanda;

(b) unjust enrichment; and

(c) acquired rights.

In inquiring into their impact on compensation disputes, we shall begin first by focusing our analysis on pacta sunt servanda and then on unjust enrichment. As for acquired rights, it shall not be treated separately as the other two because it is a principle that is fundamental to both. Hence, its analysis is best achieved through its inclusion with pacta sunt servanda when inquiring into pacta sunt servanda and with unjust enrichment when inquiring into unjust enrichment.

A. Pacta Sunt Servanda. —

The impact of this rule on compensation disputes falling within the legal bounds of treaties and concession agreements is unquestionable, nor is its status in international law. In an international arena where interdependency transcends the bounds of ideology and conflicting interests, pacta sunt servanda has continuously proved to be a very important stabilization medium. Its strength is that it is not a principle unique to international law nor to one ideology or regional interest group; neither is it a creation of the contemporary period. Gormley, author of an extensive article on the principle, alludes us to these facts in the following words:

> "Pacta sunt servanda is founded on all legal systems, in all periods of history, in all cultures, in the judicial orders of all sovereigns, and in all religions. To illustrate, ancient history as remote as 1292 B.C. records the treaty of peace and mutual coexistence between Ramses II and Hatushill III in which their respective deities were held to guarantee the sacred obligation of the treaty; moreover, similar examples exist in all periods of man's habitation of the earth. Though the norm, as we know of it, comes from Roman Law, identical doctrine is found in Hindu, Buddhist, Muslim, Confucian, and even the communist systems." [1]

Without the principle of pacta sunt servanda, rights that are acquired by a party to an agreement, acquired rights or vested rights, would be meaningless in international law or any other domestic jurisdiction. The effect of pacta sunt servanda, however, is not entirely derived from the consent of the parties to an agreement, rather, it is derived from the legal jurisdiction(s) within which consent of the parties assumes

binding force. Brierly argues against basing pacta sunt servanda solely on consent, in these words:

> "...consent cannot of itself create an obligation; it can do so only with a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting. To say that the rule pacta sunt servanda is itself found on consent is to argue in a circle. A consistently consensual theory again would have to admit that if consent is withdrawn, the obligation created by it comes to an end." [2]

Bearing Brierly's words in mind, it is safe to say that it is at the legal juncture of consenting to acquire certain rights and to assume corresponding obligations, by parties to an agreement, that the notion of pacta sunt servanda begins to play its role in maintaining sanctity and observance of the agreement under the legal regime(s) giving binding effect to the agreement. Consequently, where, as in Saudi Arabia v. Arabian American Oil Co. (ARAMCO),[3] "a right (is) in the nature of an acquired right", it cannot be unilaterally modified by the party granting such right. In that case, Saudi Arabia's concession agreement with ARAMCO granted the latter with the exclusive right of transportation of oil out of Saudi Arabia. But a subsequent agreement, the Onassis Agreement, between Saudi Arabia and a third party interfered with ARAMCO's exclusive right of transportation. It was held that such vested right could not be unilaterally modified or abrogated by the state and consequently, ARAMCO's right of transportation was fully restored.

The international law status and applicability of pacta sunt servanda as basis for settling take-over disputes between parties to a treaty or

a concession agreement is evidenced by its specific codification in the Vienna Convention on the Law of Treaties 1969 [4] and its role in guiding the outcome of numerous international arbitral awards. Pacta sunt servanda is codified in Article 26 of the Vienna Convention in these words:

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." [5]

Article 27 of the Vienna Convention adds more substance to pacta sunt servanda by precluding states from using their domestic law as shelter against performance of their treaty obligations. In a world of interdependency, notwithstanding the apparent conflicting ideologies and interests, the notion has been a fulcrum on which the stability of treaty and contractual relationships between developed capitalist, socialist and developing states are balanced and maintained. From time to time, however, universal adherence to the notion has not always been forthcoming. Treaty and contractual obligations have been breached or have not been performed and consequently causing injury to innocent parties. In disputes, arising out of such breach or non-performance, international tribunals have not been shy in using pacta sunt servanda, in the sense of specific performance or restitutio in integrum, as remedy or as vehicle for determining compensation payment therefor.

Before inquiring further, we should pause to remind ourselves that our analysis of specific performance, restitutio in integrum and compensation payment which flow from the general principle of pacta sunt servanda must be restricted to our area of concern. Consequently, like the

sole arbitrator in BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic, [6] we must restrict our inquiry "to the general field of economic interests and especially to long-term contracts of a commercial or industrial character and property and other assets employed in industrial undertakings." [7] On this basis, cases like the Case concerning the Temple of Preah Vhear (Cambodia v. Thailand) (Merits) [8] which led the International Court of Justice, in 1962, to decree restitutio in integrum, on the basis of Thailand's wrongful possession of the disputed temple within Cambodian territory, have no relevance to our area of concern. Restoration of wrongfully possessed territory of a state by another state on the basis of restitutio in integrum does not fall within the bounds of economic interests and should not therefore be used as precedent therefor. Guided by the foregoing considerations, let us now proceed with our inquiry on the role and effect of pacta sunt servanda in the sense of specific performance, restitutio in integrum and compensation as remedies for take-over disputes arising out of acquired rights.

There is a general consensus among decisions of international tribunals on the remedial role of specific performance, restitutio in integrum and compensation payment in take-over disputes arising out of acquired rights pursuant to treaties or concession agreements. That this should be the situation is owed in no small part to the Chorzow Factory case of 1928. [9] For it was Chorzow Factory that played a large jurisprudential role in setting the stage by pointing the direction in

which specific performance, restitutio in integrum and compensation payment would develop in cases involving a breach or non-performance of treaty or of contractual obligations. In that case, Poland was found to have breached its treaty obligations with Germany. Contrary to its obligations, assumed under the Geneva Convention, Poland acquired, by virtue of its domestic law, investments and assets owned by German investors. The Permanent Court of International Justice, in finding the acquisitions to be unlawful, ruled that Poland compensate the German divested owners on the basis of restitutio in integrum. We can only speculate that perhaps the Court used restitutio in integrum as vehicle for determining compensation because Germany made no claim for the restoration of its citizens' investment and the Court therefore was given no opportunity to rule on such claim. In the absence of Germany's claim for restitutio in integrum and the Court's willingness to use the remedy as basis for awarding compensation, subsequent disputes have been similarly settled.

Except for one known case, Texaco Overseas Petroleum Company (Texaco) and California Asiatic Oil Company (Calasiatic) v. The Government of the Libyan Arab Republic, [10] most other cases arising out of breach or non-performance of contractual obligations have resulted in compensation awards. Their rationale for determining and awarding compensation have, however, been varied. In the Sapphire International Petroleums Ltd. v. National Iranian Oil Company (NIOC) Arbitral Award [11] particular attention was given to pacta sunt servanda. Pursuant to the terms of their

oil concession agreement, Sapphire and NIOC agreed to perform their contractual obligations in accordance with the principles of good faith and good will. Hence, their mutual intention to have their concession agreement governed by the general principles of law. Before long, however, NIOC brought the parties into dispute when it failed to perform its contractual obligations. In finding this to have transpired, the Swiss sole arbitrator found further that NIOC's non-performance of its obligations violated the general international law principle of pacta sunt servanda, as obviously seen in these words:

> "...it is a fundamental principle of law, which is being proclaimed by international courts, that contractual undertakings must be respected. The rule pacta sunt servanda is the basis of every contractual relationship." [12]

Adding further, the sole arbitrator stated that:

> "It would be illogical and contrary to the most elementary notions of equity if one party could obtain satisfaction while the other suffered a loss. Whether the notion of the reciprocal effect of obligations, of the implied conditions is relied on, it is impossible to escape the essential and elementary conclusion that one of the parties must not benefit from the performance of the contract of his partner while evading his own obligations." [13]

However, instead of decreeing specific performance of NIOC's obligations, not performed, or restitutio in integrum, the sole arbitrator held that Sapphire was entitled to damages determined on the basis of pacta sunt servanda. That is to say, the only effect of pacta sunt servanda on the obligations not performed by NIOC is that it substitutes them with a pecuniary obligation (compensation payment). On this basis, the compensation award was structured so as to return Sapphire to "the

pecuniary position [it] would have been in if the contract had been performed." [14] Consequently, all expenses (U.S. $ 650,874.00) incurred by Sapphire pursuant to the performance of its obligations were added in total with its loss of profits (U.S. $ 2 million) as fully representative of the value of NIOC's pecuniary obligations. [15]

While accepting that compensation awards are the norm rather than the exception in cases of contractual breach and cases involving non-performance of contractual obligations, two cases shed more light on why this is so, but based, however, on different reasoning. In BP Exploration Company (Libya) Ltd. v. The Government of the Libyan Arab Republic[16], Langergren, the sole arbitrator, found that although the Libyan Nationalization Laws were effective, their implementation resulted in a wrongful breach of Libya's obligations under its concession agreement with BP. Langergren's analysis of whether or not specific performance or restitutio in integrum be decreed led him to reject their applicability in such situations. For he concluded that, although both remedies are accepted as general principles of law founded on the municipal laws of England, the U.S.A., Denmark and most other states, neither could be applied to remedy the dispute. Their remedial application, as he discovered, being restricted to daily sale of goods transactions and "other transactions of limited duration where, moreover, typically one party performs in kind and the other party in money," [17] can not be used in an investment relationship of greater complexity and which has a contractual life of many years. He held therefore that in

such investment relationships, where a wrongful (not unlawful) breach materializes, compensation payment is the general remedy with specific performance and restitutio in integrum as its exceptions.

Dr. Sohbi Mahmassani, the sole arbitrator in Libyan American Oil Company (LIAMCO) and the Libyan Arab Republic: Award of the Arbitral Tribunal, [18] reached the same final determination, but on the basis of different reasons. When ruling on LIAMCO's claim for restitutio in integrum, the sole arbitrator was not hesitant in rejecting the claim. While agreeing that restitutio in integrum is a general principle of international law, common to most domestic jurisdictions, he rejected its remedial application nonetheless because of it being "conditioned by the possibility of performance and consequently hindered by its performance. Such impossibility is most usual in the international field" because "it is impossible to compel a state to make restitution" and to do so "would constitute in fact an intolerable interference in the internal sovereignty of states". [19] Compensation was subsequently awarded to remedy Libya's premature termination of the concession agreement with LIAMCO and Libya's nationalization of LIAMCO's assets.

While falling in line with Chorzow Factory's decision in the final analysis, i.e., settlement of such take-over disputes through compensation payment, there are distinct differences between the Chorzow Factory settlement and the two, BP and LIAMCO, awards. In Chorzow Factory, Poland's acquisitions of German owned investments were in breach of its

treaty obligations. Not only did Poland's acquisitions constitute a breach, they were also unlawful and therefore did not constitute expropriation or nationalization of the German investments. Consistent with these determinations was the fact that Poland's take-over legislation being ineffective, the take-overs arising therefrom were unlawful and therefore resulting in an unlawful breach of Poland's treaty obligations. Consequently, compensation was awarded with a view to restoring the victims to pecuniary positions they would have been enjoying if not for the unlawful breach. The BP and LIAMCO awards provide a similar, yet different scenario. In both awards, the sole arbitrators accepted Libya's nationalization laws as effectively terminating the concession agreements on the one hand, while, on the other, holding the terminations to be in wrongful (not unlawful) breach of the concession agreements. As Libya's acquisitions of BP and LIAMCO assets were done pursuant to its effective nationalization laws, the takings were lawful and did therefore constitute acts of nationalization. The fact that the nationalization of BP and LIAMCO assets did contravene obligations assumed by Libya under the concession agreements did not entitle BP and LIAMCO, for reasons already discussed, to the remedies of specific performance and restitutio in integrum. Instead, only compensation payment is expected.

The sole arbitrator of LIAMCO best summarizes the distinction between Chorzon Factory and cases like BP and LIAMCO in these words:

"...it may be safely laid down that it is lawful to nationalize

> concession rights before the expiry of the concession term, provided that the measure be not discriminatory nor in breach of treaty, and provided that compensation be duly paid." [20]

Support for this can be easily traced to pre-World War II cases. In the Lena Goldfields Arbitration [21], for example, Russian nationalization measures breached its contractual obligations pertaining to the concession agreement with the Lena Goldfields Company. As remedy therefor, the tribunal decided on a compensation award which was determined so as to equate the pecuniary value of Lena Goldfields' rights and interests so affected by Russian measures. A subsequent case, Jablonsky v. German Reich, [22] provides persuasive support as well. Although the case was not the product of a breach of contractual obligations, it is important nevertheless. In distinguishing other business concerns from those which materialize through legally binding relationships between a state and private citizens, the Upper Silesian Arbitral Tribunal stated, by way of obiter, that property interests in the latter category are governed by the international law principle of acquired rights. And where such property interests are affected by nationalization measures, a victim of such measures is to be compensated.

The two apparent scenarios, one orchestrated by Chorzow Factory and the other by BP and LIAMCO are important to settlement of take-over disputes for two reasons. One, they bring to focus a fundamental difference in the international law status and effect of treaties and concession agreements. The difference being, that a state, on one hand, is not at liberty to introduce domestic legislation which would excuse it-

self from performing its treaty obligations or which it would use as justification for breaching such obligations. This position, not surprisingly, is codified in the form of Article 27 of the Vienna Convention on the Law of Treaties 1969. If any such legislation is introduced by a state, as did Poland, it (the legislation) fails to assume legal force in international law. Any act which is performed pursuant to such legislation is therefore an illegal act. Although the International Court of Justice has had no occasion to clarify, develop or redefine the Chorzow Factory decision in light of changes, in the international community, that have transpired from 1928 to the contemporary period of international law, the fact that the basis of the Chorzow Factory compensation award is codified in the Vienna Convention provides ample evidence of its applicability in like contemporary situations.

On the other hand, the same state is at liberty to pass legislation for use as a shield or sword; allowing it to shield away its contractual obligations or, as a sword, to effect premature termination of a concession agreement, but obviously at a price. The second important point is, that the Chorzow Factory decision shows that when awarding compensation for breach of treaty obligations, the award, guided by the notion of restitutio in integrum, must, as far as is possible to determine, repair the breach in a pecuniary manner. On the other hand, the two arbitral awards show that where a taking is lawful but results in a wrongful breach of the state's contractual obligations, specific performance and restitutio in integrum offer little or no guidance in determining

compensation payment.

On the basis of the foregoing analysis, issue is taken with the ruling of the sole arbitrator in Texaco Overseas Petroleum Company (Texaco) and California Asiatic Oil Company (Calasiatic) v. The Government of the Libyan Arab Republic, [23] on two fronts. In that arbitration case, Libya had nationalized Texaco and Calasiatic assets in contravention of the stabilization clause of its concession agreements with the two American oil companies. In its remedial award for Libya's breach of its contractual obligations, the arbitral tribunal decreed restitutio in integrum stricto sensu. First of all, the award was based on a wrong premise, i.e. the takings were unlawful. As we have seen, however, any such taking which is pursued in satisfaction of an effective legislation, notwithstanding its wrongful breach of contractual obligations, is lawful. Consequently, the appropriate remedy for this type of breach is compensation payment, not restitutio in integrum. To decree restitutio in integrum is to order that such legally effective acquisitions are unlawful acts. A result which is obviously contrary to logical analysis. Had Rene-Jean Dupuy, the sole arbitrator, focused his analysis of restitutio in integrum more on the field of long-term economic contracts, instead of a broad analysis thereof, he would have probably made an award for compensation payment.

The other point, which is related to the first, is that to say a taking which is made pursuant to an effective piece of legislation, but

which is in wrongful breach of a contractual obligation, is unlawful is to elevate concession agreements to the same international law status as treaties. Similarly, if concession agreements are to be accorded the same international law character as treaties, it is consistently logical to also go further by recognizing private foreign investors as enjoying identical international law status as states. These propositions must be rejected, if only, for the reason that no where are they codified in the Vienna Convention, any other multilateral treaty of a universal nature or found in international case law. For these reasons together with the impossibility of effecting restitutio in integrum between a state and private foreign investors, restitutio in integrum should not have been decreed to remedy the breach. And not surprisingly enough, impossibility of performance of the award forced Calasiatic to subsequently negotiate a compensation settlement under which it received crude oil, valued at U.S. $ 76 million, from Libya within a 15 month period. [24]

Regardless of its apparent lack of fitting into the scheme of jurisprudential development orchestrated by the Chorzow Factory case on the one hand and the arbitral awards on the other, the Texaco and Calasiatic v. Libya case is still important for two reasons. For one, the Texaco and Calasiatic award best illustrates the fact that the law regarding settlement of disputes arising out of a breach or non-performance of contractual obligations is an area which is yet to be fully developed. Consequently, such decisions are easy to render should

the remedy of restitutio in integrum be broadly analyzed. The other more important point is that the award is applicable in a different factual situation. Whereas Texaco and Calasiatic v. Libya did not base its award on the basis of lawful breach, it succeeded nevertheless in showing that acquisitions arising out of an unlawful termination of a concession agreement are unlawful acts. This being the case, victims of such unlawful actions are entitled to the remedy of restitutio in integrum, but if this is not possible they then should be compensated on the basis of the remedy. For example, a state that prematurely terminates a concession agreement in contravention of the agreement's stabilization clause and acquires property that is owned by the concessionaire, without prior effective legislation giving effect thereto, is responsible for having committed an unlawful taking. A victim of an unlawful breach is consequently entitled to the remedy of restitutio in integrum or, if performance thereof is impossible, its pecuniary equivalent. Seen from this perspective, instead of being discarded, the Texaco and Calasiatic v. Libya case helps to clarify and define the principles which determine the appropriate remedies that are applied to takings in breach of treaty obligations and those in breach of contractual obligations. And as is now only too obvious, whether or not restitutio in integrum or its pecuniary equivalent is decreed depends on such takings being unlawful, but if the takings be lawful then compensation is the appropriate remedy.

Compensation for nationalized property (lawful takings), which is in

breach of contractual obligations, has been awarded, in the arbitral cases, on the basis of varying factors. In the LIAMCO v. Libya case, the sole arbitrator rejected usage of the standard of prompt, adequate and effective arguing that "it stands only as a maximum rarely attained in practice". [25] Rejected as well was Libya's contention that compensation be calculated on the basis of 'net book value'. Instead, compensation was awarded on the basis of 'equitable compensation'. And, because Clause 26 of the concession agreements granted LIAMCO the right to remove its physical assets upon expiration or termination of the agreement, it was entitled to be paid an amount representing the market value of those assets. On this basis, the physical plants and equipment were valuated at U.S. $ 13,882,677. Again, in applying the notion of 'equitable compensation', the pecuniary value of LIAMCO's concession rights (expected profit earnings) in one oil field was calculated at U.S. $ 66 million while the other was dismissed as having no earning power because its economic viability was questionable. [26] In Sapphire International Petroleums Ltd. v. NIOC, compensation was determined differently. The compensation award, based on the notion of pacta sunt servanda, included all the expenses incurred by Sapphire pursuant to the performance of its obligations (U.S. $ 650,874.00) in total with its loss of profits (U.S. $ 2 million). In both cases, compensation for loss of profits was awarded only because it was strongly probable that if the agreements were not breached, the innocent parties would generate the amounts awarded. Where, as in LIAMCO, loss of profits could not be substantiated, as in the Mabruk field, the claim was rejected as not

compensable. [27] Unlike the LIAMCO and Sapphire awards, the tribunal in Lena Goldfields based its compensation award on the principle of 'unjust enrichment'. In so doing, calculation of the amount was restricted to determination of future profits, if not for the breach. [28] Although awarding compensation on the basis of different principles and criteria, there is no denying that in all three cases the innocent parties had suffered actual loss. The 'actual loss' factor, not the breach, is the most crucial element in compensation payment. The position of the World Court is very clear on this, for it stated in Mavrommatis Jerusalem Concessions case [29] that "although a breach of an international obligation has been committed, compensation will be awarded only on proof of actual loss." [30]

But in view of the fact that all three awards were founded on the notions of acquired rights and pacta sunt servanda, why the different methods of determining actual loss? Their adoption of the different methods is explained by the fact that there exists no single universally applicable standard practice for determining the amount of compensation in like instances of nationalization. In their separate effort to fill this void, the tribunals have had to "look for the common intention of the parties and use the connecting factors generally used in doctrine and in case law and... disregard, national peculiarities" [31] when identifying a basis on which to justify and determine compensation payment. Hence, their adoption of neutral or common notions as 'equitable compensation', pacta sunt servanda and 'unjust enrichment', all of which

are legally justified by the general principle of acquired rights. Of the three notions, pacta sunt servanda is restricted in its application to nationalization of acquired right, but not so for the other two which are also applicable in nationalization of rights and interests outside of acquired rights. Regrettably though, the concept of equitable compensation requires further case law and doctrinal development. Consequently, a useful analysis thereof cannot be seriously pursued. Fortunately, the same cannot be said of 'unjust enrichment'.

B. Unjust Enrichment.

The effect of the doctrine of unjust enrichment on compensation, although has been espoused by several writers, parties to take-over disputes and applied in Lena Goldfields, has yet to be fully recognized in international practice. [32] For the states whose economic and social systems' existence depend largely on the institution of private property, any taking of private property without due compensation leads to unjust enrichment of the taker. Entailed in this position "is not the elements of the loss suffered by" a victim of nationalization, "but rather the enrichment, the beneficial gain which has been obtained by the nationalizing state, which must be taken into account." [33] However, as already discussed, the concept of acquired rights is the foundation on which unjust enrichment rests. Defined, acquired rights are "any rights, corporeal or incorporeal, properly vested under municipal law (and/or international law) in a natural or juristic person and of asses-

sable monetary value." [34] Although such rights serve as criteria for determining ownership and do not in themselves confer an obligation on a taking state to compensate a victim of its taking, the obligation to compensate is implied by the theory of unjust enrichment. Consequently, states would unjustly enrich themselves if they are allowed to transfer or terminate acquired ownership rights and interests of persons for their (states') benefit without paying the monetary value of those rights and interests as compensation therefor.

Usage of the doctrine against a nationalizing state finds particular support in investment relationships which are governed by internationalized agreements. If a private foreign investor has by virtue of a bilateral treaty or an international convention to which the host state is bound, been conferred rights which are subsequently violated unlawfully as in the Chorzow Factory dispute or has by virtue of a concession agreement, as in Lena Goldfields, been granted mining and economic exploitation rights which are wrongfully violated by the host state, through non performance or breach of its obligations thereunder without restoration of those rights and interests or compensation payment thereof, the state would unjustly benefit itself. Put differently, non payment of compensation, calculated on the basis of restitutio in integrum or specific performance, as in Chorzow Factory, for unlawful takings or calculated on the basis of unjust enrichment as in Lena Goldfields [35] would not only unjustly benefit the nationalizing state but it would also violate the agreements giving rise to the rights so

violated.

Unjust enrichment, however, is a notion based on fairness and it should not be restricted to compensation payments awarded against nationalizing states. Such restrictions would allow a deprived private foreign investor to full receipt of compensation due thereto without balancing the amount to be paid thereto against any unjust benefit the deprived investor may have obtained from the terminated investment relationship. For example, where a deprived investor has been unduly enriched because he enjoyed a period of monopoly control or a highly privileged business position, the notion may be used against him. [36] Likewise, where a private foreign investor has accumulated profits in excess of his anticipated profit margin of earnings the doctrine of unjust enrichment should also be and has been used against him by both developing and developed capitalist states.

However, notwithstanding its usage against investors by both groups of states, the doctrine has not been well received in the international fora because of the way it has been used by some developing states to justify compensation payment or the lack of payment. Ecuador, Brazil, Bolivia, Iran, Egypt, Peru and Chile, have upon nationalization urged that the principle of excess profits be used as a valuation criteria in compensation settlements. [37] But above all, Chile's experience, is "the most noteworthy case to date ..." [38] Hence, it is selected as vehicle for generating discussion on the excess profits issue. The Chilean case

is also of particular importance because it raises other questions on the determination and application of excess profits. Pursuance of this vein of inquiry begins first by a brief description of how excess profits deductions were estimated by Chile.

Estimation of the amount constituting excess profits were based on two sets of figures. One, account was taken of each nationalized corporation's financial figures as represented in their balance sheets, i.e. each corporation's written down book value. Two, repatriated profits that had not been included in each corporation's books were also accounted for. Thus, "the financial figures of" Chuquicamata Copper Co. (CCC), Salvador Copper Co. (SCC) and El Teniente Mining Co. (ETMC) "as reflected in their balance sheets since 5 May 1955" were taken into consideration together with "those benefits which the parent corporations had been successful in procuring at the expense of those companies and branches operating in Chile, based on the high costs charged to the latter for delivery of costly materials, services and technological assistance and the lesser sums paid for the production." [39] From these sets of figures was calculated what was deemed as each investment's normal or fair and reasonable profit margin. Any portion of profits generated that exceeded each corporation's normal profit margin was considered as excess profits which the host state should have received.

Chile used excess profit deductions as a part of a three part compensation framework of which the other two were book value and specific

deductions. [40] Specific deductions were defined as being "amounts representing assets that the state failed to receive in good operating conditions, or property turned over without service rights, repairs, and spare parts, and those representing studies, prospecting information and other compensable intangible assets that are turned over without complete documentation, plans, reports, and data to make their full utilization possible." [41] In arriving at the amount of compensation to be paid, specific and excess profit deductions of each corporation were made on its book value. Using this formula, Chile concluded that CCC was not entitled to compensation. CCC's book value as at 31 December 1970 amounted to U.S. $ 241,958,862.43. [42] Its specific deductions ran at U.S. $ 18,459,799.50 and it obtained U.S. $ 300,000,000.00 in excess profits. [43] The result being CCC owed Chile U.S. $ 76,500,937.07. [44] SCC was calculated to owe the host state U.S. $ 1,577,634.50 and so was ETMC at U.S. $ 310,426,417.21. [45]

Chile's justification for the foregoing compensation framework and Allende's excess profit estimates rest more on economic conditions prevalent in an investment relationship between a foreign owned corporation and its host state. Especially where the foreign owned corporation is a subsidiary of a multinational corporation and it (subsidiary) is incorporated to do business in a developing state. As support for the compensation framework and his excess profit estimates, President Allende argued inter alia that:

"Foreign investment - so it is said - is one of the mechanisms

> that can contribute to raising the standard of living and increasing the rate of development in the underdeveloped countries. As a matter of fact, however, this mechanism has been converted into just one more element which, in conjunction with financial dependency and unequal interchange, has served to mold the subordination of backward nations to the economically powerful countries.
>
> ...in Chile, as in the rest of Latin America, the revenues produced by foreign capital contributions are much inferior to the disbursements engendered by profits of already invested capital. Up to the present time, because of lack of adequate regulation, foreign investment has failed to be a mechanism by which rich nations contribute to the development of poor countries - and consequently to international peace and community living - but on the contrary, it is a mechanism by the latter make contributions to the economies of the former." [46]

His study of the Chilean social and economic history and the relationship between the Chilean subsidiaries and their foreign parents convinced him that the foregoing factors were prevalent realities. He subsequently stressed that: "If the profits of the enterprises that operated in Chile - based on the difference between the annual net profits and the book values - were to be compared with the profits of the parent corporation, received from the aggregate of its international activities, those obtained in Chile are much higher." [47] Understood in this context, the principle of excess profits is nothing more than a corrective measure that allows the nationalizing state to achieve economic redress. It becomes a vehicle by which the host state deducts or recovers any unjust enrichment obtained by a foreign investor.

While there may exist some element of reality in Chile's justifications, no substantive proof that would render the excess profit estimates legitimate was advanced. For theoretical rhetoric is one thing,

justification based on factual realities is another and which was found to be wanting in the Chilean case. Without being compelled by Law 17,450 to explain the quantitative method by which his excess profit estimates were calculated, Allende avoided doing so. Hence, the accuracy and validity of his estimates can only be speculated on. The fact that no such explanation was rendered opens his excess profit figures susceptible to the conclusion that they were arbitrarily determined. Another argument against Chile's usage of the criteria of excess profits is that it was unreasonably pursued against the nationalized corporations. If excess profit deductions are to be made, it is only reasonable that the conservative book value of each taken corporation be also adjusted to reflect its fair market value. In Chile's case, it was a one-sided affair. Against Chile's excess profit deductions is also the contention that this valuation criteria is improper and in violation of the concept of compensation payment.

Excess profits, however, is not a principle that is peculiar to the municipal law and practice of developing states. For it is not an alien legal concept to the municipal law of developed capitalist states, of which some are the U.S.A., the U.K., Canada and West Germany. [48] The Pentagon, for example, in letters dated March 15, 1985 to United Technologies Corp. and General Electric Corp. requested a voluntary refund of U.S. $ 40 million in excess profits from the former and U.S. $ 168 million in excess profits from the latter. [49] Similarly, it was reported that "Exxon, the world's largest corporation, was ordered Mon-

day, [July 1st, 1985,] to pay more than $2 billion for overpricing crude oil during the energy short 1970s. A special federal court, handling alleged violations when oil in the United States was under now-expired federal price controls, held Exxon Corp. liable for $895.5 million in overcharges from 1975 until 1981 for crude oil from its Hawkins Field in east Texas - plus interest." [50]

What now emerges are two fundamental differences that separate the Chilean experience and others like it from usage of excess profits by developed capitalist states. While developed capitalist states supra provide quantitative guidelines to substantiate their excess profit claims, Chile avoided doing so. As well, Chile's application of the criteria, by virtue of Law 17,450, was retroactive while the principle of excess profits finds prospective application in developed capitalist states. It is only too obvious therefore that the center of controversy is not excess profits per se. The method of quantifying excess profits and how the criteria is to be applied (retroactive or prospective) are concerns which opposing sides take issue. The acceptability of excess profits by parties to a take-over dispute depends therefore on the parameters in which they will accept excess profit determinations and application. As of now, the parameters wherein the notion of excess profits is to be applied are not fully defined. Nonetheless, prospective deduction of substantiated excess profits from the pecuniary value of a nationalized investor's acquired rights and interests to arrive at the net compensatory figure should not be overlooked by courts and ar-

bitral tribunals because developing states would obviously support such deductions over Chile's radical preference for retroactive deduction that is theoretically justified if their not doing so would not allow for excess profits deductions to be made at all. In this sense, Chile's experience is of great significance because its radical departure from the position of developed capitalist states makes the latter's position as the only alternative between having or not having excess profits deducted. The Chilean position "should not" therefore "be summarily dismissed, but seriously considered as an excellent... step towards defining" a universal international standard of 'appropriate' compensation" [51] that is based on the notion of unjust enrichment.

What now remains to be done is to marry both aspects of unjust enrichment, one as applied against the nationalizing state in Lena Goldfields and the other as applied, in the sense of excess profits, against the investor in the practice of developed capitalist states, when awarding compensation thereunder. Such a step would elevate the doctrine of unjust enrichment to the universal international law status it deserves, because although argued in support of the traditional standard of compensation payment [52] and advanced by Peru, Bolivia, Chile and other developing states in support of excess profit deductions, [53] unjust enrichment does not predetermine in whose favor it is to be applied. Its application "requires the taking into account of all circumstances of each specific situation and the balancing of the claims of the dispossessed alien with the undue advantages that he may have enjoyed prior

to nationalization." [54] Applied in this direction, as it should be, unjust enrichment is a superior compensation standard to the traditional standard of compensation, equality principle espoused by the adherents of the Calvo doctrine and even the book value standard because of its position of neutrality. [55] Such a position allows it to "accommodate...the competing demands of national sovereignty, an international minimum, and the free flow of capital. The theory admits into its consideration of fairness elements of national integrity, such as the state's ability to pay and the extent of reorganization of which the taking is a part, that are excluded under the full compensation standard. It provides an international standard that is capable both of raising the levels of international practice and mediating neutrally between different groups of states. Finally, it may be expected to promote capital flows by providing both a modicum of investment certainty and some assurance to the host country of local control over its own economic and social resources." [56] All these factors in mind, usage of 'equitable compensation' by the arbitral tribunal in LIAMCO v. Libya over the traditional standard of prompt, adequate and effective and written down book value is an excellent first step toward applying the doctrine of unjust enrichment as it should.

Endnotes : Chapter Five

1. W.P. Gormley, "The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Clas-

sical Norms of Moral Force and Good Faith" (1970), 14 St. Louis U. L. J. 367, at 373-374.

2. L.J. Brierly, The Law of Nations (6th ed. 1963) at 53. Refer as well to L.J. Brierly, The Basis of Obligation in International Law (1958) at 10-14 for an indepth analysis of consent and pacta sunt servanda.

3. Saudi Arabia v. ARAMCO (1963), 20 I. L. R. 117.

4. The Vienna Convention on the Law of Treaties 1969, is reprinted in (1969), 8 Int'l. Legal Materials 679.

5. Similarly, Article 2 of OECD'S Draft Convention on the Protection of Foreign Property provides that:

"Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party."

The Draft Convention is reprinted in (1963), 2 Int'l. Legal Materials 241. Article 2 appears on p. 247.

6. BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic (1979), 53 I. L. R. 297.

7. Id., at 334.

8. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Merits) (1967), 33 I. L. R. 48.

9. Chorzow Factory Case [1928] P. C. I. J. Ser. A, no. 17

10. Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic (1979), 53 I. L. R. 422.

11. Sapphire International Petroleums Ltd. v. National Iranian Oil Company Arbitral Award (1967), 35 I. L. R. 136.

12. Id., at 181.

13. Id., at 183.

14. Id. ,at 186.

15. Loss of profit was accepted as a compensable loss by the sole

artibrator only because he was satisfied that there was a strong probability regarding the existence of commercially exploitable oil in the concession areas.

16. Refer to note 6, supra.

17. Id., at 349.

18. Libyan American Oil Company v. The Libyan Arab Republic: Award of the Arbitral Tribunal (1982), 62 I. L. R. 141. The award is also reprinted in (1981) 20 Int'l Legal Materials 1.

19. Id., at 198 of 62 I. L. R. and p. 63 of 20 International Legal Materials, ibid.

20. Id. at 207 of 62 I. L. R.

21. Lena Goldfields Arbitration, in (1929-30), 5 Annual Digest of Public International Law Cases 3. The case also appears in (1950), 36 Cornell L. Q. 31.

22. Jablonsky v. German Reich (1935-37), 8 Annual Digest of Public International Law Cases 138.

23. Refer to note 10, supra.

24. Id., at 391. Refer to the note.

25. LIAMCO v. Libya, op.cit., note 18, at 206.

26. In determining the pecuniary value of LIAMCO's concession rights in The Raguba Field, the sole arbitrator rejected the two different valuation figures as being two extremes. Using the notion of 'equitable compensation', he settled for the middle figure of U.S. $ 66 million by taking into consideration all other factors that affect profitability. Refer to pp. 212 to 214.

27. Id., at 214-215.

28. The rationale of the Lena Goldfields award is discussed in more detail in the subsequent part of this chapter on 'unjust enrichment'.

29. The Mavrommatis Jerusalem Concessions (1925-26), 3 Annual Digest of Public International Law Cases 204.

30. Id., at 205, refer to the note.

31. Sapphire International Petroleums v. NIOC, op.cit., note 11, at 170.

32. For authorities on the doctrine, see D.P. O'Connell, The Law of State Succession (1956) at 104. Three disputes wherein the doctrine was advanced are: Spanish Zone of Morocco Claims (1924), 2 U.N.R.I.A.A. 682; Iraq Petroleum Co. v. Deutsche Band und Disconto Gesellshaft (Anglo-German Mixed Arbitral Tribunal, 1930), [1929-30] Recueil des Cours 478; Libyan American Oil Company v. The Libyan Arab Republic, cited in note 18, supra.

33. E.J. de Arechaga, "State Responsibility for the Nationalization of Foreign Owned Property" (1978), 11 N. Y. U. J. Int'l. L. Pol. 179, at 182.

34. Refer to O'Connell in note 83, supra, at 81.

35. Determination of the compensation award on the basis of unjust enrichment was based on future profits Lena would have generated, if not for the breach, "and which the (Russian) Government now can make on the assumption of good commercial management and the best technical skill and up to date development. In the case of Lena that assumption has been proved by past facts. In the case of the Government it is legally just." Hence the following valuation figures (in British Pounds) :

Lenskoie		
	Gold	985,000
Urals		
	Copper	1,900,000
	Iron	7,000,000
Altai		
	Copper,Lead,Zinc,Silver,Gold	3,000,000

Total sum awarded	12,885,000

Refer to the text of the award, reprinted in part in (1950), 36 Cornell L. Q. 42, at 51-52.

36. W. Friedmann, The Changing Structure of International Law (1964) at 20.

37. R.C. Wesley, "A Compensation Framework for Expropriated Property in the Developing Countries," in R. Lillich ed., Valuation of Nationalized Property in International Law vol.3 (1975) at 25-32.

38. Id., at 25.

39. See Decree Concerning Excess Profits for Copper Companies [Sept. 28, 1971] as reprinted in (1971), 10 Int'l. Legal Materials 1235, at 1238-1239.

40. See Comptroller General's Resolution on Compensation [Oct. 11, 1971] as reprinted in (1971), 19 Int'l. Legal Materials 1240, at 1242.

41. See Decree Concerning Excess Profits for Copper Companies, supra, at 1238.

42. See Comptroller General's Resolution on Compensation, supra, at 1251.

43. Ibid.

44. Ibid.

45. Id., at 1252-1253.

46. See Decree Concerning Excess Profits of Copper Companies, supra, at 1239.

47. Ibid.

48. Wesley, in note 69, supra. See pp. 33-40 wherein Wesley describes and discusses other "Analogous Excess Profit Systems."

49. See the newspaper article: "Pentagon wants a refund," in The Citizen (Ottawa), Friday, March 29, 1985, at B10.

50. Refer to the newspaper article: "Exxon fined billions,"in The Citizen (Ottawa), Tuesday, July 2, 1985, at A13.

51. Note, "The Chilean Copper Nationalization: The Foundation for a Standard of 'Appropriate' Compensation" (1974), 23 Buffalo L. Rev. 765, at 784.

52. B. Cheng, "The Rationale for Compensation for Expropriation" (1958-59), 44 Groitus Transactions 167.

53. D.B. Furnish, "Days of Revindication and National Dignity: Petroleum Expropriations in Peru and Bolivia," in R. Lillich ed., Valuation of Nationalized Property in International Law vol.2 (1973) at 55.

54. See de Arechaga note 33, supra.

55. Note, "International Minimum Standard - Chilean 'Excess Profits Deductions Held Non-Renewable" (1973), 14 Harv. Int'l. L. J. 378, at 389.

56. Ibid.

Chapter 6: UNITED NATIONS RESOLUTIONS.

Although U.N. General Assembly resolutions, by virtue of Articles 10, 11 and 13 of the Charter of the United Nations, are recommendatory, those that attempt to codify, help develop or reshape existing international law norms should not be simply classified as such. For resolutions that are adopted by the General Assembly "for the purpose of... encouraging the progressive development of international law and its codification" [1] are important for determining universally accepted international law practice. Such resolutions must not, therefore, be summarily set aside as recommendations, instead the fact that they are adopted by a majority vote count warrants their being tested with a legal litmus paper test that determines their legal effect, or the lack of it, in international law.

Resolutions that deal with nationalization and compensation must be analysed in this manner before any judgment call is made on their legal merit. Pursuing this approach, our analysis of these resolutions shall revolve around resolution 1803 (XVII) and the Charter of Economic Rights and Duties of States, only because they are the most important U.N. General Assembly instruments on the treatment of foreign investment. The other resolutions, studies and proposals that preceded the adoption of resolution 1803 (XVII) and the Charter, but which contributed toward formulation of both instruments, are vital to our analysis and shall not, therefore, be neglected.

A. Resolution 1803 (XVII).

Adoption of resolution 1803 (XVII) of 1962 on permanent sovereignty over natural resources [2] saw a clash of ideologies and interests on the scope in which the sovereign right of each state is to be exercised in order that the state may economically develop. Recognition, by all states, of the permanent sovereignty of states over economic resources and wealth within their jurisdiction was no problem. For one finds "that much of the resolution consists of affirmation and reaffirmation of the" right. [3] So much so that, its international law status needs no further analysis nor elaboration. The same, however, is not so with respect to its scope in international law. Here, one cannot help but realize the different and conflicting views on whether permanent sovereignty be absolute or whether it be subject to restrictions. On these questions, the General Assembly, by a vote of 87 for, 2 against, and 12 abstentions, [4] resolved that sovereignty be subject to conditions which are set out in paragraph 4 of the resolution. The paragraph states that:

> "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interests which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."

Before dwelling on the implications of paragraph 4 on sovereignty, let us first look and inquire into the voting patterns of states. Except for France and South Africa, the two dissenting voters, all developed capitalist states voted for adoption of resolution 1803 (XVII). The willingness of the majority of developed capitalist states to support the resolution was attributed not so much to the resolution's numerous recitals of sovereignty but more so to the sovereign obligations espoused by paragraph 4 and paragraph 8 which will be discussed later. As is only too obvious, had the resolution given little regard or totally disregarded sovereign obligations, the support of the U.S.A., the U.K., and other developed capitalist states would not have been forthcoming. [5] On the issue of compensation, the position of the U.S.A., and the U.K. and other developed capitalist states was clear. For them, 'appropriate compensation' could only refer to prompt, adequate and effective compensation. [6]

Not unexpected was the contrary position advanced by the Eastern Bloc states. The Soviet Union insisted that the sovereign rights of states be absolute and should not, therefore, be compromised by the inclusion of sovereign obligations. To this end, it proposed that the General Assembly "(c)onfirms the inalienable right of peoples and nations to the unobstructed execution of nationalization, expropriation and other essential measures aimed at protecting and strengthening their sovereignty over natural wealth and resources." [7] The Soviet Union's proposal was

well received by other Eastern Bloc states, as seen for example in the statement by Hungary against construing 'appropriate compensation' to mean nothing more than prompt, adequate and effective compensation. [8] Hungary argued that:

> "It was not correct to say that nationalization with the payment of compensation was a generally acceptably principle; the fundamental principle was that of sovereignty. Any decision relating to whether and how much compensation should be paid was essentially an internal affair of the state concerned, which therefore was the sole judge in the matter and could brook no outside interference whatsoever in the exercise of its sovereignty. The basis of any right to compensation was not some rule of international law but the relevant legislation of the state concerned... The concept of prompt, adequate and effective compensation, which the United States wished to impose and codify as a sort of international law, would be flagrantly unjust to emerging nations." [9]

But just as the developed capitalist position on compensation failed to attract any support from Eastern Bloc states, neither did the Eastern Bloc perspectives gather any support from developed capitalist states.[10]

Most of the developing states, except for Burma and Ghana that abstained, voted in support of the resolution. [11] On the question of compensation, the U.S.A. and the U.K. agreed with developing states to withdraw their proposal, for the specific mention of prompt, adequate and effective compensation, as a compromise. [12] Nonetheless, as pointed out by Schwebel, "Ambassador Klutznick stated that the United States delegation 'was confident that the expression appropriate compensation in operative paragraph 4 of the draft resolution would be interpreted as meaning, under international law, prompt, adequate and effective compen-

sation." [13] As for the Eastern Bloc initiative, proposed by the Soviet Union, it was not withdrawn. It "was put to a vote, first in Committee and, having been defeated there, then in Plenary Session. In that latter, determinative test, it was rejected by 48 votes against, 34 in favor, and 21 abstentions. Among the delegations favoring the Soviet amendments, 23 were not Communist." [14]

Important to the nationalization and compensation issues and the broader issue of sovereignty as well, is paragraph 8 of the resolution which states that:

> "Foreign investment agreements freely entered into by, or between, sovereign states shall be observed in good faith; states and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution."

Before its adoption, however, a number of proposals were advanced. The United States and the United Kingdom, for example, proposed that good faith observance of investment agreements, entered into by states or a state and private foreign investor, be specifically mentioned. [15] While their joint proposal received the support of Panama, other developing states like Lebanon and Syria rejected inclusion of agreements entered into by a state and private foreign investor. [16] Their (Lebanon and Syria) counter proposal was, however, "defeated by a vote of 47 to 33, with 11 abstentions." [17] On the other hand, the joint proposal of the United States and the United Kingdom was "adopted by 53 votes in favor,

22 opposed and 15 abstentions" [18] to form the substance of paragraph 8.

Where a dispute, for example nationalization, arises between parties to a paragraph 8 investment agreement, the paragraph seems to suggest that only the terms of the agreement would be used in determining the rights and obligations of the parties. This, however, is not the case. For paragraph 3 of the resolution clearly specifies that in such disputes , the rights and obligations of the parties shall be determined by giving due consideration to domestic law and international law requirements as well. This is obvious in the words of the paragraph:

> "In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient state, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources."

Consequently, the requirements of paragraphs 3 and 8 on compensation for nationalization of private foreign investments are at no substantial variance with the requirements of paragraph 4.

Is the compensation framework of the resolution no different to the U.S.A. assertion that it is based on the standard of prompt, adequate and effective? Although the U.S.A., the U.K. and other developed capitalist states voted for the resolution's adoption with the understanding that the compensation framework therein refers to prompt, adequate and effective compensation, their construction of appropriate

compensation in paragraph 4 together with their support for the resolution do not qualify the compensation framework in their favor. The words: "In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law", make it difficult to accept the U.S.A.'s construction of 'appropriate compensation'. Consequently, if anything, the U.S.A.'s construction refers to nothing more than its domestic position on compensation. What is obvious is that 'appropriate compensation,'in any nationalization dispute, derives its color from the nationalizing state's law and international law. This being the case, how can one ascertain with absolute certainty that the compensation framework of paragraph 4 refers to only one particular standard ?

Resolution 1803 (XVII)'s compensation framework is not, therefore, restricted to a single compensation standard; prompt, adequate and effective or otherwise. If it is to be categorized as a single standard, case law indicates explicitly that it must be described as a mixed and neutral standard whose satisfaction is subject to different valuation variables, which are identified through the application of principles of law common to the host state's domestic law and international law, and the circumstances which exist in an investment relationship, influencing the investment's ability or disability to generate profit. The fact that the compensation framework is mixed allows it to be neutral because if exclusively satisfied on the basis of its market value, the framework

would be seen as pro nationalized investors. Or, alternatively, if the compensation framework is to be exclusively satisfied according to the requirements of the host state's law, it would be seen as pro host states. A consequence which would be detrimental to developing states because private foreign investors would be insecure if they were to venture into such states. In fact the International Chamber of Commerce Court of Arbitration ruled in March 11, 1983 [19] that even where reference is made only to the application of the host state's domestic law, such reference "must be construed so as to include such principles of international law as may be applicable and that the national laws of" the host state "can be relied upon only in as much as they do not contravene said principles." [20]

An article by Dworkin, on the value of wealth, [21] gives support to the resolution's mixed standard of compensation. As Dworkin's article helps to highlight an important feature of the standard, i.e., the fact that it is mixed not only makes it neutral but it gives to the standard a great deal of flexibility. In the article, Dworkin implies that if left to a nationalized private investor and nationalizing state to determine compensation, chances are that the nationalized party "will ask for more... than he would pay to acquire" the investment. [22] Conversely, if left again to the same parties, chances are that the nationalizating party will want to pay less for its acquisition of the investment than it would ask for if it were to dispose of the investment by sale to a buyer. The point made by Dworkin here is that property is, usually,

more valuable to its owner than to any other party, unless of course the other person's interest in its acquisition and exploitation is equal to or more than the owner's monetary valuation thereof and that the other person is willing and able to pay the price (equal to or more than). [23] On the basis of these factors, the resolution's mixed standard of compensation makes a good deal of sense. Furthermore, with the compensation framework, mixed as it is, the amount for compensation payment is not capable of predetermination. Hence, a sense of neutrality is retained in international law.

In order to understand and appreciate what 'appropriate compensation' means, reference must be made to reports and studies that focused on the compensation issue and which preceded the resolution's adoption. To do so is important and necessary because as stated by Gess, resolution 1803(XVII) was the result of an extensive study by the United Nations Secretariat which was preceded by meetings conducted separately by "the United Nations Commission on Sovereignty over Natural Resources... the Economic and Social Council and the General Assembly..." [24]. The "study provided a consolidated analysis of national legislation, bilateral and multilateral international agreements, international arbitrations and adjudications, and codification studies and, in summary, covered the many aspects of permanent sovereignty and related property and exploitation rights." [25] Gess further added that the United Nations was able to draw on the "study which reflected the world's major legal and political systems" and on this basis, resolution 1803(XVII) reflects "current in-

ternational legal thought," as at 1962, "based upon full documentation that is not limited in geographical or doctrinal scope." [26]

Equally influential on the resolution were the series of reports, the Draft Code and Revised Draft Code submitted by Garcia Amador, the Special Rapporteur appointed by the International Law Commission to report to it from 1956 to 1961, inclusive, on state responsibility, to the International Law Commission. [redacted] reports are of particular importance to us because they also focus on the problem of compensation payment, showing how the position has shifted from adequate compensation to a different framework. His first report of 1956 was dominated by his analysis of the conflicting doctrines of the minimum international standard of treatment of aliens on one hand and equality of treatment between nationals and foreigners on the other. [27] The outcome of his inquiry into both doctrines, based on case law and doctrinal development, was his rejection of the latter doctrine as being irrelevant in determining state responsibility. [28] For, in his words:

> "The fact that nationals suffer equally from ... a situation can not constitute a valid excuse for a state to avoid its international responsibility." [29]

On the basis of the doctrine of the minimum international standard of treatment of aliens, the Special Rapporteur, in his analysis of the problem of nationalization and compensation, provided in his report of 1957 [30] that:

> "The state is responsible for the injuries caused to an alien by the expropriation of his property, save in so far as the

measure in question is justified on grounds of public interest and the alien receives adequate compensation." [31]

Adequacy of payment as the minimum international standard of compensation for nationalized private foreign property is also evident in Article 24(1) of the Special Rapporteur's Draft Code which states that:

> "The reparation of the injury caused to an alien may take the form of restitution in kind... or, if restitution is not possible or does not constitute adequate reparation for the injury, or pecuniary damages." [32]

Article 24(1) states, expressly clear, that reparation must at the minimum be adequate, be it in the form of restitutio in integrum or compensation payment. [33]

Although accepting adequacy of compensation as the minimum international law requirement, Garcia Amador and the International Law Commission were persuaded by post World War II tendencies of states, in their constitutional law adoption of "such terms as 'fair', 'equitable' and 'reasonable' compensation, to qualify their acceptance thereof." [34] Realizing the obvious shift in the post World War II practice of states, from adequate compensation in the sense of market value to fair, equitable and reasonable compensation, Garcia Amador provided the following qualifying statements:

> "Even where there is no doubt as to their interpretation, the use of any of these terms immediately raises the question of determining the amount of compensation that should in fact properly be paid to the owners of expropriated property in the various cases and circumstances that may arise. In other words, it is necessary to ascertain the rule or rules that must be followed in assessing the value of expropriated property. An in this connexion, it must be noted that, in spite of their

> undeniable similarity and the points of contact between them, these rules should not be confused with rules applied in determining the amount of compensation in the case of injury caused by 'unlawful' acts or omissions imputable to the State." [35]

Appropriate compensation does not, therefore, depend on the satisfaction of the standard of prompt, adequate, and effective. Its satisfaction depends on "the rule or rules" of the host state's domestic law and international law "that must be followed in assessing the value of the expropriated property."

What does this mean? Will satisfaction of 'appropriate compensation' always fall short of prompt, adequate and effective? Of course not. As a mixed and neutral standard, the requirements of prompt, adequate and effective compensation do not fall outside of its parameters. To illustrate, the tribunal in the Kuwait and AMINOIL dispute accepted the compensation framework of resolution 1803(XVII) as applicable to the dispute. [36] And, in determining what constituted 'appropriate compensation' the tribunal stated that an inquiry "into all the circumstances relevant to the... case... which (did) not in any way exclude a substantial indemnity" [37], i.e., payment of adequate compensation, was necessary. To this end, the ICSID Arbitration Tribunal, in the dispute between Benvenuti and Bonfant (B & B) v. Congo [38], in applying the host state's domestic law and principles of international law [39], based its valuation on the fact that the investment was a recent investment. Using the recent investment criteria, the tribunal valued B & B's nationalized rights and interests at 122,000,000 CFA [40]. Although wary of

the tribunal's figure, B & B limited its claim to its own valuation figure of 110,098,936 CFA which the tribunal held Congo must pay.

On the other hand, however, even if adequate payment in the sense of market value would serve to satisfy the valuation requirements of the parties' binding investment agreement, circumstances peculiar to the investment, making it difficult to ascertain market value, may warrant the standard's inapplicability. In the Ditta Luigi Gallotti v. the Somali Government Arbitral Award [41], for example, the unavailability of purchase invoices and the high depreciating effect of the host state's tropical climate on the property made it difficult to arrive at a market value figure. Turning to the "general principles of justice and equity" as its guide, the tribunal determined the amount of compensation on the basis of the type of property, its historical (original or capital) costs less allowable depreciation value. [42] The result being that Somalia was calculated as having incurred a compensable liability of So.Shs.1,400,000.00. An amount which rested between the claimant's claim of So.Shs.2,800,207.00 and the Somalian offer of So.Shs.937,920.00.

What is clear is that the general principles of law, common in domestic law and international law, only offer a general guidance on determining compensation payment. It is within this general legal framework that all the circumstances affecting profitability would mold the amount of compensation into shape. And, as stated in the Kuwait and AMINOIL

award and demonstrated by the ICSID Arbitral Tribunal in B & B v. Congo, supra, given the right circumstances, payment of adequate compensation is not inconceivable. We should note though that, where such principles of law have been employed as guide for determining compensation, most past World War II awards have not measured up to adequacy of payment. Returning to the Kuwait and AMINOIL award, the amount of compensation awarded by the tribunal, based on the parties' sponsored notion of "legitimate expectations" which was construed as a moderate estimate of profits, did not in fact measure up to adequate compensation.[43]

As we have seen in Chapter 5, where disputing parties have agreed on having their rights and obligations determined in accordance with the host state's domestic law and international law, international tribunals have applied principles of law they find to be common in the two legal systems when determining compensation payment. Except for the the Lena Goldfields award, a pre-World War II award, the post World War II awards did not measure up to adequacy of compensation payment. On this basis, there is no reason why the compensation requirements of resolution 1803 (XVII) should be construed any differently nor should the settlement of any compensation dispute, if paragraph 4 is to be applied, be pursued in a different direction. The post World War II arbitral awards indicate clearly that O'Keefe's concern, that the resolution "gives no significant guidance as to the standard of compensation required," [44] was ill conceived. Compensation, a complex and controversial international issue that it is, is best left unrestricted by the usage of a particular

standard. To link compensation payment with a single non mixed standard is to make compensation payment less attractive universally. While it is admitted that the specific mention of a particular non mixed compensation standard would make the predictability and determination of compensation a lot easier, it would not have been as practical as the resolution's compensation framework.

As for the Soviet led proposals, they should be accepted only to the extent that they reflect the regional international law position of Eastern Bloc states. Their contention that the sovereign right of a state is absolute is correct, but only to the extent that it is so in their political, economic and legal systems where sovereignty is emphasized more than a state's obligations toward private citizens as one finds to be prevalent in other systems. Just as public ownership of property is discouraged in a capitalist society so is private ownership of property in a socialist society, and just as private ownership of property is emphasized in a capitalist society so is public ownership in a socialist state. What does this mean? Simply, it shows that socialist perceptions of sovereignty and compensation payment are validly justified in a legal environment where the institution of private property has no legal status. In other words, such perceptions make sense in socialist jurisdictions, but they have no basis for justification in jurisdictions that have varying degrees of respect for the institution of private property.

If the socialist proposals cannot be justified in jurisdictions that accord lawful recognition of the institution of private property, how can the resolution's compensation framework be justified in a socialist jurisdiction? In other words, why should socialist states pay compensation for their nationalization of private foreign investment? We saw in Chapter 1 that, generally, in socialist jurisdictions, ownership of private property for purposes of generating profit is illegal. Hence, where such property is operated, its illegality makes it vulnerable to confiscation. The same, however, is not true of private foreign investment that enters socialist states. Such investment enters on the basis of being accorded a legal status, with legal rights and obligations that define the environment in which profit is generated while in Russia, East Germany, Poland or Romania. The status so accorded and the rights so granted are corresponded by the socialist state's assumption of sovereign obligations that seek to maintain the status so accorded and guarantee the foreign investor's enjoyment of the rights so granted. Consequently, their proposition that compensation is not a requirement of nationalization of such investment is not legally justified even in a socialist jurisdiction. In fact the Lena Goldfields dispute between Lena Goldfields and Russia is a perfect example. Russia, contrary to its policy position, saying that it was under no obligation to compensate, eventually paid the amount which was determined on the basis of the principle of unjust enrichment. For these reasons, the resolution's compensation framework is not contrary to the socialist legal rationale that compensation not be paid.

It was not long, however, before challenges were orchestrated against the universal applicability of the resolution's compensation framework by subsequent resolutions. The most notable of which is resolution 3281 (XXIX), better known as the Charter of Economic Rights and Duties of States.

B. The Charter of Economic Rights and Duties of States.

Backed by a massive vote of 120 for, 6 against, and 10 abstentions, the General Assembly adopted the Charter of Economic Rights and Duties of States in December 12, 1974 at its 2315th plenary meeting. [45] Forming the basis of what is now understood as the "New International Economic Order," the Charter, in aiming "to establish a just order and stable world," pays particular attention to the economic needs and problems of developing countries. [46] The part of the massive vote count it was able to attract from the developing states is therefore understandable. As for the Eastern Bloc states that voted with the developing states, their reasons for doing so cannot be said to be the same. After all, Russia and East Germany are not developing states. For them, the Charter's main attraction stems from the fact that it is more protective of the sovereign rights of each state by making such rights subject to the dictates of its domestic law, not domestic law and international law as one finds in resolution 1803 (XVII). In other words, the Charter is consistent with their being obsessed with the notion that

a state's sovereign rights should not be restricted by conditions, i.e., sovereign obligations.

Just as Article 2 of the Charter was the basis for attracting the support of developing and socialist states so was it the basis for rendering the instrument unattractive to the support of the chief exporters of private capital and technology. In its entirety, the Article reads in these words:

> "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, co-operate 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 principles of free choice of means."

As is only too obvious, the Article, in creating an environment in which the rights and interests of the host state are overly protected, leaves private foreign investors at the mercy of their host states.

The issue of compensation for nationalization is no exception. While resolution 1803 (XVII) requires payment of compensation to be satisfied in accordance with domestic law and international law, Article 2.2(c) of the Charter makes it clear that compensation payment is strictly a matter of national jurisdiction if a nationalized investor's host state and home state are not parties to a mutually binding agreement that sets out the parties' choice of legal and procedural machinery for resolving a compensation dispute between the investor and host state. Although the condition imposed on subjection of any compensation dispute to the host states domestic law and procedure by the Charter keeps the door open for the application of international law principles, it is not far reaching enough. The condition does not in fact make it obligatory for capital importing and capital exporting states to enter into "free choice of means" agreements. For this reason, unless they are coerced, there is no guarantee that capital importing states will freely enter into such agreements so as to ensure that the condition prevails over domestication of the compensation problem. And seen against the nationalization experiences of developing and socialist states, domestication of the

compensation issue does not guarantee compensation payment. Hence, it would have been unrealistic for the chief exporters of private capital and technology to take side with the developing and socialist states. [47] Conversely, if the Charter was overly protective of the rights of private foreign investors, as in the OECD Draft Convention on the Protection of Foreign Property, it would have been equally unrealistic for it to receive unanimous backing from the developing and Eastern Bloc states. It is understandable therefore that Belgium, West Germany, the United States, the United Kingdom, Luxembourg, and Denmark should vote against adoption of the Charter, with Japan, Canada, the Netherlands, Spain, France, Italy, Norway, Israel, Austria, and Ireland abstaining.

Again, adoption of resolution 3486 (XXX) which sought to implement the Charter saw no substantial change in the voting pattern of states. [48] Consistent with the voting pattern of resolution 3281 (XXIX), 114 countries voted for the implementing resolution, with the United Kingdom, West Germany, and the United States voting against. Abstaining were Japan, Canada, the Netherlands, Spain, France, Italy, Belgium, Israel,Ireland, Luxembourg and Denmark.

The Charter, as one discovers, is not the first direct challenge against resolution 1803 (XVII) nor was it drafted and debated without prior extensive research and discussions on issues pertaining thereto. Two resolutions, first, resolution 88 (XII) that was adopted by the UNCTAD trade and development board in its 335th meeting, in 1972, [49] and,

second, resolution 3171 (XXVIII) [50] that was adopted by the General Assembly in the following year, preceded the Charter's challenge. The UNCTAD resolution reiterates that:

> "...such measures as nationalization as States may adopt in order to recover their natural resources are the common expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedures for these measures, any dispute which falls in that connexion falls within the sole jurisdiction of its courts ... ." [51]

Furthermore, the resolution urges "all States to abide by these principles and in particular to refrain from any act which might directly or indirectly obstruct the exercise of the sovereign right freely to dispose of natural resources..." [52] But, as naturally expected, although adopted by the votes of 39 states, the resolution failed to get the support of the chief exporters of capital and technology. [53] Interestingly enough, yet not hardly surprising, the UNCTAD resolution was motivated by the Latin American states of Uruguay, Chile, Ecuador, Brazil, Columbia, Bolivia, Peru, Argentina, Mexico, Venezuela, and Guatemala.[54] Their push for adoption of the resolution was, in part, a direct response to the Chilean and Kennecott dispute which was then pending in a French court. [55] The resolution's espousal of the Calvo doctrine is not, therefore, surprising.

The second assault on the compensation framework of resolution 1803 (XVII) was supported by 108 states, with 1 state voting against and 16 abstentions. Not only does resolution 3171 (XXVIII)[56] of the General Assembly challenge resolution 1803 (XVII), but, like the UNCTAD resolu-

tion, it takes the position that the determination of compensation is an issue that is exclusive to the host state's national jurisdiction. The General Assembly's affirmation of the compensation framework of the UNCTAD resolution is obvious in the words of paragraph 3 of its resolution 3171 (XXVIII):

> "...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 ....."

Clearly, therefore, the Charter is not the first U.N. instrument nor is it the only one that espouses domestication of compensation for nationalized private foreign property. Aside from resolutions preceding the Charter, studies conducted by other U.N. bodies prior to the Charter's adoption clearly indicate a preference for the Calvo doctrine.

One discovers, for instance, that with professional direction provided by a group of eminent persons, the Department of Economic and Social Affairs of the U.N. Secretariat submitted a Report on Multinational Corporations in World Development.[57] It does not take long for one to determine the legal environment in which the report wants the issue of compensation to fall within. Its preference for Calvo is obvious in these words:

> "Home country programme
>
> The behaviour of multinational corporations can be greatly influenced by the attitudes and actions of their home countries.

It is significant that multinational corporations can no longer count on unquestioning support by the home country in any dispute. A more judicious avoidance of interference and a formal renunciation of extra-territorial applications, through the adoption of the Calvo doctrine for example, would improve the atmosphere and allay host countries' fears of foreign domination. Some screening and even auditing of the operations of multinational corporations and requirements for greater disclosure could promote the accountability of these corporations.

Host country programmes

While such measures can be taken unilaterally by a home country or group of home countries, host country programmes are often crucial. The question arises with respect to the Calvo doctrine whether certain minimum rights of subsidiaries can also be protected. Although many host countries would probably regard such a guarantee as circumscribing their sovereign rights it would facilitate the acceptance of the Calvo doctrine by home countries. Conflict is often due as much to vacillations and uncertainties of policy as to policy content. Many multinational corporations are not necessarily detered by attempts to guide or even limit their activities. This is demonstrated by the keen interest expressed by multinational corporations in activity in countries in which machinery for the screening or review of foreign investment has been established, precisely because an important source of uncertainty has been removed. Even in cases in which nationalization has taken place, there may still be room for a contribution by multinational corporations in designated areas. Furthermore, the presence of multinational corporations in a number of socialist countries demonstrates the possibility of mutually beneficial arrangements even in centrally planned economies.

The precise relationship between the multinational corporation and the host country must therefore be defined by the host country itself. While each country should formulate its own policy, there is a general need for a national co-ordinating and reviewing body.

These functions are often widely scattered among various ministries. Few ministries are equipped to deal with the whole range of problems that may arise, or are in a position to play a central role in developing a consistent set of policies. A co-ordinating body can gradually develop a nucleus of people who are capable of understanding the operations of the multinational corporations and of conducting negotiations with them.

In countries where some form of participation in the decision making of multinational corporations is aimed at, the exercise

> of this role through a development corporation may facilitate co-ordination and minimize the strain on domestic managerial capacity. This arrangement has the advantage of working from the inside so that cumbersome procedures can be avoided. AT the same time, it may be more flexible than rules of thumb such as minimum requirements for domestic voting stock and management personnel." [58]

The report states that although the Calvo doctrine appears to give to the host state the unrestricted right to impose any degree of legislative control it sees fit, the right is in fact restricted by the fact that a multinational corporation can easily relocate elsewhere should its rights and interests come under tight control or cease to be respected. [59] Hence, a host state will be forced, if it has not already done so, to provide an acceptable compensation framework and guarantee its application when nationalization is effected against private foreign investors if the host state wants to attract and retain the contributions of private foreign investment to its economic development.

Like the post 1962 resolutions and reports on sovereignty over natural resources and wealth that preceded the Charter, a report by the Ad Hoc Committee of the Sixth Special Session spoke of nationalization as a sovereign right which should be subjected only to the taking state's domestic law. Resolutions 3201 (S-VI) [60] and 3202 (S-VI) [61] which adopted the Ad Hoc Committee's Declaration on the Establishment of a New International Economic Order and Programme of Action on the Establishment of a New International Economic Order, respectively, make the desire to have exclusive domestication of nationalization and compensation issues obvious. We see, for example, paragraph 4(e) of the Decla-

ration, adopted as resolution 3201 (S-VI), speaking of the domestication of compensation in these words:

> "Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."

Similarly, the Programme of Action, adopted as resolution 3202 (S-VI), impliedly refers to the same compensation framework in these words:

> "All efforts should be made:
> (a) to defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources ... ."
> (b) ..... .[62]

Taking the preceding resolutions and reports into consideration, one should not summarily dismiss the Charter as being merely reflective of the political will of developing and socialist states. To do so would entail overlooking the economic and legal considerations that helped shape the Charter's content. But the economic and legal debates and reports that influenced the drafting of the Charter, however, do not, by themselves, give the instrument international legal effect. The issue of whether or not the Charter has international legal force must be tested against legal considerations before judgment is passed one way or another.

C. The Question of Law

What needs to be satisfied here is whether or not the Charter, adopted by the U.N. General Assembly, is a valid statement of a general practice within the scope of Article 38, paragraph 1(b) of the Statute of the International Court of Justice. If it is a correct statement then resolution 1803 (XVII) ceases to be so, but, if it is not, resolution 1803 (XVII) remains an effective statement of a universally accepted international law custom. A proper legal analysis of the Charter and resolution 1803 (XVII) will best be realized by pursuing the approach given in the dissenting opinion of Judge Tanaka in the South West Africa cases.[63] Like Judge Tanaka, "we cannot admit that individual resolutions, declarations , judgments, decisions, etc., have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matters in the same, or diverse, organizations must take place repeatedly."[64]

Notwithstanding the above approach for determining universal customary international law, Article 2.2(c) of the Charter has been said to represent existing international law for different reasons, of which:

(a) the Charter was intended to be a legally effective instrument;

(b) the language of the Charter imply it to be legally binding;

(c) the Charter, although a General Assembly resolution, is more than any ordinary resolution that is recommendatory;

(d) the Charter, having been adopted by a massive 120-6-10 vote, enjoys support which gives to its concepts the legal maturity those concepts deserve [65]; and

(e) the Charter is the final product of not only political and economic, but legal considerations and reports as well. [66]

These arguments, collectively or otherwise, do not satisfy the requirements of customary international law that Judge Tanaka, supra, alludes us to. Something more than the above five factors is needed as well, i.e., decisions and judgments of courts and tribunals, and state behaviour outside of the United Nations.

The treaty practice of states, as we have seen in Chapter 3, provides no comfort for acceptance of Article 2.2(c) of the Charter as a statement of the existing international law position on compensation payment. Not only is the unwillingness of developing, socialist and developed capitalist states to adopt a multilateral investment agreement that espouses the compensation requirements of the Charter indicative of the compensation framework's lack of universal support, but even the

bilateral investment agreements between developed capitalist and developing states, developed capitalist and socialist states, developing and socialist states, developing and developing states, and socialist and socialist states show no universal support for the Charter's compensation framework. Hence, while socialist and developing states have used the United Nations to launch what they perceive as the existing compensation framework under international law, their treaty practice has not been consistent therewith. Their contrary treaty practice, consequently, makes Article 2.2(c) of the Charter less reflective of the existing international law position.

More importantly and providing no comfort for the Charter either are court and tribunal judgments and decisions. In most, if not all, cases discussed in Chapters 4 and 5, we found no evidence of settlement of compensation disputes between host states and foreign investors being resolved exclusively under the host state's domestic law and procedure. In BP v. Libya, for example, the arbitral tribunal decided that the dispute be settled in accordance with the parties choice of law, i.e. principles of Libyan law that are in common with international law principles, and where conflict arises between the two legal regimes general principles of law and principles applied by international tribunals would apply. [67] Similarly, one finds that claims submitted before the U.S.A. Foreign Claims Settlement Commission were subjected to principles of U.S.A. law and international law. And, except for Eastern Bloc takeovers that were visited upon foreign property owners who were

granted no legal recourse except for lump sum payments made to the deprived owner's home state, other foreign take over claims were not settled solely under the host state's domestic law and procedure.

Even where a host state has tried to invoke the nationalization and compensation provisions of the Charter, international tribunals have either rejected or attached little significance to such propositions. In Texaco and Calsiatic v. Libya, [68] the tribunal recognized the provisions of resolution 1803 (XVII) on one hand while rejecting the Charter's provisions on the other. The tribunal's acceptance of resolution 1803 (XVII) is evident in these words:

> "...Resolution 1803 (XVII) seems to this tribunal to reflect the state of customary law existing in this field. Indeed, on the occasion of the vote on a resolution finding the existence of a customary rule, the States concerned clearly expressed their views. The consensus by a majority of the States belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated, i.e., with respect to nationalization and compensation the use of the rules in force in the nationalizing State, but all this in conformity with international law." [69]

But the Charter's nationalization and compensation provisions were rejected in these words:

> "The absence of any connection between the procedure of compensation and international law and the subjection of this procedure solely to municipal law cannot be regarded by this Tribunal except as a de lege ferenda formulation, which even appears contra legem in the eyes of developing countries. Similarly, several developing countries, although having voted favorably on the Charter of Economic Rights and Duties of states as a whole, in explaining their votes regretted the absence of any reference to international law." [70]

Similarly, the tribunal in LIAMCO v. Libya rejected the Charter's application, stating that "it does not represent the consensus of nations and cannot be invoked as a source of international law." [71]

Another strong and valid argument against acceptance of the Charter as representative of existing international law concepts flows from the lack of support given to the Charter by the developed capitalist states. As the chief exporters of private foreign investment, their majority support together with the majority support of the chief recipients of private foreign investment for the adoption of any U.N. General Assembly resolution on treatment of foreign investment is necessary for any such resolution to be creative of new norms of international law. While the majority support of both groups of states was prevalent in the adoption of resolution 1803 (XVII), the same support was not forthcoming in the Charter's adoption. And as we saw in Chapter 3, where the majority consensus of states from both sides has not been forthcoming in the adoption of a draft multilateral investment agreement, the draft agreement has failed to mature into an effective legal instrument. Consequently, the Charter cannot be said to be a fully effective instrument of international law.

Equally important are the Charter's implications, especially Article 2.2(c), on private foreign investors should the Charter be fully accepted as an international law instrument. No where in Article 2.2(c) do we find any mention, expressed or implied, of a minimum standard for

determining compensation payment. As it is apparent that a minimum standard is what is or is not prescribed by the host state's domestic law, there is no guarantee that the owner of a nationalized private foreign investment shall always receive compensation payment nor is there any guarantee that the Chilean retroactive application of excess profit deductions will not be duplicated. One cannot, therefore, help but be sensitive to injustices that would be visited upon private foreign investors should the Charter be accepted as a legally effective instrument. Furthermore, instead of Article 2.2(c) of the Charter providing a legal environment in which the conflicting positions of states on nationalization and compensation would eventually surrender to a universally recognized practice for the settlement of nationalization disputes, the provisions of Article 2.2(c) invite further chaos. [72] For these two reasons the Charter's nationalization and compensation framework is not totally conducive to creating an international environment that fosters the free flow of capital and technology which the states that voted for the Charter's adoption so desperately need.

The foregoing arguments against the Charter as an instrument of international law are very fundamental to the issue of whether or not the Charter has legal force. Arguments advanced as justification for the Charter's legal effect are not fanciful, they are legitimate. Nonetheless, they alone are not conclusive to fully render the Charter an instrument of international law. As is now only too apparent, those arguments find no further support in other quarters that would help substan-

tiate any claim for the Charter as wholly having the force of law. Instead, we find overwhelming arguments to the contrary, counter arguments that clearly outweigh all supporting arguments. It is obvious, therefore, that Article 2 of the Charter cannot be totally accepted as a valid statement on existing international law norms.

However, notwithstanding the validity and strength of the arguments against legal and procedural domestication of determining compensation payment, the Charter's compensation framework is not totally devoid of any usefulness in the resolution of compensation claims. Although qualification of the domestic resolution of compensation disputes, which states that "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," does not guarantee that the states concerned shall always enter into such agreements, the agreements are legally effective nonetheless when entered into. The Claims Settlement Declaration [73], declared, pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria [74], by Algeria in its capacity "as an intermediary in seeking a mutually acceptable resolution of the" hostage "crisis" [75] between Iran and the U.S.A. best illustrates the importance and effect of such agreements in the resolution of compensation claims.

Pursuant to the two declarations and other related instruments, Iran and the U.S.A. mutually agreed to have private U.S. claims against Iran

and private Iranian claims against the U.S.A. arising out of nationalization and other measures of deprivation of property rights entertained, in accordance with their choice of law and procedure, by the Iran-U.S. Claims Tribunal. Article V of the Claims Settlement Declaration, which provides that compensation for nationalization and monetary recovery arising out of other claims shall be decided "on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances", is little different from the compensation framework of resolution 1803 (XVII). This shows clearly in the compensation awards so far rendered by the tribunal.

Like resolution 1803's mixed compensation standard, Article V's legal framework for determining compensation does not preclude awarding payments in satisfaction of the market value notion, but like the post World War II awards, the compensation awards have so far fallen short of the amounts claimed. Belland, legal counsel for a U.S. claimant, makes this point as well as his rationalization of the rendering of such awards. [76] He states that:

> "No one, least of all the arbitrators who will hear your case, wishes to see the Tribunal collapse, and the withdrawal of Iran from further participation would virtually assure this.
>
> There is, therefore, a constant pressure toward compromise. Even the most conscientious of the arbitrators would like to find an award that gives the claimant acceptable redress but denies enough of what the claimant seeks to make the award acceptable to Iran. This atmosphere seems lend itself naturally

to the 50 per cent recovery." [77]

This is true of compensation for nationalization claims but not so for other claims. In White Westinghouse International Co. v. Bank Sepah-Iran [78], for instance, the claimant company made a claim for recovery of U.S.$ 298,757.45 from the respondent bank and the tribunal accepted the amount with interest as being due to the claimant.

In the American International Group, Inc. (AIG) v. Iran award, [79] for example, the Claims Tribunal reached the figure of U.S.$ 10 million as compensation for Iran's nationalization of AIG's rights and interests. The compensation award is in fact significantly less than the claimants' appraisals which were rejected by the Claims Tribunal for reasons described in these words:

> "...the appraisals do not sufficiently consider the changes in general social and economic conditions in Iran which had taken place between the autumn of 1978 and June 1979, or their likely duration. In this connection, it should be noted that during that period many Iranian nationals belonging to the wealthier part of the population left the country. Second, the appraisals do not account for the effects of certain taxes upon net profitability. Third, changes in the company's financial position between 21 March 1979 and the date of nationalization are not reflected in Mr. Freethy's revised valuation. Fourth, the company had been conducting its business only for little more than 4 1/2 years, and such an insufficient basis for projecting future profits." [80]

Similarly, in Dame and Moore v. Iran [81], the claimants sought full recovery of the value of their nationalized physical equipment, U.S. $ 354,924.00, which they argued represented the total original cost of the equipment. To this effect, documents attesting to the original purchase

price of all the nationalized equipment were tendered as evidence. Nevertheless, the Claims Tribunal rejected the claimant's figure because it did not take account, inter alia, of depreciation of the value of all the equipment, from their date of purchase to their nationalization date. "Considering all the circumstances, including the age of the equipment, the Tribunal approximated the nationalized property at U.S. $100,000." [82]

More than one important observation emerges from the Iran-U.S. experience. First, the compensation awards rendered so far by the Iran-U.S. Claims Tribunal have, like other post World War II awards, fallen short of adequate compensation. One reason for this is the constant pressure endured by the tribunal, alluded to us by Belland, coupled with the Tribunal's need to maintain "equilibrium between the Parties" [83] by ensuring that the awards are fair and equitable to both sides [84]. Another equally important reason, which is consistent with the premise of "equilibrium between the Parties" and the principles of fairness and equity, is the downward effect all circumstances affecting valuation of investments have on arriving at a final amount for compensation. Not unlike the other post World War II awards, all circumstances factors, applied within the confines of general principles of law, have been the rationale behind payments not measuring up to adequate compensation. This being so, neutrality of the awards and international law is projected to the state required to make such payments. Second, the Iran-U.S. experience shows us that while the Charter's compensation

framework is largely defective in international law, it should not be totally rejected. Any rejection should be restricted to domestication of the compensation problem while states should not be discouraged from entering into "free choice of means" agreements with other states when the need to do so arises. Finally, compensation awards rendered pursuant to the Iran-U.S. agreements have not challenged the mixed and neutral standard of resolution 1803 (XVII). In fact, the awards further enhance the universal international law status of the mixed and neutral standard.

Like the other post World War II awards, the Iran-U.S. compensation awards have been and shall continue to be determined within a framework that is consistent with the principle of neutrality of international law. Put differently, the principle of neutrality of international law is easily identified as the creative force behind the mixed compensation standard. Why and how is this so? In answering this twofold question, let us borrow the words and reasonings of Weil who said: "The emergence of legal" norms like the compensation requirements of resolution 1803 (XVII) which serve to bridge the existing chaos in the domestic and regional practice of states, are "stimulated - as it has always been - by a twofold necessity: first to enable... heterogeneous and equal states to live side by side, and to that end establish orderly and, as far as possible, peaceful relations among them; second, to cater to the common interest that did not take long to surface over and above the diversity of states. Such have been the twin roots of international

law, and such from the beginning have always been its two essential functions: on the one hand, to reduce anarchy through the elaboration of norms of conduct enabling orderly relations to be established among sovereign and equal states (as Max Huber put it in a now famous formulation: international law 'has the object of assuring the co-existence of different interests which are worthy of legal protection'); on the other hand, to serve the common aims of the international community." [85]

Seen against the dual functions of international law, the mixed and neutral standard of compensation not only makes sense, but is fully appreciated as well. Its application, as we have seen, has been able to easily realize fulfillment of the said functions of international law because of its religious and ideological neutrality [86] which allows the mixed compensation framework to transcend the fact that, although accepted as sovereign equals, states "remain, more than ever, different from each other, whether in size, political or economic system, ideology or level of development". [87] Not only has the neutral nature of the mixed compensation framework been successful in its application to disputes between parties of the said different backgrounds, but it is the best compromise that ensures preservation of the right of every state to freely determine "and develop its political, social, economic and cultural system" [88] as well as ensuring the continuing free flow of capital and technology between states of the said backgrounds.

This is where the Charter falls short. Apart from failing to fully reflect prevailing universal customary practice, it also falls short of projecting an image of neutrality. These failures are easily traced to and explained by the fact that the Charter was drafted and adopted to induce distributive economic justice. This being the case, little or no attention was given to all the sources for determining the universal customary practice of states regarding nationalization and compensation during its formulation. Had other sources been consulted, there is no doubt that the Charter's compensation framework would have been little different to that of resolution 1803 (XVII). But to do so would have been counter productive with respect to the Charter's objective of fostering distributive economic justice. As a consequence, while the Charter's compensation framework is consistent with the U.N. proposed New International Economic Order, it fails to fully satisfy the requirements of Article 38, paragraph 1(b) of the Statute of the International Court of Justice. The same, however, cannot be said of paragraphs 3, 4 and 8 of resolution 1803 (XVII) of 1962. For reasons already discussed, and tested against post 1962 practice of states, the said paragraphs reflect the current international law position. That nationalization and compensation disputes be subjected to principles that are common in the host state's law and international law, taking full account as well of all circumstances affecting the value of an investment.

Endnotes : Chapter Six.

1. Refer to Article 13.1(a) of the Charter of the U.N.
2. Resolution 1803 (XVII) is reprinted in (1963), 2 Int'l. Legal Materials 223.
3. S.M. Schwebel, "The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources" (1963) 49 Am. B. A. J. 463.
4. Ibid.
5. Id., at 464.
6. Id., at 465.
7. Ibid., as cited by Schwebel.
8. Ibid.
9. Ibid., as cited by Schwebel.
10. Ibid.
11. Id., at 463.
12. Id., at 466
13. Ibid.
14. Ibid.
15. Ibid.
16. Ibid.
17. Id., at 467
18. Ibid.
19. Refer to the Award in the Arbitration Between S.P.P. (Middle East) Ltd., Southern Pacific Properties Ltd. and the Arab Republic of Egypt, The Egyptian General Company for Tourism and Hotels, in (1981), 22 Int'l. Legal Materials 752.
20. Id. at 771.
21. R.M. Dworkin, "Is Wealth a Value?" (1980), 9 J. Legal Stud. 191.
22. Id. at 192.
23. This point is also discussed by A.T. Kronman, "Wealth Maxi-

mization as a Normative Principle" (1980), 9 J. Legal Stud. 227 and R.A. Posner, "The Value of Wealth: A Comment on Dworking and Kronman" (1980), 9 J.Legal Stud. 243.

24. K.N. Gess, Permanent Sovereignty over Natural Resources" (1964), 13 Int'l. & Comp. L. Q. 398.

25. Ibid.

26. Id., at 398-399.

27. The Special Rapporteur's first report is reprinted in (1956), 2 Yearbook of the International Law Commission 173, U.N. Doc. A/CN.4/96 (1956).

28. Id., at 200.

29. Id., at 203.

30. The Special Rapporteur's second report is reprinted in (1957), 2 Yearbook of the International Law Commission 104, U.N. Doc. A/CN. 4/106 (1957).

31. Refer to Article 9 of the Draft Code, submitted by the Special Rapporteur in Chapter IV of the second report, at 117.

32. Article 24(1) of the Draft Code appears in the Special Rapporteur's third report of 1958, reprinted in (1958) 2 Yearbook of the International Law Commission 47, at 67, U.N. Doc. A/CN. 4/111 (1958).

33. Reparation is not the same as compensation payment, for the latter is a form of the former. The other form of reparation is restitutio in integrum. Refer to the Special Rapporteur's fourth report of 1959, reprinted in (1959), 2 Yearbook of the International Law Commission 1, at 16-17, U.N. Doc. A/CN. 4/119.

34. Id., at 20.

35. Ibid.

36. The Kuwait and the American Independent Oil Co. (AMINOIL) Arbitral Award, in (1982), 21 Int'l. Legal Materials 976.

37. Id. at 1033.

38. Benvenuti and Bonfant v. Republic of Congo (1984), 67 I. L.

R. 345.

39. Refer as well to Agip Spa v. Republic of Congo (1984), 67 I. L. R. 319 wherein the ICSID Arbitral Tribunal also applied "The Law of the Congo supplemented... by... principles of international law... ."

40. Benvenuti and Bonfant v. Congo, op.cit., note 38, at 376.

41. Ditta Luigi Gallotti v. Somalian Government Arbitral Award, (1970), 40 I. L. R. 158.

42. Id. at 163.

43. Refer to note 36, supra.

44. P.J. O'Keefe, "The United Nations and Permanent Sovereignty over Natural-Resources" (1974), 8 J. World Trade L. 239, at 275.

45. The text of the Charter is reprinted, in full, in (1975), 14 Int'l. Legal Materials 251 and (1975) 69 Am. J. Int'l. L. 484

46. Ibid. Refer to the first paragraph of resolution 3281 (XXIX).

47. Not only is domestication of the compensation issue a new legal direction taken by the Charter, Article 2.2(c) of the Charter is silent on the traditional conditions of 'public purpose' and 'non-discrimination'. Refer to B.H. Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-owned Wealth" (1981), 75 Am. J. Int'l. L. 437, at 439-447.

48. The implementation resolution is reprinted in (1976), 15 Int'l. Legal Materials 175.

49. The UNCTAD resolution is reprinted in (1972), 11 Int'l. Legal Materials 1474.

50. Resolution 3171 (XXVIII) is reprinted in (1974), 68 Am. J. Int'l. L. 381.

51. UNCTAD resolution, op.cit. at 1475.

52. Ibid.

53. The UNCTAD resolution was adopted by 39 states that voted

for, 2 voted against and 23 abstained.; Some developing states did not vote for the resolution's adoption. For example, Greece voted (with the United States) against the resolution while Gabon, Rwanda, Senegal, Sri Lanka and Zaire abstained.

54. Note, UNCTAD: Permanent Sovereignty over Natural Resources," (1973), 7 J. World Trade L. 376, at 378.

55. Id., at 376-378.

56. Refer to note 50, supra.

57. Chapter IV of the report: "Towards a Programme of Action," is reprinted in (1973) 12 Int'l. Legal Materials 1109.

58. Id., at 1129-1130.

59. Id., at 1130.

60. Resolution 3201 (S-VI) is reprinted in (1974), 13 Int'l. Legal Materials 715.

61. Resolution 3202 (S-VI) is reprinted in (1974), 13 Int'l. Legal Materials 720.

62. Id., at 729.

63. South West Africa Cases, [1966] I.C.J. Rep. 248.

64. Id., at 291.

65. The first four arguments, used as justification for the Charter as a legally effective instrument, appear in (but not supported by) H.B. Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-owned Wealth" (1981), 75 Am. J. Int'l. L. 437, at 451.

66. The forth and fifth arguments are advanced by R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property" (1981), 75 Am. J. Int'l. L. 553, at 563.

67. BP v. Libya (1979), 53 Int'l. L. R. 297, at 328-329.

68. Texaco and Calsiatic v. Libya (1979), 53 I. L. R. 422.

69. Id., at 491-492.

70. Id., at 493.

71. LIAMCO v. Libya (1982), 62 I. L. R. 141, at 189.

72. Read R.B. Lillich, ed., "The Valuation of Nationalized Property in International Law: Toward a Consensus or More "Rich Chaos" vol. 3, The Valuation of Nationalized Property in International Law (1975) at 183.

73. The Claims Settlement Declaration is reprinted in its entirety in (1981-82) 1 Iran-U.S. Claims Tribunal Reports 9.

74. The General Declaration is reprinted in its entirety in (1981-82) 1 Iran-U.S. Claims Tribunal Rep. 3.

75. Ibid.

76. S.P. Belland, "The Iran-U.S. Claims Tribunal: Some Reflections on Trying a Claim" (1984), 1:3 J. Int'l. Arb. 237.

77. Id. at 246-247.

78. White Westinghouse Int'l. Co. v. Bank Sepah-Iran, (Award No. 7-14-3) (1981-82), 1 Iran-U.S. Claims Tribunal Reports 169.

79. American Int'l. Group, Inc. v. Iran, (Award No. 93-2-3) (1983), 4 Iran-U.S. Claims Tribunal Reports 96.

80. Id. at 107-108.

81. Dames and Moore v. Iran, (Award No. 97-54-3) (1983), 4 Iran-U.S. Claims Tribunal Reports 212.

82. Id. at 224.

83. This fact is acknowledged by Claims Tribunal in its Decision with Regard to Issues Arising in Connection with the Establishments and Operation of the Security Account. See (1983), 22 Int'l. Legal Materials 591, at 594, and by President Lagergren, at 609, in his dissenting opinion.

84. Id. at 610.

85. P. Weil, "Towards Normative Relativity in International Law?" (1983), 77 Am. J. Int'l. L. 413 at 418-419.

86. Id. at 420.

87. Id. at 419.

88. Refer to Article 1 of the 1966 Covenants on Human Rights as cited by Weil in note 21 of his article, supra.

Chapter 7: CONCLUSIONS.

Contrary to any assumption about the non existence of a universally settled practice on the compensation for nationalization problem, we have found the existence and consistent application of a compensation framework that is universal in nature. The framework, as we have seen, is based on neutral principles of law that are common to the host state's domestic law and international law, which are generally used as guide, and taking account of any investment agreement regulating a nationalized investment's economic viability and all the circumstances pertaining to a nationalized investment's ability or disability to generate profit. Although the compensation framework's susbstance remains to be fully defined, its general appearance and substance as described supra is definite. What is obvious is the fact that, generally, neutral principles of law are applied as guide for determining the amount of compensation and justification therefor, but the actual amount a nationalizing state pays is subject to all the circumstances of a nationalized investment's profit generating ability and the terms of any investment agreement regulating the investment.

Within this broad framework, we have found that depending on all the circumstances affecting valuation and profitability of a nationalized investment, the amount of compensation has been calculated to satisfy the requirement:

(a) of adequacy of payment;

(b) that payment be based on the investment's written down (unadjusted) book value;

(c) that payment be based on a downward adjustment of the investment's written down book value; or

(d) that no amount be paid.

As well, there have been instances of payments, determined in satisfaction of the compensation framework's requirements, which have not met any of the said payment requirements but which have tilted more in favor of adequacy of payment.

The ICSID Arbitration Tribunal's willingness to satisfy the requirement of adequacy of payment in the Benvenuti and Bonfant v. Congo dispute, for example, was justified by and based on the recent investment criteria. If the investment had ben a going concern for over a long period of time prior to its nationalization, chances are that the amount to be paid would not have met the requirement of adequacy. In that case, however, the fact that the investment was a recent investment did not merit consideration of factors such as rate of depriciation that would lead to a downward adjustment of the investment's value. Furthermore, as a recent investment, it was easier to determine the investment's value because other factors affecting its valuation had not yet influenced or complicated its value in any substantial way. Set against this is another scenario, i.e., even if it is clearly stipulated by an investment agreement that the requirement of adequate compensation is

that which needs to be satisfied, circumstances peculiar to the investment, as in Ditta Luigi Gallotti v. Somalia, may result in receipt of a compensation amount significantly less than an amount measuring up to adequacy of payment.

Under another set of different circumstances, however, compensation for nationalization may be satisfied on the basis of an investment's written down book value figures. In the Singer Manufacturing Co. claim, for example, the U.S. Foreign Claims Settlement Commission calculated compensation payment by taking exclusive consideration of the balance sheets tendered by the claimant company, "subject to certain adjustments". [1] The same Commission, again, based its rendering of another compensation award on the written down book value of the claimant's interests. In the General Electric Co. claim, the compensation claim of U.S. $ 1,327,714.59, being the purchase price of the claimant's 40,000 shares affected by Russian nationalization measures and consistent with their book value, was accepted by the Commission. [2]

Again, depending on the circumstances affecting an investment's value, its final valuation may be arrived at after a downward adjustment of its written down book value. A good example of this, as we have seen, is the compensation award for Revere Copper and Brass Inc. as rendered by the American Arbitration Association. In that award, the claimant's investment had a poor rate of recovery because of its inability to generate profit. Consequently its written down book value of U.S. $

64,131,000.00 was downwardly adjusted to arrive at U.S. $ 1,131,144.00. Similarly, by downwardly adjusting the value of the claimant's rights and interests in the Standard Oil Company Claim which rested at U.S. $ 17,483,522.00 without adjustment, the U.S. Foreign Claims Settlement Commission arrived at the figure of U.S. $ 12,240,000.00.

Alternatively, where an investor's investment rights and interests have been nationalized, but the investor suffers no actual or predictable compensable economic loss, then, he is not entitled to receipt of compensation payment. The Mavrommatis Jerusalem Concessions case, wherein the World Court stated that "compensation will be awarded only on proof of actual loss" is very specific about this. [3] Subsequent claims for compensation have been rejected for want of proof of the actual loss factor. Again, in the Standard Oil Co. claim, the U.S. Foreign Claims Commission rejected Standard Oil's compensation claim rgarding its undeveloped concession areas as not compensable because they had no predictable economic value. In another dispute between LIAMCO and Libya, the claimant's claim for loss of profits in one of its undeveloped oil fields was also rejected as non compensable because the claim could not be substantiated. Consequently, it is not nationalization in wrongful breach of a state's investment obligations or other nationalization measures per se which warrant a nationalized investor's receipt of compensation payment. What is equally significant is the actual loss factor, without it, a victim of nationalization suffers no compensable loss.

Apart from awarding compensation payments or the lack of it in satisfaction of the foregoing requirements, there are those that also fall within the compensation framework's parameters, but which fail to level with any of the foregoing requirements. A case in point here is the dispute between Kuwait and AMINOIL. Therein the tribunal accepted the compensation framework's application with its further acceptance of the parties' mutual espousal of the notion of legitimate expectations as basis for determining the amount of compensation. To this end, the compensation award was calculated from what was accepted by the tribunal as AMINOIL's reasonable rate of return, i.e., the amount was based on a moderate estimate of profits which was conducive to the claimant's legitimate expectation because over the years preceding the nationalization measure, the claimant had accepted such estimates. Such compensation awards, though not measuring up to adequacy of payment, tend to tilt in its favor nonetheless.

As well, there are those general principles of law whose application in calculation of compensation payments have resulted in awards tilting in favor of adequacy of payment. While generally used as guide and justification for determining compensation payment, not all neutral principles of law:

(a) acquired rights;

(b) pacta sunt servanda;

(c) unjust enrichment; and

(d) justice and equity,

so far applied by tribunals, have been done so only for purposes of guidance and justification. To illustrate, the principle of pacta sunt servanda was referred to not as guide, but as basis for calculating and justifying compensation payment in the dispute between Sapphire International Petroleums Ltd. and National Iranian Oil Company. According to the tribunal, the principle of pacta sunt servanda substituted National Iranian Oil Company's non performance of its investment obligations with a pecuniary obligation. This meant returning Sappnire International Petroleums Ltd. to "the pecuniary position (it) would have been in if" not for National Iranian Oil Company's non performance of its obligations. [4] To this end, all expenses assumed by Sapphire International in pursuance of its investment obligations with National Iranian Oil was totalled with its (Sapphire's) loss of profits as constituting National Iranian Oil's pecuniary obligations.

Using another principle, the tribunal in the Lena Goldfields dispute determined compensation on the basis of the notion of unjust enrichment. The tribunal therein, applying the principle of unjust enrichment, restricted its calculation to loss of future profits arising out of Russia's premature termination of its concession agreement with Lena Goldfields. Application of both principles resulted in payments more closer to adequacy of compensation payment than payment in satisfaction of the written down book value notion or other espoused compensation requirements. As for the remaining principles, acquired rights is used

as 'justification for application of pacta sunt servanda and unjust enrichment while the notions of justice and equity have been used as justification for having to pay compensation of which the amount is dependent on all circumstances affecting valuation and profitability.

Clearly, therefore, the compensation framework is a mixed framework. It's application, depending on the principles and circumstances adopted, has resulted in compensation awards ranging from no compensation to adequacy of payment. What has become apparent also is that most compensation awards rendered in accordance therewith have tended to measure more closer to adequate compensation than the other domestically supported standards. One fundamental reason for this is so as to maintain and encourage the free movement of private capital and technology between all states (developed capitalist, socialist and developing states alike). As well, now that more and more investments are becoming increasingly complex so has determination of their value upon nationalization. Hence, the more complex an investment, the more difficult it is to determine its value when calculating the amount of compensation for nationalization thereof. For this reason, it is becoming increasingly acceptable that expert technical opinions be given as evidence in compensation disputes. When given, opinions of accountants, mining experts, oil experts and other knowledgeable experts in other areas of investments have tended to tilt more in the direction of adequate compensation. Where such opinions are relied on when determining the value of an investment, compensation payment obviously ends up closer to meeting

the requirement of adequacy than any other domestic standard.

Why is it that we have a mixed compensation framework of universal application which when applied is capable of satisfying the position:

(a) that compensation be adequate;

(b) that compensation be based exclusively on an investment's unadjusted book value;

(c) that compensation be based on a downward adjustment of an investment's written down book value; or

(d) that no compensation be paid,

but whose application usually results in compensation payments closer to adequacy of payment? Is there not a principle of international law which gave rise to the mixed compensation framework's emergence and which also influences how it is to be applied in determining compensation? Answers to these inquiries are provided and explained by the dual functions of international law.

We found Weil's analysis of the functions of international law as being very helpful in this respect. Not only did we realize through Weil that international law norms are to promote and maintain the peaceful co-existence of all states, but such norms must also go as far as "to serve the common aims of the international community". [5] In order that such a norm is capable of serving the said functions and, consequently, maturing into an international law norm, it needs to be seen as satisfying the principle of neutrality of internaitonal law. That is

to say, it must be capable of ideological and religious (moral) neutrality. This is found to be prevalent within the mixed compensation framework. The fact that it is mixed gives to it a status of neutrality. For it does not predetermine in whose favor a compensation for nationalization dispute would be resolved because the final outcome depends on the applicable general principles of law that are found to be common in a nationalizing state's law and international law, the terms of any binding investment agreement, all the circumstances pertaining to valuation of a nationalized investment and whether or not an investor has suffered actual compensable loss. Within the mixed compensation framework and depending on the four said factors, the general principles of law factor, the terms of any binding agreement factor, the circumstances factor and the actual loss factor, we have seen the amount of compensation awarded range from no compensation to adequate compensation. In view of this, the mixed compensation framework's evolution into a norm of universal application in international law could only have been largely orchestrated by the principle of neutrality of international law. Not only is it, as we have seen, capable of maintaining the peaceful co-existence of the different states and their varying or conflicting support for the institution of private property and the different standards of compensation, but it also preserves the common interest of the global community by not being an impediment to the free movement of private capital and technology.

If the principle of neutrality of international law is responsible for

having guided the mixed compensation framework's evlution, then, the fact that the value of a property or investment fluctuates, depending on economic factors affecting its value in an upward or downward manner or keeping its value static and depending on how valuable it is to the owner or potential owners, did allow for the mixed compensation framework's evolution to take place. The fact that property, as pointed out by Dworkin and others, is usually more valuable to its owner than to its potential buyers, unless they attach the same or more value thereto, coupled with the fact that most nationalized investments are complex concerns with complex factors affecting their valuation allowed international tribunals to shape the compensation framework as is in order that neutrality of international law is maintained whenever the mixed compensation framework comes into play.

For these reasons, there cannot be any doubt about the mixed compensation framework's universal applicability in international law and its acceptance by the international community at large. Evidence of the mixed compenation framework's application and acceptance is seen in the compensation for nationalization awards rendered by the Iran-U.S. claims Tribunal. Not only was the mixed framework important in determining compensation payment, but its acceptance by Iran and the U.S.A. was also important in reaching a peaceful resolution of the hostage crisis. There is no doubt that its strength as a framework of universal applicability flows from its position of neutrality and its respect for suvereign of states and private property. Bearing all the aforesaid

factors in mind, resolution 1803 (XVII) of the U.N. General Assembly should be seen as providing an accurate codification of the mixed compensation framework. The Charter for Economic Rights and Duties of State is, however, accurate only in so far as the condition it imposes on domestication of compensation disputes. Qualification of the Charter's domestication of compensation for nationalization disputes, which reads:

> "...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 principles of free choice of means",

is consistent with the practice of states and should not, therefore, be rejected. Notwithstanding our dismissal of the Charter's domestication of compensation disputes, the qualification of domestication of compensation disputes, supra, should not be equally dismissed if only because it opens the door to adoption of a variety of settlement models.

One obvious settlement model which has come to be of political and economic significance between Eastern Bloc states and developed capitalist states and which remains encouraged by the qualification is the conclusion of lump sum settlement agreements. Another settlement model also falling within the confines of the qualification is the one that was concluded by Iran and the U.S.A. in their mutual effort to peacefully resolve the hostage crisis and claims disputes triggered by the same crisis. As well and equally important to the compensation issue is that the qualification allows states that support the same com-

pensation standard in their domestic practice to have compensation disputes between them and their private investors determined in accordance with their supported standard. To illustrate, if the United Kingdom nationalizes a United States owned private investment, then, there is nothing to stop the parties from agreeing to the application of prompt, adequate and effective compensation. Similarly, if Chile nationalizes a Brazilian or Peruvian owned private investment, there is no reason why compensation payment should not be satisfied on the basis of the Calvo doctrine if the parties so choose. Or, alternatively, if a nationalizing state supports the written down book value standard as does Libya and the nationalized investor's home state supports the same, the qualification does not preclude the parties from applying the standard if there is mutual consent to do so. The qualification is, therefore, significant not only because it allows for adoption of a variety of settlement models, but it also leaves the door open for the application of regionally supported compensation standards. Consequently, it forms an integral part of the mixed compensation framework.

In view of all our concluding observations, a redrafting of the mixed compensation framework as found in resolution 1803(XVII) of the U.N. General Assembly is needed for two reasons. First, specific mention should be made of general principles of law common to a nationalizing state's law and international law as well as all the circumstances factor. Second, qualification of the Charter's general compensation framework should be incorporated into the mixed compensation framework

as an integral part thereof. A redraft should read in the following language:

> Every State has the sovereign right to nationalize or expropriate private foreign property in which case appropriate compensation shall be paid by the State adopting such measures and that the amount of compensation to be paid shall be calculated by taking account of:
>
> (a)the relevant general principle or principles of law common or neutral to the State's domestic law and international law;
>
> (b)the terms of any investment agreement regulating the rights and interests pertaining to such property; and
>
> (c)all the circumstances affecting valuation and profitability of such property.
>
> In any case, where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall, subject to the said requirements for calculating the amount of compensation, be exhausted, 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 principles of free choice of means.

It is obvious from the foregoing,consistent with the international law principle of exhaustion of local remedies, that where a compensation for nationalization dispute arises the procedural remedies of the host state shall be exhausted, "subject to the requirements for calculating the amount of compensation", before diplomatic espousal of a nationalized investor's compensation claim is pursued before the ICJ or the Permanent Court of Arbitration by the investor's home state. However, where the disputing parties or the investor's host state and home state reach a free and mutual agreement with respect to a peaceful resolution of the dispute by other means, exhaustion of the host state's procedural remedies is avoided. In fact, the freedom enjoyed by the disputing parties or the investors' host states and home states to agree on alternative and pieceful means of resolving compensation disputes has resulted in most of the said disputes being determined by bodies other than the ICJ or the Permanent Court of Arbitration.

We have seen. for instance, that such disputes have been pursued before ad hoc arbitration, the ICSID Arbitral Tribunal and the International Chamber of Commerce Court of Arbitration. As well, a very significant number of claims have ended up being settled through the process of negotiation. Consequently, notwithstanding the exhaustion of

local remedies and diplomatic espousal principles, most compensation disputes will continue to be determined in other forums. Nonetheless, regardless of what forum such a dispute is brought before, the said requirements for determining the amount of compensation have usually been applied and will continue to be applied, unless a negotiated settlement is the parties' preference.

Fundamental to the compensation problem as well are the different modes of compliance. However, given the fact that this study is already too lengthy as is, the different methods of compliance were intentionally avioded. Nonetheless, it is our hope that any one who cultivates an interest in the compensation problem is able to research and write on the void we left behind.

Endnotes Chapter 7.

1. Refer to note 18 of Chapter 4.
2. Refer to note 19 of Chapter 4.
3. Refer to note 30 of Chapter 5.
4. Refer to note 14 of Chapter 5.
5. Refer to note 85 of Chapter 6.

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