

NATIONALIZATION OF FOREIGN INVESTMENTS
IN INTERNATIONAL LAW : THE EXPERIENCE
OF SELECTED AFRICAN COUNTRIES.

By

AHMAD S. KILINGO, LL.B. Hons. (Dar.)

A dissertation presented to the Faculty
of Law of the University of Tasmania in
fulfilment of the requirements for the
Award of the degree of Master of Laws

FACULTY OF LAW
UNIVERSITY OF TASMANIA
MARCH, 1983.

NATIONALIZATION OF FOREIGN INVESTMENTS

IN INTERNATIONAL LAW : THE EXPERIENCE,

OF SELECTED AFRICAN COUNTRIES.

CONTENTS

				<u>Page</u>
Declaration	..	..	..	i.
Acknowledgements	..	..	..	ii.
Abstract	..	..	..	iii.
INTRODUCTION	..	..	..	1
CHAPTER 1	NATIONALIZATION OF FOREIGN- OWNED PROPERTY: A GENERAL SURVEY	..		4
CHAPTER II	COMPENSATION FOR NATIONALIZED PROPERTY	..		44
CHAPTER III	THE ROLE OF FOREIGN INVEST- MENTS IN AFRICAN ECONOMIC DEVELOPMENT	..		73
CHAPTER IV	NATIONALIZATION IN SELECTED AFRICAN COUNTRIES - CASE STUDIES	..		104
CONCLUSION	..	..	..	163
BIBLIOGRAPHY	..	..	..	174

DECLARATION

This dissertation is the result of
my original research; borrowed
sources have been duly acknowledged
in the text.

.....

ACKNOWLEDGEMENTS

In the course of research and writing of this work I have received help from various people to whom I am very grateful.

I would like in particular to thank my thesis supervisor, Dr. M. Sornarajah, whose guidance, criticism and encouragement have contributed to any semblance of scholarship that this work might claim.

I am also indebted to my friend and colleague, Mr. S.K. Blay for his constructive criticism and arguments which helped me to consolidate some of my ideas, to the staff of the Faculty of Law Library, who helped me during my research, to the staff of the Australian National Library, Canberra, for their help during my research trip there, and to Miss Kieran Nixon for polishing the final draft, adding considerably to its readability.

Finally I am of course grateful to the Australian Development Assistance Bureau, whose financial support made this project possible.

Notwithstanding all the generous assistance I remain responsible for any errors that remain.

AHMAD S. KILINGO
FACULTY OF LAW
UNIVERSITY OF TASMANIA
HOBART
AUSTRALIA

ABSTRACT

This work is divided into four broad chapters. The first, discusses historical background to the concept and the rules governing nationalization of foreign-owned property in general, the second chapter deals with the question of payment of compensation for nationalized foreign-owned property, the third is concerned with the role of foreign investments in African economic development and lastly the fourth chapter is devoted to case studies of nationalization measures in respect of selected African countries.

Regarding the rules of international law governing nationalization measures, it is argued in the first chapter that, before the Second World War, when nationalization measures were not popular, international law concerned itself more with general acts of expropriation of private property. Although expropriation is related to the concept of nationalization, the two however, are distinct legal phenomena.

It was during the Middle Ages that international law developed rules to regulate expropriation acts. The rules which emerged, required that expropriation be carried out in furtherance of public purpose and upon payment of prompt adequate and effective compensation. This rule is attributed to natural law, the rationale of which is the protection of the "acquired rights" (droits acquis).

After the Second World War, when acts of nationalization became popular, the same rule developed during the Middle Ages to regulate acts of expropriation was applied to regulate and protect foreign investors from acts of nationalization by the host states. It was therefore claimed that like expropriation, nationalization is lawful if it is carried out in furtherance of public purpose and is

accompanied by payment of adequate, prompt and effective compensation and without discrimination.

This principle has been stated in all leading text books, in statements issued by foreign offices of capital exporting nations, in bilateral commercial treaties, in conventions drafted by international agencies, in judgments of national courts and in statements issued by foreign offices of capital exporting nations, and in statements issued by multinational corporations.

Although the requirements of public purpose and non-discrimination have been readily accepted by the international community, the rule which requires payment of prompt, adequate and effective compensation has received a considerable amount of opposition from capital importing countries. This is so because the norm which requires payment of prompt adequate and effective compensation is inconsistent with the definition of nationalization. Reference of such controversies to international tribunals by deploying concept of diplomatic protection, would have been the best way of resolving the conflict. The major obstacle in this regard however is the fact that the concept of diplomatic protection itself, has not received a universal acceptance in the international community. The most vocal opponents of this concept are the countries adhering to the concept of national treatment. Because of non-acceptability of traditional norm regarding payment of compensation upon nationalization of foreign-owned property, new norms were evolved by nationalizing states.

Compensation for Nationalized Property:

As it has already been pointed out, classical international law requires that nationalization like expropriation, be carried out in furtherance of public purpose, without discrimination and be accompanied by prompt payment of adequate and effective compensation. Although almost all nations which nationalized foreign-owned property, with exception of USSR, paid some form of compensation upon nationalization, it is submitted that there is no established rule of international law requiring nationalizing states to pay prompt adequate and effective compensation. It is also argued that payment of some form of compensation by nationalizing states has not been due to existence of an established rule of customary international law dictating the same, but it is mainly due to other factors. The factors which influence the nationalizing states to pay some form of compensation are mainly political and economic in nature. It should be remembered that it was the developed countries which were affected by these measures. The Soviet Union's view regarding the requirement of compensation upon nationalization of foreign-owned property, has always been that which denies the existence of an obligation to compensate at all. The main argument used being that her nationalization measures which took place after the 1917 October Revolution, covered the properties of Russians and aliens alike and therefore, the question of compensation could not arise. This is the same argument used by those states advocating the concept of national treatment. What should be noted with regard to Soviet nationalization, together with those of other Socialist states is the fact that, public ownership of major means of production and exchange is regarded as the ultimate goal and therefore superior to individual's rights to private property. This is obviously different from those states with capitalist or mixed economies, where although

the notion of social function of property has become increasingly popular, private ownership of property is still the backbone of the social-economic system. It is therefore not an accident to note that legal principles and rules are developed to protect private property the rule under discussion being not an exception.

The USSR's attitude towards payment of compensation may have a bearing on the attitude of other developing countries on the same issue, especially the Latin American countries which, like USSR, advocate the concept of national treatment. It may be far fetched, to say that, the recent United Nations Resolutions stressing on permanent sovereignty over natural resources have been influenced by USSR's attitude towards private property, but what is certain is the fact that the capital importing states found the notion of permanent sovereignty over natural resources as a means towards economic self-determination.

Various doctrines have been used to justify the claim for prompt adequate and effective compensation. One of the principles of law more often relied upon implies that nationalization of foreign property is illegal and therefore a foreign investor should be paid restitution in kind and if not possible, full compensation to remedy the wrong.

Examination of restitution as a remedy in the context of nationalization cases, shows that unless there are Treaty provisions restricting nationalization, restitution is not a remedy to be used in cases of nationalization.

The Charzow Factory Case (1927) PCIJ Ser. A No. 9 helps to demonstrate this point very clearly. It was held in obiter that the remedy applies where there is violation of Treaty provisions only.

Another principle relied upon is Pacta Sunt Servanda. This is a basic principle of law of Treaties, requiring parties to respect treaties to which they have entered into. This principle does not apply to nationalization cases because the law applicable in nationalization is municipal law of nationalizing nation and not international law.

Those who support the concept of internationalized contracts argue that, the principle of Pacta Sunt Servanda applies to this class of contracts as well as to treaties. It is argued in this dissertation that the concept of internationalized contract is a falacy because it has no juridical foundation and therefore the principle of Pacta Sunt Servanda does not apply to nationalization cases.

Other justifications used by the advocates of prompt adequate and effective compensation are the concepts of "unjust enrichment" and respect for "acquired rights". The first principle simple means that a country should not unjustly enrich itself to the extent of the value of the property nationalized. This basically is an equitable principle requiring payment of some form of compensation and does not necessarily mean that compensation should be prompt adequate and effective. Depending on the equities involved, compensation payable may be based on different formulae. Since the new norms advocated by developing countries are acceptable by the larger majority of International Community they help to indicate the way on how the rule of customary law will be formed. As regards "acquired rights",

which demand immunity of private rights acquired through Municipal law from nationalization, it is submitted that this immunity no longer stands. This is so due to emergence of a notion of social value of property which became more popular after the Russian October Revolution. This revolution has made serious inroads into the hegemony of private property and has made the doctrine of freedom of private property, no longer hegimonic or sacrosanct.

In case of concession agreements having "stabilization clauses", it has been argued that because of the concept of acquired rights a host state may not pass a law to revoke the rights vested in the original agreement. The contention put forward in this work is that, whether there are stabilizing clauses or not concession agreements are governed by Municipal law of a host state, and therefore can be changed at any time by a host state through a municipal law.

Writing of publicists, decisions of international courts and awards of arbitral tribunals have also been used to justify payment of prompt adequate and effective compensation. Apart from the Texaco Arbitration Award which supports the application of restitution in cases of nationalization all other sources mentioned do not lend support to the rule.

The norm requiring payment of full compensation represented by the formula "prompt adequate and effective" developed by capital exporting states, to protect their investments abroad, has been rendered inapplicable in modern times. This is so because the developing countries have formulated new norms in accordance with the concept of permanent sovereignty over natural resources.

In brief, therefore, the present law governing nationalization of foreign-owned property and especially the payment of compensation thereof, may be summed up as Modus Vivendi between on the one hand, the states which profess economies of a more or less laissez-faire character comprehensively protecting private property, and on the other hand, those states which organize their economies with a measure of public ownership in view especially of poor economic conditions.

The new norms put forward by developing countries range from excess profit deduction to claim for "appropriate compensation", the last norm enjoys considerable amount of support from developing countries.

The history of the claim for "appropriate compensation" can be traced from the famous U.N. Resolution 1803 of 1962 in which the notion of Permanent Sovereignty over natural resources was asserted. Under Article 4 of the 1962 resolution "appropriate compensation" is to be paid in accordance with international law. The concept of appropriate compensation was emphasized in the subsequent resolutions e.g. U.N. General Assembly Resolution 3117 (XXVII), the resolution on New International Economic Order, and charter of Economic Rights and Duties of States. It is true that these resolutions have no law creating effect. However, it is the main argument of this paper that the new norms developed by the developing nations through these resolutions do represent the will of larger majority of international community, and therefore form a basis for progressive development of the law and speedy consolidation of customary rules hence they are de lege ferenda.

The Role of Foreign Investments in African Economic Development:

This section of the study seeks to show that the logic of post independence economic policies of most of the African countries has been that of encouraging private investments, which had the effect of creating a foreign-owned and controlled manufacturing sector.

Alongside this there was also the creation of the indigenous capitalist class created to ultimately "take over" from the foreign investors. It was the indigenous capitalist class which influenced their governments to adopt policies geared towards Africanization, Indigenization and joint-venture. The driving force of these policies was the notion of economic independence. These policies affected mainly small and medium scale business enterprises but left the multinationals intact. The reason for this difference being an analysis of their roles in economic development as seen by most of the host states. Because of this policy foreign investments were initially encouraged and allowed to enter almost all sectors. After sometime, when most of the African states realized that the multinationals are getting out of hand, some countries attempted to limit their activities by way of imposing limitations. At the same time the more radical countries attempted to nationalize some of the activities formally under their control. This however does not imply that foreign investments were not encouraged or protected. There are instruments such as Foreign Investment Protection Acts (FIPA) in almost all African countries geared towards protection of foreign investments and promising some form of compensation in case of nationalization.

Regarding foreign investment protection as a whole this study seeks to demonstrate that investment protection policies on the part of capital exporting countries e.g. suspension of bilateral assistance,

withdrawal of support, etc., are not as effective as the bilateral treaties are in protecting foreign investments abroad.

It has also been demonstrated that, foreign aid sanctions against states taking foreign investments without payment of prompt adequate and effective compensation have been generally counter-productive.

Although the investment guarantees provided by most of the developing countries are of little legal effect, they however help the foreign to know investment policies of a particular country.

This study has also demonstrated that some alien investors are capable of satisfactorily using their capital in atmospheres of economic nationalism, provided that they are assured of some sort of monopoly and smooth operation through joint-ventures with state-owned Companies. In this way they stand to gain more in the final analysis and they are, contrary to the general belief, not deterred by nationalization, indigenization or Africanization measures.

Nationalization in Selected African Countries:

Most African countries, like other developing countries, regard the right to nationalise foreign-owned property as one deriving from the right of nations to economic self-determination. This can be achieved through various ways. The general framework however, has been laid down in the General Assembly Resolution on Permanent Sovereignty over natural resources. Because of this, African countries see no reason why they should adhere to the classical international law rule, which requires payment of prompt adequate and effective

compensation because, doing so will defeat the whole philosophy of economic self-determination which they seek to implement through nationalization of major means of production or exchange.

Although the African countries refuse to adhere to the "Hull rule", there has been very few cases where compensation for nationalized property was totally denied. In most cases nationalization measures have been followed by promises to pay some form of compensation, using such formulations as "full and fair" in case of Tanzania, "Book-Value" of the assets nationalized, to be paid out of future profits as in the case of Zambia and "Lump Sum" compensation reached through negotiations between the interested parties in as was the case with Zaire.

One common feature in African nationalizations is that although there had been some protests regarding the form of payment of compensation, with exception of Libya, most of the disputes were settled amicably through negotiations. The final settlements were in most cases reached as a matter of compromise and therefore some of the legal principles discussed were compromised. Reaching an acceptable settlement was regarded as a necessity by both parties because each needed the other. While the nationalizing states needed the multinationals to invest and manage other ventures, the multinationals on the other hand wanted to be assured of their continued existence, albeit in different forms. Demonstrating this point the Chief Executive and Managing Director of Lonrho, Mr. Tiny Rowland described an agreement signed recently under which the Tanzanian Government will pay his Company TShs. 155.0 million (in local currency) as compensation for

the Company's assets taken over in 1978, as "an acceptable compromise representing full and fair compensation to LONRHO" (Daily News 13/9/83) the money will be used by the Company for other investments in the country.

In brief therefore, the African case studies examined especially the broad cases of nationalization of Tanzania, Zambia and Zaire demonstrate how the notion of appropriate compensation has been used as an alternative to full compensation in keeping with the general theme discussed above that the new norms will grow into fully fledged acceptable rules of customary international law.

INTRODUCTION

The consequences which follow nationalization of foreign-owned property, pose the most difficult problems of modern international law. The major problems are mostly centred not on the right of nations to nationalize foreign-owned property within their boundaries, but on the conditions which should govern the exercise of this right. While the developing countries, as well as many Eastern countries, maintain that a state has an unlimited right to nationalize foreign-owned properties or assets located within its territory and that there is in international law no rule universally accepted in theory or practice which makes it obligatory the payment of compensation,¹ the rule accepted and supported by many governments, scholars and jurists in Western countries is that expropriation is lawful only if it is for a public purpose, is nondiscriminatory and is accompanied by payment of prompt, adequate and effective compensation.² This departure from classical international law rules, regarding expropriation of foreign-owned property and payment of compensation, advocated by the developing countries, may be regarded as part of the general attempt by the new States to revise the traditional international law rules to accommodate their present needs.³

In as far as this field is concerned, the need which the new

-
1. See: "The Mexican Note to the United States dated 3 August, 1938", 32 AMJIL (1938), 181.
 2. See: "U.S. Statement on Economic Assistance and Investment Security in Developing Nations, 19th January, 1972", 11 (1972) ILM, 241.
 3. See, e.g. S. Sinha, *New Nations and the Law of Nations* (1967), 26; R. Anand, *New States and International Law* (1972), 57.

States have tried to accommodate is none other than economic independence. After the Second World War, when most of the developing countries emerged from colonialism, these new states aspired to force themselves from the bonds of foreign capital, representing in their eyes, colonialism and imperialism.⁴

Nationalization of major means of production and exchange was therefore considered to be vital, for the achievement of economic independence. Having realized the existence with their aspirations, these countries attempted to formulate new norms to govern nationalization measures based on doctrine of permanent sovereignty over natural resources.⁵

Nationalization of foreign owned property however is by no means a new phenomenon nor is it restricted to developing nations only. What should be conceded however, is the fact in recent times it has been carried out more in the developing world than elsewhere.

This dissertation will attempt to examine the historical as well as economic background to the concept of nationalization, the conflicting norms regarding assessment and payment of compensation the role of foreign investments in African economic development and finally case studies of African nationalization measures will be examined with the view of finding out the African state practices as far as assessment and payment of compensation are concerned.

4. To use the words of Dr. Kwame Nkrumah, "Political Independence did not mean anything if the economy was still controlled by former colonial masters or by any other neo-colonialists". K. Nkrumah, Neo-Colonialism, the Last Stage of Imperialism, 1965 Pp.15-36.

5. See A. Akinsanya "Permanent Sovereignty over Natural Resources, and the Future of Private Foreign Investments in the Third World". 18 (1978) IJIL Pp.175.

This work being basically a legal text, extreme care has been exercised not to indulge into non-legal arguments. This however is not to say that they are not relevant or are not connected with the legal arguments. In fact most of the problems discussed in the text are the result of political decisions based on economic and nationalistic reasons. These factors have been dealt with in this study where it was deemed necessary for the understanding of certain legal phenomena.

CHAPTER ONE

NATIONALIZATION OF FOREIGN-OWNED PROPERTY :

A GENERAL SURVEY.

Almost all writers on the subject of nationalization of foreign-owned property have attempted to define the essential characteristics of the term nationalization.¹ The best definitions however, are those which attempt to reflect its political as well as economic motivation. This is important because these are the characteristics which identify nationalization from other forms of taking of private property.² Among the writers who adopt such a method, is Foighel, who defines nationalization as the compulsory transfer to the state of private property dictated by economic motives and having as its purpose the continued and essentially unaltered exploitation of particular property.³

-
1. For studies dealing with this subject see, I. Foighel, *Nationalization*; Copenhagen, 1957; G. White, *Nationalization of Foreign Property*; London, 1961; A.A. Fatouros, *Government Guarantees to Foreign Investors*; New York, 1962; K. Katzarov, *The Theory of Nationalization*; The Hague, 1964; C.F. Amerasinghe, *State Responsibility For Injuries to Aliens*; Oxford, 1967; D.P. O'Connell, *International Law*, vol. 2, 2nd edn, London, 1970, pp. 780-790; J.G. Starke, *Introduction to International Law*, 8th edn., London, 1977, p. 326; D.W. Greig, *International Law*, 3rd edn., London, 1979, p. 579; B.A. Wortley, *Expropriation in International Law*; Cambridge, 1959, pp. 129-133; see also F.A. Mann, "Outline of a History of Expropriation of Foreign Property", 35 AMJIL (1941), pp. 243-63; B.A. Wortley, "The Protection of Property Situated Abroad", 35 *Tulane Law Rev.* (1961), pp. 739-66; U.O. Umuzorike, "Nationalization of Foreign-owned Property and Economic Self-Determination", 6 EALJ, pp. 76-99; I. Brownlie, *Principles of Public International Law*; Oxford, 1979, 3rd edn., pp. 531-51; A.A. Akinsanya, *The expropriation of Multinational Property in the Third World*; New York, 1980.
 2. See I. Foighel, *supra* note 1, p. 19; on what constitutes taking in International Law see Sohn and Baxter, "Responsibility of States for injuries to Aliens" 55 AMJIL (1961), p. 558; G.C. Christie, "What constitutes a Taking of Property under International Law?", 38 BYBIL (1962), 310-11.
 3. Foighel, *Ibid.*

Gillian White on the other hand, summed up her discussion on the subject by defining nationalization as an act which sets in motion a legal process whereby private rights and interests in property are compulsorily transferred to the State or some other organ created by the State with the view of future exploitation of those rights and interests by and for the benefit of the State.⁴

Another writer who adopted this definition is Katzarov, who summarized his discussion on nationalization by saying that it is a superior kind of transfer of specific assets or activities which are means of production or exchange into assets or activities of the community, with the view to their utilization in the public interest.⁵

According to all these writers therefore, what distinguishes nationalization from other forms of taking, such as expropriation and confiscation, is its economic motivation or as Katzarov puts it, a public interest of superior order.⁶ It is important to note that although these writers tend to agree that nationalization and expropriation are generally related in several respects they are of the view that it is the motivation behind the concept of nationalization as well as the means by which they are implemented, which set it apart from the individual acts of expropriation.

This distinction however has not been accepted by other international lawyers. Among those who voiced an opposition to a distinction between nationalization and expropriation is O'Connell, who while discussing the meaning of nationalization, said that,

4. G. White, *supra* note 1, p. 50.

5. K. Katzarov, *supra* note 1, p. 160.

6. *Ibid.*: Expropriation in simple terms is defined as the compulsory acquisition of property by the State. The taking of land for laying of a railway or building of a school would be the best example of it.

Nationalization is not a word of art; hence as such has no place in the language of international law. It has been popularly employed to describe the process whereby certain industries or means of production, distribution or exchange are in pursuance of social or economic policies concentrated in public hands.... Should the process involve the transference from private to public ownership of movable and immovable property, debts and tangible things of value then it is one of expropriation.⁷

According to this view, which is also supported by other international lawyers,⁸ the term nationalization has no specific meaning in international law parlance but is only employed vaguely to imply a process which is known already as expropriation. Incidentally, this is the view which seems to be adopted by most of the writers on the subject, especially those from capital exporting countries, who tend to consider the phenomenon of nationalization from the point of view of foreign-investors and come to a conclusion that whatever form a taking of private property may take, its effect on the foreign investors is the same. In pursuance of this line of thought, some have argued that the essence of the matter is the deprivation by State organs of a right of property either as such, or by permanent transfer of power of management as well as control.⁹ It is probably true that from the point of view of a foreign owner it makes no difference whether the taking of his property by the State is labelled nationalization or expropriation. This is not the same as saying that the concept of nationalization is unknown in international law parlance: to say so will be the same as underlining the old position in international law which needs serious reconsideration in view of the recent developments reflected in various General Assembly resolutions recognizing, among other things, the right

7. D.P. O'Connell, *supra* note 1, p. 843.

8. B.A. Wortley, *Expropriation in International Law*: Cambridge, 1959, p. 532.

9. See, e.g. Brownlie, *supra* note 1, p. 532.

of nations to nationalize foreign-owned property.¹⁰

Apart from those who consider nationalization as being synonymous with expropriation because of the effects they have on the foreign-owner, some consider these two phenomena as synonymous because nationalization is a species of expropriation and that form should not be allowed to take precedence over substance.¹¹

According to this view, the essence of the matter with which international law is concerned, is deprivation of a right to property by a State organ.¹² Again, although this may be true, it is also true that international law is concerned with the right of States to nationalize foreign-owned property.

Expropriation of Private Property: A Historical Survey

A study of history of the concept of expropriation of private property, indicates that at different stages of history, individuals were liable to have their private property taken away from them by the State.¹³ This is a fact which is attested to by the long struggle about the conditions and restrictions which could be put upon the power of States to expropriate private property.

Although the idea of limitless right of ownership of property was evident in different times, it was attacked by prominent scholars and philosophers of the time. Gierke, for example, attacked the idea of limitless right of ownership to property as far back as the

10. See E. Jimenez de Arechaga, "The State Responsibility for Nationalization of Foreign-owned Property", 11 N.U.J. Int'l Law and Pol. (1978) with various General Assembly Resolutions on Permanent Sovereignty over natural resources cited therein.

11. For the view that Nationalization is a species of expropriation see C.F. Amerasinghe, *supra* note 1, p. 129.

12. See I. Brownlie, *supra* note 1, p. 532.

13. F.A. Mann, *supra* note 1, p. 189.

second half of the nineteenth century.¹⁴ Almost simultaneously in Germany, Rudolf von Ihering, criticised the individualistic conception of property by referring to it as "an expression of the insatiability and the greediness of egoism".¹⁵ Vinding Kruse on the other hand stated that, "the unconditional inviolable nature of the right of property remains but one of those magnificent phrases which it is so easy to shout from the house-tops in the enthusiasm of a revolution and in the dawn of constitutions but which in the more sober aftermath it is impossible to live up to".¹⁶

What all these scholars try to demonstrate in these different formulations is the simple fact that the right of a sovereign to expropriate had always been assumed and treated as superior to the right of property ownership.

This, however, is not in any way to suggest that the frequency with which States expropriated private property, say during the period of the *Laissez faire* economies, is the same as that which is now experienced with the extension of public sector in many economies.¹⁷

The right of a State to expropriate private property has always been closely associated with the concept of sovereignty. It is by virtue of sovereignty rather than ownership of the property expropriated that the supreme authority in the State has always derived

14. *Ibid.*

15. *Ibid.*, p. 190.

16. The Right of Property (Translated by Federspiel), 1939, p.7; Also cited at p.19 in F. Mann, *supra* note 13; See also I. Seidl-Hohenveldern, "The Social Function of Property and Property Protection in Present Day International Law" in F. Kalshove *et al.* (eds), *Essays on Development of International Legal Order*: Nijhoff, 1980, pp. 79-80, where he says that the notion of social theory of property was known by St. Thomas Aquinas (1225-74) although it is true by the present day legal thinking and practice more weight is attached to the social function of property than was the case in the past.

17. Brownlie, *supra*, p. 532.

power to take property.¹⁸ It is believed however that the development of international law rules regarding expropriation can be traced as far back as the Middle Ages when the concept of sovereignty had become a power vested in one person.¹⁹ It is also thought that it was during this period that the concept of expropriation for public purpose also emerged.²⁰

The developments which took place in relation to this concept during the Middle Ages were very well summarized by Gierke as follows:

The history of theory of expropriation takes, in the main, the form of a process whereby definite bonds are set to an expropriatory right. As to the total nature of these bonds it was generally agreed that the supreme power should not arbitrarily interfere with the vested rights but only "ex justa causa" - a principle to which some attributed the force of an absolutely binding rule of law and which other maintained as a rule capable of being transgressed by the sovereign in all or at least in certain cases.... With increasing emphasis, however, the important principle was developed that in case of expropriation for reasons of public benefit compensation was to be paid at public expense.²¹

Gierke's conclusion that public policy permits interference with private right if it is accompanied by payment of compensation, found support in the writings of Lucas de Penna,²² who, in the 14th century, wrote about the concept of expropriation of private property.

The idea is also said to have been well established in the Statutes

-
18. This view is frequently ascribed to Grotious. See e.g., Mann, *supra* note 1, p. 192.
 19. G. White, *supra*, p. 41; the use of the term Middle Ages is often very confusing as there is no clear cut definition of the term. According to Chambers Encyclopedia (1950 edn.), vol.9, p. 385, the Middle Ages lies between the fall of Roman empire and 15th Century. To the historians of 17th and 18th centuries this was the period of general ignorance and incivility; and they made little attempt to differentiate its stages and activities.
 20. G. White, *supra*.
 21. Gierke, *Natural Law and the Theory of Society 1500-1800* (Translated by Ernest Barker, 1934), p.1641 F. Mann, *supra* note 1, pp. 201-2.
 22. W. Ulmann, *The Medieval idea of Law as represented by Lucas de Penna*, 1946, p. 230.

of Medieval cities of Italy and by 1600 it was embodied in the general law of Italy.²³

Having seen the development of the concept of expropriation for public purpose, one would like to pursue the reason behind the development of such a concept.

As already pointed out, it was during the Middle Ages that the concept of sovereignty had become a power vested in one person. With this concept of sovereignty, the sovereign was regarded as the source of positive law and his power in this regard was considered to be inalienable and indivisible. Because of this power, the sovereign could dispose of any property based on positive law.²⁴ This power however was limited to positive law domain only. This means therefore he could not interfere with what was referred to as "the acquired rights" of his citizens, without proper justification. The reason behind this limitation is that the institution of private property was believed to have originated from "Jus Gentium", the right flowing from the natural law and not positive law. It was also believed that the sovereign was bound by the rules of natural law, while he bound himself to his subjects through a social contract, the binding force being derived from natural law through the principle of "pacta sunt servanda".²⁵

The notion of public purpose derived from the natural law shares the general weakness inherent in the natural law itself, in that there is no authoritative body which can determine the State's public purpose other than the State itself. Together with this weakness, in modern

23. See Calisse, *A History of Italian Law* (translated by Regislar, London, 1928, p. 690; F. Mann, *supra*, pp. 79-80.

24. See Gierke, *Political Theories of Middle Ages* (Translation), Cambridge, 1938.

25. *Ibid.*, pp. 40-41.

times, the distinction between the rights derived from positive law or natural law remains of historical importance only. This is even more so if one considers the fact that in modern times the unlimited right to property is increasingly denied. The present day legal thinking and practice attach more importance to the social function of property than was the case in the past. This is true not only in socialist states, which already have reduced to a great extent the role of private property in favour of collective or State ownership but also in Western countries where there is an increasing trend to attach more importance to the social function of property.²⁶ This, however, does not mean that these States have completely done away with the requirements of public purpose and payment of compensation which are still regarded as important elements in international law rules regulating expropriation of foreign-owned property.

What may be said in brief therefore is that although in modern times lawyers do not concern themselves with the source of a right to expropriate, the existing rule of public international law which requires expropriation to be carried out only in furtherance of public purpose and upon prompt payment of adequate and effective compensation has its origin in the natural law era, formulated to protect "the acquired rights".

The right of States to expropriate is now so clear that history is not needed to explain it. Most of the modern constitutions for instance, confer the power of expropriation. This power may exist even if it is not expressly provided for in the constitution. In order to illustrate this point, one needs only to see one U.S. Supreme Court decision, in which the court held that it was inherent and

26. Seidl-Hohevelde, *supra* note 16, p. 80.

incidental to the powers expressly allowed to the Federal government and therefore existed notwithstanding the silence of the Federal Constitution or the absence of the States consent.²⁷

Nationalization

It is not a very easy exercise to determine the exact point in time in which nationalization as a distinct legal entity emerged. However, the time immediately following the Second World War may be chosen as a starting point in a discussion of the concept of nationalization. This time is important because it was not until after the Second World War that the world experienced widespread acts of nationalization. This was the period that most of the capital importing States gained their political independence which, according to the view expressed by some leaders of these countries, does not amount to full independence unless accompanied by economic independence.²⁸ Nationalization of natural resources industry together with other major means of production and exchange was considered as the most important way of attaining economic independence.

According to a study conducted in relation to measures of nationalization 39 per cent of 878 instances of nationalization which occurred between 1960 and 1974, took place in newly independent African countries.²⁹ Considering the fact that most of these countries became independent during that time, the findings of this study support the proposition that the newly independent states regarded the nationalization

27. Kohl v. United States (1876), 91 U.S.A.49 at p. 451, per Strong, J.

28. See U.O. Umuzorike, *supra* note 1; D.P. Ghai, "Concepts and Strategies of Economic Independence", 11 JMAS (1973); K. Nkrumah, *Neo-Colonialism, The Last Stage of Imperialism*, 1965, 15-36.

29. See U.N. General Assembly Report of Economic and Social Council on "Permanent Sovereignty over Natural Resources", U.N. Doc. A/9916 supp. E/5425.

of foreign-owned property as a means towards the attainment of the much needed economic independence.³⁰

Having seen the emergence of these widespread acts of nationalization one would like to see if there were any special rules formulated by public international law to cater for this hitherto uncommon phenomenon. The answer to this is 'no'. What happened on the other hand was that the same rules which developed in the Middle Ages to regulate acts of expropriation were applied to nationalization measures which had emerged. This may be due to the reasoning dominant among international lawyers at that time, that the overriding consideration is the effect the taking has on the foreign-owner and not the form that it takes. Whatever the consideration may be, what in fact happened is that the traditional international law rules developed to regulate expropriation were extended to nationalizations as well. Hence the law required that for nationalization to be lawful it should be carried out in furtherance of public purpose, without discrimination and on payment of compensation to the owner of the nationalized property. The traditional international law rule stated in leading textbooks,³¹ in Statements issued by foreign offices of capital exporting countries,³² in bilateral commercial treaties to which capital exporting nations have been parties,³³ in conventions drafted

30. See e.g., how Zambia and Zaire nationalized their mineral rights from BSA and Union Miniere respectively, just a few months after independence in G. Lanning and M. Mueller, *Africa Undermined*, Penguin Books, 1979, pp. 196-256.

31. See e.g., D.P. O'Connell, *supra* note 1, pp. 780-90; J.G. Starke, *supra* note 1, p. 326; D.W. Greig, *supra* note 1, p. 579. For a qualified view see G. White, *supra*, p. 15 and B.A. Wortley, *supra*, p. 129.

32. U.S. Department of State Statement for the Promotion of Investments and Nationalization, 30 December 1975 (1975) 15 ILM, 186.

33. Egypt-U.K. Agreement for the Protection of Investment, 11 June 1975, 14 (1975) ILM 1470; Singapore-U.K. Agreement on the Protection and Protection of Investments, 22 July 1976, 15 ILM (1976), 591. Article 5 of both agreements use the formula "Prompt, adequate and effective" compensation and refer to obligation to pay market value of the property.

by international agencies,³⁴ in judgment of national courts³⁵ and arbitral tribunals³⁶ and in statements issued by multinational corporations,³⁷ is that when property belonging to a foreign national is expropriated, States should pay "prompt, adequate and effective compensation".

34. See e.g. OECD Draft Convention on the protection of Foreign Property (Dec. 1962).

35. See e.g. I. Seidl-Hohenveldern, "Chilean Copper Nationalization before German Courts", 69 AMJIL (1975), 110.

36. See e.g. Award on Merits in the dispute between *Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of Libyan Arab Republic*, 16 ILM (1978), p.1.

37. E.g., *Kennecott Copper Corporation, Expropriation of El Teinente* (excerpted in R.B. Lillich, *Valuation of Nationalised Property in International Law*, vol.2, Virginia, 1972, p.82); See also M. Sornarajah, 13 JWTL (1979), p.108.

Public Purpose

The right of nations to expropriate foreign-owned private property is not without limitations. One of the basic limitations public international law has imposed, is that which requires that expropriation should be exercised only if doing so will further a public purpose. The aim here is to avoid retaliatory measures which are generally, not motivated by any economic policy of the country concerned.

The question which follows therefore is whether this limitation applies to cases of nationalization as well.

Examination of various decisions regarding nationalization cases tend to confirm the proposition that this limitation applies to expropriation and nationalization as well.

In *Sabatino Case*¹ for instance, the U.S. circuit court of appeal held that the retaliatory purpose behind the Cuban nationalizations, deprived them of validity because they lacked a true public purpose.

But in the *Shufeldt Arbitration Case*² which concerned the cancellation of a concession, the arbitrator took a contrary view, virtually recognizing the absence of limitation on public purpose. And a PCIJ's dictum in *oscer chinn case*³ often quoted as an authority on this point is not really conclusive either way.

During the settlement of disputes following the Mexican oil expropriations, the British Government insisted on this requirement, while the Mexican Government asserted that public purpose may be determined by each state at its own discretion.⁴

1. 3 IIM (1964) 381: 56 AMJIL (1962) 1058.

2. (1930) USA vs. Guatamale, 2 UNRIAA 1095.

3. See *oscer chinn Case* 1928, 2 PCIJ 105.

When the Government of Ceylon nationalized assets and facilities of the three oil companies used for the importation and distribution of oil, the Government explained that at the time when there was an imperative need for putting all capital assets within the country to economical and beneficial use, "the Government would have been failing in its duty to the people of this country, if it had required the Ceylon Petroleum Corporation to provide itself with entirely new equipment and facilities such as petrol pumps and petrol stations".⁵

It would appear that the explanation given by the Ceylon Government is enough to establish the existence of a public purpose and that for the purpose of law, it does not matter whether the nationalization was total or partial.

The same reasoning was used by the Ceylon Government in the total nationalization of petroleum business in 1964. When Burma nationalized foreign banks in 1962 the reason given was that, "a business which can command huge sums of public money is not fit to be left in private hands."⁶ This was also regarded as a public purpose to justify nationalization. The text writers however are not in agreement on the issue especially as regards to nationalization. Writers such as Domke⁷ and Schwarzenberger⁸ regard it as a necessary limitation just as it is in the case of other expropriations. Domke

5. Hansard (House of Representatives, Ceylon), 20 FEB., 1963.

6. *The Hindustan Times*, 24 Feb., 1963.

7. Domke (1961) 590.

8. 9.J. Pub. L. (1960) 156 9 Ibid.

points out however that, the determination of public interest by nationalizing government could hardly be challenged unless it were totally beyond any reasonable limit.⁹ Herz, on the other hand, goes to the extent of saying that, "the purpose and motivation are entirely irrelevant as far as legal consequences are concerned in that even in extreme cases where a state takes foreign property without giving any reason or motivation, international law does not contain any special rule dealing with such cases in any way different from ordinary expropriation for public purpose".¹⁰

The recent codification drafts contain references to the requirement of "public purpose"¹¹ but do not go beyond mere pronouncement. They do not say whether absence of public purpose will render the taking unlawful. According to weight of authorities it would appear that the view which requires the existence of public interest has more support than that which says it is irrelevant. The principle however cannot be said to have been established beyond doubt, especially in cases of nationalization. Since the definition of nationalization presupposes a taking of property in the public interest, the only limitations that can be imposed are that nationalization measures should be bona fide and that the host state should not go beyond reasonable limits in determining reasons for nationalization.

9. Ibid.

10. J.H. Herz "Expropriation of Foreign Property" 35 AMJIL (1941) 255.

11. Garcia Amador, ILC Yearbook (1961) II 47; The Harvard Draft of 1961 Art. 10.

These are the only limitations that can be consistently imposed. The fact that it has not been questioned whether the modern nationalizations were carried out in public interest explains the acceptance by international community that nationalization measures are essentially a product of a certain economic policy and therefore irrespective of acceptability of this policy by those affected by the measures, the existence of a public purpose is obvious.

In brief therefore although it has not been established beyond doubt it applies to nationalization measures in the same way as it applies to expropriation cases, its application is not in any way harmful as the notion of public purpose is pre-supposed in the definition of nationalization itself. The major problem however is the application or determination of this limitation. Because what constitutes a public purpose for one country may not be regarded as a public purpose for another. It is therefore, suggested that although the notion of public purpose is an important limitation in avoiding retaliatory measures, what should be emphasized is the fact that the measures should be bona fide and in determining reasons for nationalizations host states should not go beyond reasonable limits.

Non Discrimination

Absence of discrimination is another limitation imposed by traditional international law, on right of to expropriate foreign-owned property.

What it really means is that in exercising its right to expropriate foreign-owned property, a state should not discriminate aliens of one nationality in favour of those of another. This however does not imply that if a host state nationalizes all the shares in a company owned by citizens of a nation A, it should also do the same in respect of a company owned by nationals of a country B. What is expected is that, when properties of aliens belonging to different nationalities are expropriated the host state should refrain from awarding differential treatments when dealing with the question of payment of compensation.

It should probably be pointed out that this limitation, like other principles discussed above, was developed to take care of expropriatory measures, before acts of nationalization became popular. If this is the case, the question which follows immediately is whether this limitation applies to nationalization measures as well. A study of case law relating to nationalization measures tend to favour this view.

In Cuban Nationalization cases of 1960 (43 Dept. of State Bulletin (1960) pg. 171) for example the United States protested against the discriminatory nature of the Cuban Nationalizations which affected the properties of United States nationals only as being retaliatory.

Whatever can be said regarding the merits or otherwise, of the American objection, it is important to note that the limitation was applied in a case involving nationalization. Apart from a few instances where the notion of non-discrimination was categorically rejected, the principle appears to enjoy a wide acceptance in the international community, as representing a fundamental principle of justice.

One of the few instances in which the principle of non-discrimination was rejected is in a recent German decision,¹ where it was alleged that the equality meant that equals must be treated equally and therefore differential treatment of unequals was admissible.²

This statement was used to justify differential treatment by former colonial people towards companies owned by former colonial masters. The principle of non-discrimination was also rejected in cases involving post-war nationalizations in Czechoslovakia, Poland, Bulgaria and Rumania.³ Although these countries finally entered into treaties with states of affected aliens regarding payment of compensation, it is not clear whether there was agreement between the parties regarding illegality of discriminatory nationalization.

There is evidence that this principle is acceptable even to some Eastern European Communist countries,⁴ and it has support of some Draft Conventions.⁵

1. *W.V. Verenigde Deli-Maatschpijen and N.V. Sanembah-Matchapij 1959*, cited in C.F. Amerasinghe, *Ibid*.

2. *Ibid*.

3. See G. White's Analysis *Supra* note 1, pg. 211.

4. C.F. Amerasinghe, *Supra* pg. 139.

5. See e.g. Garcia - Amador's Final Draft, Article 9 Int. Law Commission Yearbook (1961) ii, p.47; Article 10 of Harvard Draft (1961), P.558.

In view of easy acceptability of this principle, it is safe to conclude that the principle of non-discrimination is in general a sound one, because it is based on a fundamental principle of justice and is vital to ordered relations based on mutual respect between states. Since there is no evidence to suggest that discrimination is vital to the efficacy of nationalization, the presumption is that the principle survives even in regard to nationalizations.

Payment of Compensation

Payment of compensation to the owners of the property affected by the nationalization measures is another limitation imposed on a State's right to nationalize foreign-owned property.

The rule which is supported by all leading capital exporting countries, already discussed, is that expropriation is lawful only if prompt payment of adequate and effective compensation is paid to the alien owner of the expropriated property.⁶ As expropriation and nationalization are considered to be synonymous in traditional public international law, this requirement also applies to acts of nationalization. This means that nationalization, which is regarded as an exercise of territorial sovereignty, here becomes lawful subject to payment of compensation. This view however is

6. See notes 31, 32, 33, 34, 36 and 37 above; see also U.K.'s Statement to the Indonesian Government of 20th July, 1965 (1965) BPIL, pp.199-200.

not accepted by some members of the international community, especially capital importing nations as well as some prominent publicists and as such it can hardly be said that the rule is established in international law.

Discussing the requirement of payment of compensation, Foighel points out that, "although international legal opinion largely assumes that compulsory acquisition of private property entails a liability to pay prompt, adequate and effective compensation, this requirement has not been established as a rule of international law".⁷ Foighel is not the only publicist on the subject to hold this view. John Fisher Williams pointed out that "apart from the support that this rule enjoys from prominent jurists and many lawyers of great eminence, the doctrine is found to have less support in the realm of actual international law".⁸

The question of whether the rule which requires the payment of

7. Foighel, *supra* note 1, pp. 1-2.

8. Fisher Williams, "International Law and the Property of Aliens", (1928), *BYIL*, pp. 1-2.

prompt, adequate and effective compensations established in international law is examined in the next chapter of this work, where a detailed study of this rule is made. However, an examination of terminology employed in this rule is in order.

Prompt

The requirement that compensation should be paid promptly has always posed a problem as to the exact meaning of the word "prompt". The United Kingdom's understanding of the term "prompt" is that which was expressed in its memorial in the *Anglo-Iranian oil company case*.⁹ The term "prompt" however refers to the time at which payment of compensation should be made rather than the time at which it should be assessed.¹⁰

There has also been some pronouncements to the effect that prompt compensation means immediate payment in cash.¹¹ Some governments however are prepared to admit that deferred payment may be regarded as satisfying the requirement of prompt compensation, in accordance with the rule of international law if the total amount to be paid is fixed promptly, allowance for interest for late payment is made and the guarantees that future payment will be made are satisfactory so that the person to be compensated may, if he so desires, raise the full sum at once on the security of future payments.¹² The existence of all these different interpretations shows that despite the general requirement that compensation should be paid

-
9. ICJ Pleadings *Anglo-Iranian oil company case*. pp. 105-6.
 10. Per Permanent Court of International Justice in *Chorzow Factory Case* (1938), PCIJ Ser. A. No. 17, pp. 48-9.
 11. See e.g., the Arbitration between the U.S. and Norway relating to the question of contracts for the building of ships in the U.S. in Scott, *Hague Court Reports* (1932), p. 77.
 12. The government of United Kingdom is prepared to admit this. See D.J. Harris, *Cases and Materials on International Law*, 2nd Ed., London, 1979, p. 455.

promptly, international law has not formulated a rule stipulating the exact time at which compensation should be paid. What is certain however is the fact that the term "prompt" refers to the time at which compensation should be made and in the absence of universally accepted time, it would seem that each case will differ from another, depending on the circumstances of each case.

Adequate

Classical international law also requires that compensation paid in event of expropriation of foreign-owned property should not only be prompt but it should be adequate. The term "adequate" is also quite vague and as such is capable of different interpretations. Principles such as *restitutio in integrum* and equity have been used to suggest that adequate compensation means at least the payment of market value of the property expropriated.¹³

The requirement of market value as representing adequate compensation has been rejected by third world countries, which have been responsible for most of the nationalizations in recent times.

Discussing this question, one writer concluded that the theory of adequate compensation which demands full compensation as a condition to legitimize a taking, has a defect in that it rests on the assumption that private property represents an absolute right

13. The Hickenlooper Amendment to the U.S. Foreign Assistance Act, spoke of "compensation...in convertible foreign exchange, equivalent to the full market value thereof"; see also Statement of U.S. Department of State, note 32, *supra*, which says, "the acceptance of less than market value by U.S. nationals does not constitute acceptance of any other standard by U.S. government"; also see D.A. Gantz, "The Marcona Settlement: New Forms of Negotiations and compensation for Foreign Property", 71 AMJIL (1977), 474; for equitable principle to suggest payment of market value see e.g. F. Francioni, "Compensation for Nationalization of Foreign Property: The Borderland between Law and Equity", 24 ICLQ (1975), 255.

that will not admit legal destruction without reparation.¹⁴ The author continues that this proposition fails as a general principle of law of nations, in view of the considerable emphasis the modern States have given to social function of property. Whether this is the right explanation is arguable. However there is evidence to show that there is an increasing number of situations in which capital exporting countries have accepted or permitted their citizens to accept amounts less than the market value of the expropriated property.¹⁵ This leads to a conclusion that the requirement that market value must be paid upon expropriation is no longer valid in international law.

Examination of various State practices indicates that it is possibly due to vagueness of the international law standard regarding adequacy of compensation on one hand and the rejection of market value standard by the Third World nations that States have not acted consistently on this issue. Various countries have paid or accepted amounts of compensation according to different economic, political and other non-legal motives.¹⁶

Although the term "adequate" was originally interpreted as meaning full market value of the property affected, State practice

14. J.A. Rohwer, "Nationalization: International Minimum Standard - Chilean Excess Profit Deductions", 14 Harvard Int.L.Journal, p. 385.

15. See M. Sornarajah, *supra* note 37, p. 104, where he says that, considering that in international law it is the State of alien whose property is expropriated without compensation which suffers injury, a State's tacit consent to settlements on principles other than market value could give rise to inference of the State's acquiescence in other standards of compensation.

16. For U.S. State Practice, see G. White, *supra* note 1, p. 14; see also the standard "Full and fair" compensation in Tanzania Nationalizations, in A.W. Bradley, "Legal Aspects of the Nationalizations in Tanzania" [1967], EALJ, pp. 149-76.

seems to indicate that adequate compensation is that which bears some reasonable relation to the value of property affected. This value will of course differ according to the valuation method adopted in computing compensation payable.

Effective

The term effective refers to the currency in which compensation has to be paid. It means that the amount of compensation payable should not only be adequate and paid promptly but must be of real economic value. Like the other two terms already examined, the rules of public international law are not developed to the extent of formulating hard and fast rules regarding the requirement of currency in which compensation is to be paid. Although in most cases claimants demand payment in convertible currencies, what may be regarded as effective compensation depends on the use the claimant desires to make of the compensation funds. If, for example, he intends to re-invest them in another sector of the economy within the country, it makes no sense to pay him or for him to demand payment in convertible currency. On the other hand, if he wants to take it overseas it will be unfair to pay him in local currency. In brief therefore, compensation in local currency or in transferable form may constitute effective compensation, depending on the circumstances of each particular case.¹⁷

In conclusion therefore, although it is mainly the Third World countries which reject the so-called "Hull rule" requiring payment of prompt, adequate and effective compensation, it is now evident that even some of those who supported the rule tend to agree, in view of overwhelming opinion to the contrary, that it no longer

17. G. Schwarzenberger, *Foreign Investments and International Law*, 1969, p. 11.

represents the equitable formula.¹⁸

Diplomatic Protection

The concept of diplomatic protection occupies a very important position in a discussion involving the question of State responsibility for injuries to aliens abroad. This is so because in classical international law, it is the State of the alien whose rights are alleged to have been violated which suffers injury, and therefore it is his State of nationality and not the alien himself which can institute a claim before an international tribunal against the defendant State. If a State decides to take a claim on behalf of its national, that State is said to have exercised its right of diplomatic protection over its national.¹⁹

There seems to be a consensus among various prominent publicists that the principle of diplomatic protection with its modern features²⁰ was not developed before the 19th century, for it was not until this particular time, with the coming of the industrial revolution that the actual need for diplomatic protection emerged. During this time, merchants and other businessmen went to live outside their own

18. See e.g., R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property", 75 AMJIL (1981), 558, in which he says that the so-called "Hull rule" was not formulated to disfavour developing countries but it was applied among and against Western States before most of the modern states emerged through decolonization process.
19. The doctrine of diplomatic protection has been described as the elementary principle of international law in *Barcelona Case* [1970] ICJ Rep. 3; 32-31; *Mavrommatis Palestine Concession Case* [1924] PCIJ Ser. A. no.2; *Nottebohm Case* [1955] ICJ Rep. 4, 24.
20. See e.g., E.M. Borchard, *Diplomatic Protection of Citizens Abroad*: New York, 1970; F.S. Dunn, *The Protection of Nationals*: New York, 1970, p.46; Dawson and Head, *International Law National Tribunals and Rights of Aliens*: Syracuse Uni. Press, 1971, p. 2. See also B.A. Wortley, "The Protection of Property Situated Abroad", 35 Tulane Law Rev. (1961), pp. 739-66; R.B. Lillich, "The Diplomatic Protection of Nationals Abroad: An elementary Principle of International Law Under Attack", 69 AMJIL (1975), 359; S.N. Guha Roy, "Is the Law of Responsibility of States to injuries to Aliens a part of Universal International Law?", 55 AMJIL (1961), pp. 863-91.

countries in greater numbers in search of raw materials for the growing factories which had just begun to develop in Europe. Because of this, there also emerged a general concern in Europe, where these merchants originated, over the treatment accorded to peaceful aliens living abroad. The concern arose because, until this time, the only remedies available to the aliens were those under municipal law of the host States and therefore they were applied equally to aliens and nationals alike.²¹ This concern over the need to protect aliens living abroad was reflected also in the publication at this particular point in time of Vattel's influential work entitled "The Law of Nations" in which he advanced a thesis that a State has a duty to its subjects²² and that a State that injures a person or property of the subject of another State commits an injury against the State for which it could become responsible.²³

States started practising the principle of diplomatic protection by placing their complaints for redress on the basis of international comity and maintenance of friendly relations.²⁴ In this way, there developed a body of precedent which made it customary to make these demands as claims of right.²⁵ By the middle of the 19th century, governments habitually treated the question of diplomatic protection as a legal question and they justified interposition by appealing to

21. F.A. Mann, *supra* note 1, p. 192; E.M. Borchard, *supra* note 61, p. 7.

22. This duty is understood to mean a duty to offer protection.

23. See E. De Vattel, *The Law of Nations*, Bk II, p. 136. (Classics of International Law Edn.), C. Fenwick Trans. 196. This work was not written by Vattel in 19th Century but it became more publicised during this time because the thesis injury to an individual is injury to his State was found to be appropriate at that time.

24. F.S. Dunn, *supra* note 61, p. 55.

25. *Ibid.*

the principles of international law and writings of publicists²⁶ and settlement of dispute in this way gradually became institutionalized.

Through this practice therefore, there emerged a body of rules regulating the treatment which may be accorded to foreigners. This body of rules is what is sometimes referred to as the minimum standard of international law on the protection of property abroad, which may be reduced into the following major points:

1. That a State is entitled to protect its nationals in another State from gross injustices at the hands of another State, even if applied equally to the subjects of such other State; and
2. A State is entitled to protect its subjects in another State from injuries to their property resulting from measures in application of which there is discrimination between them and the subjects of the other States.²⁷

Like other principles of international law already discussed, the concept of minimum standard of justice for the protection of citizens abroad did not receive the same amount of support in all sections of the international community. Some of its critics dismissed it as no more than the ideas which are conceived to be essential for a continuation of existing social and economic order.²⁸ The ideas embodied in the principles of diplomatic protection and minimum standard of justice received a considerable amount of opposition from capital importing States, especially the Latin American countries. These countries advocated a counter theory of national

26. *Ibid.*

27. A. Fachiri, "Expropriation and International Law" [1925], BYIL, pp. 159-71.

28. F.S. Dunn, "International Law and Private Property Rights", Columbia Law Rev. (1928), 175.

treatment in the form of what was to become "the Calvo doctrine" named after an Argentinian writer who developed the theory in his extensive treatise on the law of nations published in 1868.²⁹

Before examining the details of the Counter theory contained in the Calvo clause, a brief survey of some procedural rules of the principle of diplomatic protection will be necessary.

Nationality of Claims rule

The requirement of nationality of claims is based on the understanding that it is the link of nationality between a State and an individual which gives a State the right to exercise its diplomatic protection on his behalf. However in cases of "delegated" protection or when a State exercises protection over the nationals of a protectorate or a trust territory³¹ it is the criterion of the link of nationality between the individual and the "protected" State which is operative.

The Permanent Court of International Justice in the *Penevezys-Saldustisks Railway Case*, affirmed in 1939 that,

In the absence of a special agreement, it is

29. For Calvo clauses, see R.B. Lillich, "Diplomatic Protection of Nationals Abroad", 69 AMJIL (1975), 359; D. Shea, *The Calvo Clause* (1955), p. 19; Judge Ammonn's separate opinion in *Barcelona Traction Light and Power Co. Ltd.* [1970] ICJ, Rep. pp. 290-95; see also Guha Roy, note 61, supra; A.V. Freeman, "Recent Aspects of the Calvo Doctrine and the challenge to International Law", 40 AMJIL (1946), 121.

30. "Delegated Protection" as distinct from "Protection Status" is a term used by Borchard, to denote the state of fact when the interests of one sovereign State is confided in the territory of another to a third state on temporary basis. See, E.M. Borchard, note 61, supra, pp. 471-5; See also C. Parry, "Plural Nationality and Citizenship with special Reference to Commonwealth", 30 BYIL (1958), p. 257.

31. *Pablo Najera claim* (1928), UNRA, vol. 5, p. 466.

the bond of nationality between State and individual which alone confers upon the State the right of diplomatic protection.³²

The rule of nationality of claims therefore ensures that as from the time of occurrence of the alleged injury until the time of making of the award, the claim must continuously and without interruption have belonged to a person or series of persons having the nationality of the State by whom it is put forward and not having nationality of the State against which it is put forward.³³

This rule requires that there should be continuity in the nationality of the claimant. The principle of continuity has received a considerable amount of criticism, mainly because it allows incidental matters such as change of nationality by operation of law, including cession of territory, to affect reasonable claims. If the legal wrong is to the State of origin, then the wrong has been committed and matured at the time of injury and is unaffected by subsequent changes in the status of the individual.³⁴

The essence of the rule of continuity would seem to be aimed at preventing individuals from choosing a powerful protecting State by a shift of nationality. However, the view would not appear to support the application of the principle in cases of involuntary change of nationality brought about by death or State succession.³⁵ It is obvious that the rule is based on the presumption that individuals have one nationality at a time but in practice this is not always the case. There are a considerable number of instances in which people have been found to have dual or multiple nationalities. The

32. PCIJ Ser. A/B No.76; See also *Nottebohm Case* (Second Phase) Judgment of April 6, 1955, ICJ Rep. 1958, p. 23.

33. I. Brownlie, *supra* note 1, pp. 481-2; c.f. Amerasinghe, *supra* note 1.

34. Brownlie, *ibid.*

35. *Ibid.*, p. 482.

interesting question in this regard is which of these States would have the right to bring a claim under diplomatic protection.

The International Court of Justice considered this particular problem in *Nottebohm Case*,³⁶ and came to the conclusion that,

According to the practice of States to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond *having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments together with the existence of reciprocal rights and duties.....*

A State cannot claim that the rules it has thus laid down [with regard to Nationality] are entitled to recognition by another State unless it has acted in conformity with the general aim of making the legal bond of nationality in accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

[emphasis supplied]

According to the principle of this case therefore in case of dual or multiple nationality the right to bring a claim is exercised only by the State with which the alien has the stronger and more genuine ties of nationality.

Exhaustion of Local Remedies

Exhaustion of local remedies is an important rule of admissibility which applies to the cases involving diplomatic protection, as opposed to cases of direct injury to the State.

The rule simply requires that an individual alien or a corporation should exhaust the legal remedies available in the host State, before his claim can be admissible on the international plane.³⁷ The rule was confirmed by an international tribunal in the *Interhandel*

36. *Nottebohm Case*, supra.

37. The rule of exhaustion of local remedies may be avoided by agreement. See Brownlie, supra, p. 496; C.F. Amerasinghe, supra, p. 169; Borchard, supra, p. 818.

case, where it was said that, "The rule that local remedies must be exhausted before international proceedings may be instituted, is a well established rule of customary international law."³⁸

Apart from the attention it has received from various publicists, the rule also has been invoked on several occasions before the Permanent Court of International Justice and the International Court of Justice³⁹ and before other international tribunals.⁴⁰

The main consideration behind this rule seems to be that it is difficult if not impossible to say whether an injury can be imputed to the State before the claimant brings and exhausts all the actions and proceedings provided for in the State where the injury is alleged to have happened.

⁴¹
Borchard⁴¹ who made a detailed study on the subject of diplomatic protection, outlined several reasons for this limitation on the principle of diplomatic protection. One of the reasons that he gave for the rule of local remedies is that people going abroad are presumed to take into account the means furnished by the local law

38. [1959] ICJ, Rep. p. 27.

39. See note 78 supra.

40. See, *The Mavrommatis Palestine Concession Case* (1925) PCIJ Ser. A.No.5; *The German Interest in Upper Silesia Case* (1925), PCIJ, Ser.A. No.6; *The Chorzow Factory Case* (1927) PCIJ Ser. A. No. 9; *The Affaire Losinger and Company*, order of 27 June 1936, PCIJ Series A/B No. 74; *The Panevezys-Saldutiskis Railway Case* (1939) PCIJ Ser. A/B No.76; *The Electricity Co. of Sofia Case* (1939) PCIJ Series A/B No. 77; *Anglo-Iranian Oil Co. Case* (1952) ILJ Rep. p. 99; *Ambatielos Case* 1953, ICJ Reps. p.13; *Nottebohm Case* (1959) ICJ, Reps. p. 14; *The Interhandel Case* (1959) ICJ Reps. p. 11; *The Aerial Incident Case* (1959) ICJ Reps. p. 132; and *The Barcelona Traction Case* (1964), ICJ Reps. p. 12.

41. Borchard, note 1 supra, pp. 817-8. See also the critique of Borchard's formulation in C.F. Amerasinghe, supra, p. 171.

for the redress of wrongs. Secondly, he said that the right of sovereignty and independence warrants the local States in demanding the freedom of their court from interference and the assumption that they are capable of doing justice. Thirdly, the home governments of the complaining alien must give the offending government an opportunity of doing justice to the injured person in its own regular way and thus avoid, if possible, international action. Fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain the the wrongful acts or denial of justice is the deliberate act of the State and, fifthly, if it is the deliberate act of the State, it will show that the State is willing not to right the wrong.

Whether these are the real reasons for the rule of local remedies is arguable. However, what may be said briefly is that it is a limitation to the rule of diplomatic protection in that it requires that where there is a remedy, it must be sought. Only if sought in vain and a denial of justice established, does diplomatic protection become proper.

The Scope of the Rule

In a discussion involving the rule of local remedies, the question which should be considered is 'when are the local remedies deemed to have been exhausted?'

It has been suggested that the question whether local remedies have been exhausted is a matter which can be verified objectively. It will be sufficient for example, to know whether the decision is final or not. If a final decision has not been given, it can not be argued either in law or fact, that the remedies open to the claimant

have been exhausted⁴² and it cannot be said with certainty what is the form or scope of the act or omission complained of, on which international claim is founded.⁴³

Another important question in relation to the rule of exhaustion of local remedies is whether in pursuing the local remedies, the alien is expected to exhaust administrative and legislative as well as judicial remedies.

Discussing this aspect of the rule; Amerasinghe⁴⁴ pointed out that although textwriters generally discuss the rule of exhaustion of local remedies on the assumption that it is limited to the remedies of judicial nature, international law practice shows that there is no cogent evidence to suggest that practice has accepted this broad definition of local remedies. In his own view, the author concluded that the concept of local remedies covers only remedies which enjoy a judicial character, although it is not confined to regular courts of law⁴⁵ and that aliens should pursue and exhaust administrative remedies only if they enjoy a character which ensures impartial determination of disputes according to the law and not purely by discretion.⁴⁶ The administrative tribunals and the like may fall under this category of exhaustible remedies, if they share the required character and particularly, if they are subject to control by ordinary courts as this ensures impartiality and determination

42. F.V. Garcia-Amador, Third Report on "International responsibility: [1958], vol. II, YBILC, pp. 43-73.

43. *Ibid.*

44. C.F. Amerasinghe, *supra* note 1, 169-99.

45. *Ibid.*

46. *Ibid.*, p. 190; see also *The Phosphates in Morocco Case* [1938], PCIJ, Ser. A/B No. 74 in which the French government argued that local remedies were not exhausted as it was open to the Italian company to have recourse to civil court adjudicating upon administrative questions.

according to law.⁴⁷

Exceptions to the Rule

The rule of local remedies may be inapplicable in international proceedings for different reasons. This may be in cases where only a declaratory judgment is sought,⁴⁸ or where the rule has been waived by a treaty, or where there has been a forfeiture of the benefits of the rule by estoppel.⁴⁹ Apart from these situations, there is also an exception to the rule of local remedies which concerns the content of the rule itself. This is found in a situation whereby the application of the rule for one reason or another is bound to be futile. A common situation where an alien claimant is not expected to exhaust the remedies available in the defendant State is where there is reason to believe that an outcome is a foregone conclusion.

In the *Finnish Ships Arbitration*⁵⁰ for example, it was held that a claimant was not under an obligation to resort to an appeal which was obviously futile and that the complainant was not compelled to take his case to the highest Court in any circumstances. It was enough if the remedy merely appeared to be futile.

The rule evolved in the *Finnish Ships Arbitration* was also applied

47. C.F. Amerasinghe, *ibid.*, p. 191.

48. See e.g., *The German Interest in Upper Silesia Case* (1926), PCIJ, Ser. A, No. 6.

49. See the French government's argument in *The Norwegian Loans Case* (1957), ICJ Rep. 407; for the principle of estoppel as a general principle of International Law, see *The Temple of Preah Vihear Case* (1962), ICJ, Rep., p. 6.

50. 3 UNRIAA (1934), p. 1504; see also A.P. Fachiri, "The Local Remedies Rule in Light of the Finnish Ships Arbitration" (1936), BYBIL, pp. 19-36.

by Judge Lauterpacht in the *Norwegian Loans Case*,⁵¹ in which the issue of non-exhaustion of local remedies was raised, although not decided upon. In his separate opinion Judge Lauterpacht said that the Norwegian objection was good because it was not clear that resort to Norwegian courts would be absolutely futile.

In *Interhandel Case*,⁵² the court similarly held that there was a possibility of success in American courts for the Swiss company and that it could not be said that there were no remedies available. Judge Armond-Ugon (dissenting) however was of the view that because a further unknown period would have to elapse before remedies were exhausted, ten years already having passed, such remedies were too slow and could not be called adequate or effective remedies and could therefore be disposed with.⁵³

Absence of jurisdiction over the matter has also been held to be a good ground to exempt an alien from exhaustion of local remedies.⁵⁴ However, for an international tribunal to rule whether the local tribunal had jurisdiction over the matter or not, it must have a look at the provisions of relevant domestic law. The practice adopted by most international tribunals is that unless there is clear evidence of lack of jurisdiction on the part of a local tribunal, they will not examine the municipal law.⁵⁵

Absence of bias is another factor which will justify an excuse from resorting to local remedies. In *Robert E. Brown Case*,⁵⁶ an

51. Note 90, supra.

52. Note 79, supra.

53. *Ibid.*

54. See *Panevezys-Saldutiskis Railway Case* (1939), ICIJ Ser. A/B no. 76, p. 19.

55. See D.R. Mummery, "The content of the Rule to exhaust Local Judicial Remedies", 58 AMJIL (1964), p. 401.

56. (1923) (U.S.A. v. G.B.), 6, UNRIAA, p. 120.

international tribunal held that the alien was excused from taking his claim to local courts because they were at that time completely under the control of the government. In its own words, the tribunal said that the local remedies were ineffective on the grounds that the courts had been "reduced to submission and brought into line with a determined policy of the executive to reach the desired result regardless of constitutional guarantees and limitations".⁵⁷

The rule of this case therefore illustrates the well established principle that where the executive branch dominates the courts,⁵⁸ judicial remedies against executive actions need not be pursued.

Finally denial of justice by the judicial organ of the State is also regarded as a good reason for excusing an alien from the obligation to resort to local remedies. Denial may take the form of undue delay or a mere denial of access to the courts. It may also take the form of gross deficiency in administration of judicial process.⁵⁹

In *El Oro Mining and Railway Company Case*,⁶⁰ it was held that a court's delay in taking action for nine years was sufficient to make it insufficient remedy.

Opposition to the Principle of Diplomatic Protection: The Calvo Clause

During the formative years in the development of the concept of diplomatic protection, there also emerged a counter-theory which

57. *Ibid.*, p. 129.

58. See note 96, *supra*.

59. See Harvard Law School, *Research in International Law II*, Responsibility of States (1929), p. 134.

60. *Annual Digest of Public International Law Cases* [1931-32], No. 100.

was to be known as the theory of non-intervention. The need for this theory emerged with the realization by some Latin American scholars that there was a tendency among some developed countries to abuse the principle of diplomatic protection. These scholars thought therefore that if this tendency were left unchecked, there was a danger of some of the weak developing countries losing their territories. Like the exponents of the principle of diplomatic protection, these scholars turned to Vattel and seized yet another famous passage from his "Law of Nations" to justify their opposition to the concept of diplomatic protection. The relevant passage says that,

[A]s the administration of justice necessarily requires that every sentence pronounced in due form and by the court of last resort, be regarded as just and executed as such. When once a case in which foreigners are involved has been decided in due form, the sovereign of the litigants may not review the decision. To undertake to inquire into the justice of a definitive sentence is an attack upon the jurisdiction of the court which passed it.

The passage continues that a sovereign should refrain from interfering in suits of his subjects in foreign countries, except in cases where, "Justice has been denied or the decision is clearly and probably unjust or the proper procedure has not been observed, or finally in cases where his subjects have been discriminated against".⁶¹

Out of this passage the Latin American scholars formulated an argument that court decisions should be final in cases involving nationals and foreigners. The exception being in cases where there is clear evidence of denial of justice. This concept of equal treatment or national treatment, which is said to have originally been developed to encourage foreign immigration, was used to support an argument that foreigners are entitled to no better treatment than

61. E. de Vattel, note 64, supra.

the nationals.⁶²

The most articulate and famed proponent of this revised version of national treatment doctrine is the erudite Argentine diplomat and legal scholar named Carlos Calvo. He formulated a comprehensive theory to restrict diplomatic protection, which he set forth in detail in a monumental six-volume work published in 1896.⁶³

The Calvo Clause is based on two principles which may be briefly summed up as follows:

- (i) The sovereign State being free and independent, enjoys the right on the basis of equality and freedom from interference by other States either through force or diplomacy; and
- (ii) Although aliens should be accorded equal treatment with nationals, they are not entitled to rights and principles not accorded to nationals. Therefore, they must seek redress for grievances exclusively in local courts.

These twin concepts of the principle of non-intervention are the core of what is regarded as the Calvo doctrine, which is a corollary of the doctrine of equal treatment which is today accepted by most Latin American States as being a principle of international law.⁶⁴

The Calvo Clause may take several forms. It may consist of stipulations to the effect that the aliens concerned shall be satisfied with the remedies offered locally, under municipal law. Sometimes the aliens concerned enter into agreement with local government

62. See F. Dawson "International Law, National Tribunals and Rights of Aliens: The Latin American Experience", 21 Va.L.Rev.(1968), 718-21.

63. The original version of his work is in French, entitled *Le Droit International Theorique et pratique*: Paris, 1896.

64. See, D. Shea, *The Calvo Clause A Problem of Inter-American International Law and Diplomacy*, (1955), pp. 4-5.

undertaking to submit any dispute among them to a local tribunal. In some cases however, the Calvo Clause embodies a more direct and broader waiver of diplomatic protection, when it provides that any dispute that may arise shall in no circumstances lead to an international claim. The effect of such a provision is to bring a foreigner to an equal footing with a national for the purpose of that particular contract or concession. In the contract which was in issue in the *North American Dredging Company Case* for example, foreigners were deemed to be nationals for the purpose of the contract.⁶⁵

Some countries, mostly Latin American countries, have constitutional and legislative provisions requiring contracts entered into between State and aliens to include a Calvo Clause of the type mentioned above.⁶⁶

Despite the support that the Calvo doctrine enjoys from the Latin American States and other developing countries, some scholars, especially those from capital exporting States, argue that the Calvo Clause is nothing more than the reaffirmation of the rule of local remedies because according to this school of thought, "the clause will be ineffective if it purports to prevent the State of nationality from exercising the right of diplomatic protection under international law".⁶⁷

Whatever one's views about the Calvo Clause are it would appear to be wrong to consider the clause, even if conceived in a way which prevents the exercise of diplomatic protection, to be useless or

65. (1926) A UNRIAA, p. 26.

66. For various forms of the Calvo Clause see E. Egleton, *The Responsibility of States in International Law*: New York (1928), p. 203.

67. See e.g., D. Shea, *supra*.

superfluous because in practice it has, within this limited scope, enabled States to resist successfully international claims, which but for the existence of the clause would have been admissible.⁶⁸

CONCLUSION

Nationalization of foreign-owned property is a phenomenon closely related to the concept of expropriation which has in modern times become a separate legal phenomenon recognised in international law. Due to its close relationship and resemblance to the concept of expropriation, some publicists have often considered it as being not different from the general acts of expropriation. This is the case because invariably those who hold this view tend to consider these two concepts from the point of view of a foreign investor and hence conclude that these two phenomena have the same effect on the alien owner whose property has been taken over by the government. Because this view seems to be dominant among international lawyers, the rules developed in the Middle Ages to regulate expropriation are used also to regulate acts of nationalization.

Although some of these rules are readily accepted in the international community, the rule requiring payment of compensation has received a considerable amount of opposition, especially from capital importing States, which are responsible for most of the nationalization measures in recent times.

Because of the controversy regarding what should be the right rule of international law applicable to nationalization acts, there has emerged the need to refer the disputes between the parties to international tribunals, in accordance with the principle of

⁶⁸. *Ibid.*, Garcia-Amador, note 83, *supra*, p. 31.

diplomatic protection which enables a State of nationality to institute a claim in international tribunals on behalf of its citizens. The major obstacle in this regard however, is the fact that the concept of diplomatic protection itself is not universally accepted. Its application has been limited considerably through the concept of national treatment.

CHAPTER TWO

COMPENSATION FOR NATIONALIZED PROPERTY

The rule of traditional international law is that, expropriation of foreign-owned property is lawful if it is accompanied by payment of prompt adequate and effective compensation.¹

The amount of support that this rule enjoys from the Governments and Scholars of capital exporting countries has already been demonstrated.²

The question which follows therefore is whether there is a duty, in international law, to pay compensation in cases of nationalization.³ While capital exporting countries maintain that there is such a duty under international law, to compensate even in case of nationalization, the Soviet Union and some of the capital importing countries have taken the view that there is no obligation to compensate at all.⁴

Examination of treaty practice of most of the European countries indicates that various nationalization measures were followed with signing of treaties apparently acknowledging an obligation to pay compensation.⁵

However it is worth noting that these treaties were concluded out of economic necessity and therefore they should be interpreted on the background of special circumstances.

-
1. This rule is stated in most of the international law text books see e.g. I. Brownlie, *The Principle of Public International Law* 3rd Ed. Clarendon, Oxford, 1979 PP. 337 - 41; DP. O'Connell, *International Law* Vol. II 2nd Ed.: London, 1970.
 2. See note 47 Chapter One, *Supra*.
 3. See C.F. Amerasinghe, *Ibid.* pg. 143.
 4. Vyshinsky, *The Law of Soviet State* (1948) pg. 179.
 5. Drucker, 10, 1 CLQ (1961) 238. *ii*

This being the case, and bearing in mind that no prior explicit statement about the existence of a duty to compensate has been made by the East European countries, one can conclude that such a duty is not automatically recognised by these states.

A survey of legislation in countries which have nationalized foreign-owned property, shows that the majority of nationalization laws contain provisions concerning the liability of the nationalizing state to pay compensation. Some text-writers and commentators on the other hand disagree on the proposition that there is a duty to compensate although the majority of them are in favour of the view.⁶

International case law does not contain any clear pronouncement relating to a duty to pay compensation in cases of nationalization and recent codifications are also divided on the question of compensation.⁷

State practice for both post-war and pre-war periods indicates that with exception of the Soviet Union, arrangements were in most cases made for the payment of some form of compensation. This means therefore that apart from the exceptions mentioned above, the recent developments in the rules of international law seem to favour the proposition that there is a liability to pay compensation in case of nationalization.

6. See a list of authorities in wortley PP. 34.

7. Compare Garcia Amador's final Draft ILC Year Book (1961) ii 47, with the Harvard Draft of 1961, Article 10 which requires compensation as an obligation.

As a further evidence of the rule of law requiring payment of compensation, it is significant to note that eighty-seven members of the General Assembly of the United Nations voted in favour of a resolution which stated that "in case of nationalization expropriation or requisition, the owner shall be paid appropriate compensation in accordance with the rules in the state taking such measures in exercise of its sovereignty and in accordance with international law".⁸

In view of what has been discussed above it may be summed up that the existence of a duty to compensate is obviously established. What is not clear is whether payment of prompt adequate and effective compensation is part of our law.

Different justifications have been used to support the application of this rule. Principles such as *restitutio in integrum* and equity however, have been used widely by the advocates of this rule, to suggest that adequate compensation means at least the payment of the market value of the property expropriated.⁹

8. See General Assembly Resolution 1803 of 14th December, 1962.

9. For the use of equitable doctrines to suggest liability to pay market value compensation, see F. Francioni, "Compensation for Nationalization of Foreign Property: The Borderland between Law and Equity", 24 (1975), ICLQ 255; D.A. Grantz, "The Marcona Settlement: New Forms of Negotiations and Compensation for Foreign-Property", 71 (1977), AMJIL, 474; see also M. Sornarajah, "Compensation for Expropriation: The Emergence of New Standards", 13 JWTL (1979), 109.

The Changing and Differing Attitudes on the Status of Private Property

The concept of limitless right of ownership of property has been a subject of criticism for a long time. In the second half of the nineteenth century for example, scholars who advocated the right of a sovereign to expropriate private property for public purpose, criticised this notion. The right of a sovereign to expropriate had always been regarded as superior to the right of private property ownership. With the extension of public sector in many economies the notion of social function of property has received more weight than was the case in the past and this is generally so in capitalist as well as socialist countries.

In developed industrial countries however the notion of social function of property has not developed beyond the provision of justification for expropriation of private property on public purpose.

In the Easter Block, especially the USSR, the notion of collectivist property put forward by the October Revolution, has made serious inroads into the concept of freedom of private property. The nationalization measures which followed, demonstrate that not only private property was taken without compensation but also foreign-owned property. The justification being that public or communal ownership of property is superior to private ownership and in-keeping with the socialist ideals i.e. keeping all major means of production and exchange under communal ownership. In fact it is the major pre-occupation of this social economic system.

The current legal thinking and practice of Soviet Russia together with most of the Eastern European countries, practising socialist ideology, favour the concept of social function of property, and this is hardly surprising for the legal thinking reflects the

dominant ideology. This trend has been found more recently in the developing countries through various elaborations deriving from the "right of nations to self-determination" found in various U.N. Resolutions on permanent sovereignty over natural resources, showing that these nations, like the USSR and the Eastern European countries do not regard freedom of private property whether local or foreign-owned as being supreme to communal ownership. The only difference of course is that unlike the Soviet Union the developing countries acknowledge the existence of duty to compensate. It is because of this difference in attitude on the status of private property between developed industrial countries on the one hand and socialist and developing countries on the other, that even the rule developed to protect private property, requiring payment of prompt adequate and effective compensation upon nationalization is not acceptable to developing countries as well as to the Eastern European countries.

While the Soviet Union has flatly denied the existence of a duty to compensate, the developing countries and some Socialist States have adopted norms other than that favoured by capital exporting countries.

International law and practice supports the application of the principle of *restitutio in integrum* as a remedy in specific circumstances. In *Chorzow Factory Case*¹ for example, the Permanent Court of International Justice established a strong *obiter dicta* to the effect that *restitutio* is a remedy at international law, where there is violation of treaty provisions. The Court stated that,

The actual principle contained in the notion of illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all possibility 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.²

In view of what the Court said in this case, it is obvious that the possible availability of the remedy of restitution arose principally under the specific treaty provisions concerned. Thus the rule is applicable in cases where a special remedy has been created by a treaty or *compromis*.³

This view however, has been rejected in some instances. In *Texaco/Cali Asiatic Arbitration*⁴ for example, Professor Dupuy, the sole Arbitrator considered the authorities of *Chorzow Factory Case*⁵ *Mavrommatis Jerusalem Concession Case*,⁶ *The Temple of Preah Vihear Case*⁷ and *the Martini Case*⁸ and came to the conclusion that restitution in kind is an appropriate remedy for the breach of guaranteed concession agreements. It would appear that the sole arbitrator did not consider as vital, the fact that in *Chorzow Factory Case*⁹ the

1. *The Chorzow Factory Case (Claim for Indemnity)*, PCIJ Ser.A. No. 17, p.47. The Principle of *restitutio in integrum* was also discussed in *Texaco Arbitration*, 17 (1978), ILM, p. 1.

2. *Texaco Arbitration*, *ibid*.

3. See R. White, "Expropriation of Libyan Oil Concession: Two Conflicting International Arbitrations", 30 ICLQ (1981), p.1.

4. *Texaco Arbitration*, *supra*.

5. Note 4, *supra*.

6. [1925], P.C.I.J., Ser.A, no.5.

7. [1962] ICJ, Rep.6.

8. 2 RIAA (1930) 975,1002 Trans (Italy v. Venezuela):25 AMJIL (1931) p.554

9. Note 4, *supra*.

question of restitution in kind was considered in *obiter dictum*, because of the specific treaty provisions.

The Temple of Preah Case,¹⁰ which involved a decision regarding possession of a territory between two States, may be regarded as a case whose principle does not warrant general application, because the remedy of restitution in kind was given only because it was found that, in the circumstances of the case, the award of damages or other forms of remedies was impossible. *The Martini Case*¹¹ which is also relied upon to support Dupuy's point of view, is not relevant as the question of restitution was hardly in issue.

Brownlie seems to support the views expressed by Judge Lagergren in *B.P. Arbitration*,¹² when he said that "in many situations it is clear that a remedy which accommodates the internal competence of governments while giving redress to those adversely affected, is to be preferred: restitution is too inflexible".¹³

In view of what has been discussed above, what then can be said to be the position of restitution in kind as a remedy for nationalisation of foreign-owned property?

Apart from Dupuy's decision in *Texaco/Caliasiatic Arbitration*,¹⁴ international law and practice tend to indicate that restitution in kind is a proper remedy only where there is breach of treaty provision restricting nationalization or in cases where other remedies are practically impossible.¹⁵

10. Note 10, *supra*.

11. Note 11, *supra*.

12. See *B.P. Exploration Company Libya Ltd. v. Government of the Libyan Arab Republic* (1979) 53 ILR 297; Brownlie, *supra*, note 1, p. 383.

13. I. Brownlie, *ibid*.

14. *Texaco Arbitration*, *supra*.

15. In territorial claims cases such as in the *Temple of Preah Case*, (1962), ICJ. Rep. p. 6.

Full Market Value

The interpretation that adequate compensation means at least full market value of the property expropriated as put forward by lawyers from capital exporting States,¹ has not been accepted by the capital importing States, which have been responsible for most of the recent nationalization measures.²

It is also interesting to find out that, despite the repeated demands the governments of capital exporting countries make for full market value formula, they have in certain cases accepted compensation well below the market value of the property concerned.³ This could be interpreted to imply that States are not only prepared to accept other standards of compensation, but also that the requirement that full market value should be paid, has not yet been well established by State practice as a rule of customary law. This being the case, it would be proper at this juncture to see if there is a duty under international law, to pay compensation at all.

-
1. See note 3, *supra*: The U.S. State Department's Statement on Foreign Investments and Nationalizations, 30th December, 1975, 15 ILM (1976), 186; The British Government's Statement in a note to Indonesian government of July 1964 in (1964) BPIL, pp. 199-200.
 2. See the Report of the U.N.'s Economic and Social Council on "Permanent Sovereignty over Natural Resources", U.N. Doc. No. A/9716 (1974); L. Rood, "Compensation for Takeover in Africa", 11 (1975), JILF & Econ. 521; A. Akinsanya, "Host Government's responses to Foreign Economic Control: The Experience of Selected African countries", 30 ICLQ (1981), p. 768 and S.K.B. Asante, "Restructuring Transnational Agreements", 13 AMJIL (1979), pp. 341-55.
 3. See e.g., The Lump-sum Compensation following Post-War expropriations in A. Rado, "Czechoslovakia Nationalization Decrees: Some International Aspects", 41 AMJIL (1947), pp. 795-806; Z. Rode, "The International Claims Commission of United States", 47 AMJIL (1954), 615; Treaty between U.K. and Czechoslovakia, BTS No. 61 (1949) Cmd. 7799; and U.K. and Poland, BTS, No. 10 (1947), Cmd. 7626.

Use of Force

Examination of State practice regarding the existence of a duty to pay compensation in cases of nationalization, indicates that, with the exception of Soviet nationalization following the October 1917 Revolution, some arrangements were in most cases made for payment of some form of compensation.⁴ In case of the Post-war nationalizations, compensation agreements were concluded between the nationalizing States and the States of the affected aliens. One of the problems surrounding these agreements is the fact that it is difficult to determine whether they were reached out of *opinio iuris sive neccessitatis*, or as a result of diplomatic shrewdness on the part of the States of aliens.⁵ It is mainly because of this, that Foighel⁶ observed that,

although the compensation treaties tend to support the view that nationalization should be followed by payment of compensation, they may not be used as evidence of an established rule of international law, because the States entitled to compensation were great Powers on which compensating States depended financially and economically.⁷

Apart from the usual economic dependence discussed above, there is evidence to show that some of these agreements were reached through threats and other forms of coercion on the part of nationalizing States.⁸

Whether these agreements were secured through coercion or not

-
4. C.F. Amerasinghe, *State Responsibility for Injuries to Aliens*: Oxford, 1967, p. 164.
 5. Amerasinghe, *ibid.*
 6. I. Foighel, *Nationalization*: Copenhagen, 1957, p. 14.
 7. *Ibid.*
 8. See e.g. Compensation Agreement between U.K. and Yugoslavia of 23 December, 1948, and that between U.S.A. and Yugoslavia of 19 July 1948 in Foighel, *ibid.*; see also A. Drucker, "Compensation for Nationalized Property" the British Practice", 49 AMJIL (1958), 477.

is arguable. But assuming that this was the case, the question which follows is whether coercion has any effect on these agreements.

Apart from the general prohibition on the use of physical force by a State on another, International case law and practice do not provide much guidance on the question of economic or political coercion.⁹

There have been however, several attempts to codify the rule regarding the use of force in securing treaties. The first generally accepted rule in international regulation of coercion was the Hague Convention of 1907, which codified the Drago doctrine,¹⁰ forbidding the use of force by a country for collecting contract claims owing to its nationals.

The United Nations Charter codified a much broader prohibition on the use of force between nations,¹¹ which is applicable to treaties through the Vienna Convention on the Law of Treaties.¹² The Vienna Convention has the effect of invalidating the treaties obtained through the use or threat of use of force.¹³ Like other attempted codifications, the one contained in Article 52 of the Vienna Convention does not specifically say whether the word 'force' includes force other than physical force. An attempt to construe Article 52 of the Treaty to include force other than physical force has not been received very favourably by some countries.¹⁴ There was an

9. D.F. Vegts, "Coercion and Foreign Investment Rearrangement", 72 AMJIL (1978), 28.

10. The official name is "the Convention Respecting the Limitation of the Employment of force for the Recovery of Contract Debt, 1907".

11. See Article 2 of Paragraph 4 of the U.N. Charter.

12. U.N. Doc. A/Conf. 39/27; 63 AMJIL 875 (1960).

13. Articles 51 and 52 of Vienna Convention of the Law of Treaties.

14. D.F. Vegts, *supra* note 27, p. 28.

attempt to amend the Vienna Convention to include economic and political pressure, in its definition of the term 'force' but the amendment did not go through and it was subsequently withdrawn. A compromise resolution was however passed by the General Assembly which denounced the use of economic, political or other type of measures to coerce other States with the view of obtaining subordination or advantage of any kind.¹⁵ In view of the fact that the General Assembly resolutions have no law creating effect,¹⁶ one would say that, although the Law of Treaties does not contain a statement making treaties reached through economic and political coercion void, there is nevertheless an opinion expressed through the United Nations, abhorring such practice.

Coercion Through Aid

In modern times economic and political pressure against nationalizing States is normally exerted through an institution of foreign-aid. This is found to be the most effective way, as the Third World countries who are responsible for most of the recent nationalizations depend on foreign aid from capital exporting States for their economic development.

The capital exporting States have often used foreign aid in its

15. General Assembly Resolution 2625, 25 GAOR Supp. (No. 28), 121, U.N. Doc. A/8028 (1970); 9 ILM (1970), 1272.
16. For those who generally do not recognise General Assembly Resolutions as having a binding legal nature, see G. White, "A new International Economic order?", 16 VA.J.INTL. (1976), 223, 230; Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations" (1972), Recueil des Cours 419, 434-518; S. Schwebel, "The effect of resolutions of the U.N. General Assembly on Customary International Law", 73 ASIL Prodg. 301, 302 (1979); J. Stone, "Conscience, Law, Force and the General Assembly" in *Essays in Tribute to Wolfgang Friedmann*, Wilner (Ed.), 1979, pp. 333-37; See also *Texaco Arbitration* (Award on Merits) (1979), 35 ILR, 389; 1979 ILM, p. 1.

various forms, to put pressure on some nationalizing States which do not comply with the rule which requires payment of prompt, adequate and effective compensation. An amendment to United State's Foreign Assistance Act 1963¹ is a good example of devices used by capital exporting States to exert pressure through foreign aid. According to this amendment the President is empowered to suspend assistance to any capital importing nation which nationalizes or nullifies a contract with a U.S. controlled business entity, without promptly meeting compensation standards considered to be required by international law.

In another amendment to the Foreign Assistance Act, 1963, the U.S. Congress included a provision to the Act, which stated that "the United States will terminate aid to any less developed country which by December 31, 1965, has not signed an agreement with the United States, to institute the Investment Guarantee Program".² Although the programme is said to be popular both to foreign investors and capital importing countries, the effect the threat of terminating foreign aid cannot be underestimated. In view of the fact that there is no clear statement of law declaring treaties entered under threat of economic and political pressure as void, the best approach to adopt would be to interpret these agreements in the light of special circumstances attending them.

1. Hickenlopper Amendment to Foreign Assistance Act, 1963, 22 USC. 2370; see also H. Brown, "The Use of Foreign-Aid as an Instrument to Secure Compliance with International Obligations", 48 (1964) ASIL (Proc.), 210; F. Kirgis, "Developments in the Law and Institution of International Economic Relations", 64 AMJIL (1970), 106-38.

2. See Foreign Assistance Act, 1963, *ibid.*; see also "The Investment Guarantee Program", in R. Lillich, *The Protection of Foreign-Investments, Six Procedural Studies*, 1965, Syracuse University Press, pp. 147-64.

Pacta Sunt Servanda

Those who argue in favour of liability to pay compensation as a duty founded in the general principles of law recognised by civilized nations, single out the principle of *Pacta Sunt Servanda*¹ as being a foundation of this duty. This, in other words, means that, if a State has undertaken by way of a concession or economic development agreement, to protect foreign investors against nationalization, a breach of such undertaking constitutes an international delinquency.² But if this view is right, it will be the same as saying that these agreements are elevated to the level of treaties, thereby bringing into play the norm *Pacta Sunt Servanda*, which is a rule applicable to treaties among sovereign States. Those who support this formulation suggest that the principle of *Pacta Sunt Servanda* does not only apply to treaties but also to international agreements between sovereign States and foreign nationals.³ This claim which has the effect of elevating multinational corporations to the level of sovereign States has been upheld in a recent arbitration Award.⁴ The Award said that internationalization of certain contracts entered into between States and a private person does not confer competences comparable to those of a State. The tribunal continued to say that, the private person is only given those capacities which enable him to act internationally

-
1. This is the fundamental principle of Law of Treaties which basically means, treaties are binding upon parties and must be performed in good faith. See. McNair, *The Law of Treaties* (1961), 493; Sorensen, (ed.), *Manual of Public International Law* (1968), 175 and J. Kunz, "The Meaning and Range of the Norm Pacta Sunt Servanda". 39 AMJIL (1945), 180-97.
 2. For this view see, W. Friedmann, *Law in a Changing Society*, 2nd. Edn., Penguin Books, 1972, p. 487.
 3. This argument was advanced in *Losingel Case* (1936), PLIJ Ser. C. No. 78, p. 32; See also Hans-Wehberg, "Pacta Sunt Servanda", 53 AMJIL (1959).
 4. See *Texaco Arbitration*, supra note 4.

in order to invoke the right resulting to him from an internationalized contract.⁵

This view has been rejected by many writers some of whom support the notion of internationalized contract on different grounds. However, the concept of internationalized contract law has been described as a myth, having no basis in any juristic principle, strengthened only by repetition and given respectability in some arbitral awards.⁶

According to those who support the notion of international contract, the terms of such contracts can not be unilaterally changed by legislations of host States, as such changes amount to breach of contract, which is a violation of international law.⁷ Consequent to such violation, the foreign Party whose property is nationalized has a right to claim restitution, or in the alternative, prompt, adequate and effective compensation.⁸

Those who are against this view maintain that under the new international economic order, corporations would always be governed

-
5. For those who support the notion of internationalized contract see e.g. R.B. Lillich, "The current Status of Law of State Responsibility for injuries to Aliens", (1974), ASIL (Proc.); F.A. Mann, "Wrong in National and International Law", 48 BYIL (1977), p.1; for a different view see M. Sornarajah, "The Myth of International Contract Law", 15 JWTL (1981), pp. 187-217, and A.A. Fatouros, "The International Law and the Internationalized Contract", 74 AMJIL (1980), pp. 134-41.
 6. M. Sornarajah, *ibid.*
 7. C.F. Amerasinghe, "Choice of Law in Concession Contracts" 58 AMJIL (1964), 881; see also F.A. Mann, "State Contracts and State Responsibility", 54 AMJIL (1960), 574; R. Brown, "Choice of Law Provisions in Concession and Related Contracts" (1976), 39 MLR 625, 632.
 8. See e.g. E.J. de Arechaga, "State Responsibility for the Nationalization of Foreign owned Property", 11 NYUJ INT'L L & Pol (1978), p. 179; F.V. Garcia-Amader, "The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation by Foreign States for the Taking of Alien owned Property", 13 VJTL (1980), 51.

by municipal law of the host State, more particularly where a contract involves the exploitation of mineral resources in the host State.⁹

Unjust enrichment

The principle of unjust enrichment has also been used to justify payment of compensation in cases of nationalization. The argument behind this rule is that in taking property which belongs to foreign investors, the host State enriches itself at least to the extent of the value of the property taken, if not also to the extent of future profits that would accrue from the property.¹ Because of this, international law requires payment of compensation to offset the unjust enrichment. In other words, what is said here is that it is not equitable for a host State to take advantage of its position to enrich itself at the expense of foreign investors.

But if the basis of this principle is equity, it may also be argued that, equity also requires that an account of past relationship between parties be made. This would be particularly relevant in cases where concession agreements or other contracts were entered while the host State was still a colony or a dependence of the investor's home State. The theory of past relationship actually formulated a basis of excess profit deduction principle in Chilean nationalization law.²

The Chilean nationalization law authorising excess profit

9. The political aspects of the Third World's movement towards a new International Economic Order have been described in R.F. Meagher, *An International Redistribution of Wealth and Power*: New York, 1979; R.L. Rothstein, *Global Bargaining*; Princeton, 1979.
1. See. B. Cheng, "The Rationale for compensation for expropriation" (1948) 44, *Grotius Transactions*, 267.
2. See J. Rohwer, "Nationalization - International Minimum Standard - Chilean Excess Profit Deduction", 14 *Harvard Law Jour.*, 376;
(contd)

deduction may be deficient in that it did not indicate the way in which the excess profit was to be computed. However the fact that it was even put forward shows that the principle of unjust enrichment as an equitable concept can be used by either party.

Acquired Rights

The doctrine of acquired rights has also been used to support the norm of full compensation.

The notion of acquired or vested rights (*droits acquis*) has been developed in different areas of law such as State Succession and intertemporal conflicts, besides nationalization. This notion has the effect of upholding the status or legal rights which had been acquired under the municipal law of a State and make them respected as a matter of international obligation.¹

The notion of acquired rights was originally conceived as having the effect of creating immunity from expropriating legislation.² According to this view expropriation measures having the effect of destroying a private right to property, amounts to tortious act against a foreigner who would be entitled to restitution as full damages.

-
2. (contd) A.N. Heiben, "The Chilean Copper Nationalization: The Foundation for the Standard of appropriate compensation", 23 (1974), Buffalo Law Rev. 765; F. Orego-Vicuna, "Some International Law Problems Posed by Nationalization of the Copper Industry by Chile", 67 AMJIL (1973), 711; R.B. Lillich, "The Valuation of Copper Companies in Chile nationalizations", 1972 ASIL (Proc.), 212; Chilean Law No. 17450, reprinted in (1971) ILM 1071.
 1. O'Connell, *supra* note 1, p. 305.
 2. This extreme view had its origin in Chief Justice Marshall's decision in *U.S. v. Perchemm*, 7 Peter's U.S. Supreme Court Reports, p. 86. This early reference to the principle of respect for acquired rights was followed by a series of judicial decisions and diplomatic statements by U.S. Courts and Department of State.

The United State's stand, in relation to Mexican nationalizations, brought about by its 1917 Constitution reflects this point of view. The Department of State demanded strict restitution in respect of properties belonging to American citizens and refused the Mexican offer of compensation for any damages which could have been proved.³ But this extreme notion of the principle of acquired right could not stand the test of time. Faced with an obstacle of reconciling the alleged principle of immunity from expropriation with an internationally accepted practice which acknowledged the right of sovereign States to expropriate foreign-owned property, the supporters of the principle of acquired rights were forced to limit its scope to imply an obligation to indemnify the expropriated alien.

One writer, commenting on this principle, said that,

There is little doubt that the respect for acquired rights is a principle well established in international law...this does not mean that these [acquired rights] may not be interfered with at all. The doctrine merely indemnifies the titleholder from complete and arbitrary destruction of their interest.⁴

This view finds support in a number of old judicial decisions especially those given in the period preceding the first World War. Cases such as *The Reverend Jonas King* (1830),⁵ *The Delagoa Bay Railway Case*, 1836,⁶ *The Portuguese Religious Properties Case* 1910⁷ and the Permanent Court of International Justice decision in *Chorzow Factory Case*⁸ are regarded as the leading support on the theory

3. See Lippman, "Vested Rights and Nationalism in Latin America" [1926-27], *Foreign Affairs*, p. 353.

4. D. O'Connell, *The Law of State Succession* (1967), 266.

5. Whiteman, *Damages in International Law*, Vol. II, 1389.

6. 39 British and Foreign States Papers, 410, 904.

7. Whiteman, *Supra*, vol. III, p. 1694.

8. PCIJ, Ser. A. No. 17, p. 46.

that to comply with the notion of acquired right, compensation should put the expropriated owner in the same position as he was before the taking took place.

From what has been discussed therefore, it is obvious that the doctrine of acquired right is also based on the notion of equity, influenced and shaped by an individualistic philosophy which does not take into account social value of property. It is no accident therefore in Third World countries, notions such as this, embracing the theory of sanctity of private property, could not be allowed to stand as an obstacle against the generally accepted philosophy advocating socialization of major means of production and exchange, through nationalization measures.

But what happens where the property rights are protected by Contracts or concessions bearing stabilization clauses? In such situations one may argue that since the guarantees contained in stabilization clauses were granted under the municipal law of the host State, the principle of sovereignty would allow the host State to change the conditions in accordance with the municipal law, if it can be shown that there has been a change of circumstances. If this is accepted, a change in economic aspirations may be sufficient to allow a host State to amend its law affecting property under a concession.

This argument is however not acceptable to those who argue in favour of internationalized contract, according to whom the law applicable to these contracts is international law rather than municipal law. But since it has already been demonstrated that the notion of internationalized contract has no basis in any juristic principle,⁹

9. See note 41, supra.

it is submitted that in absence of treaty provisions to the contrary, the law applicable in such cases would be domestic law of the nationalizing State.

Writings of Publicists

Like judicial decisions, writings of publicists are regarded as the secondary means of determining the rules of international law.¹

The question whether there is an international law rule requiring payment of compensation in event of nationalization measure, is one in which the views among academic writers are most divergent. Even those from capital exporting countries do not seem to agree on this point.² This taken together with the fact that the notion of full compensation has been refused by the lawyers of capital importing countries, one can hardly be justified in saying that this notion is shared by a large number of jurists in the international community. Emphasizing the requirement that the notion should be approved by the great majority of sensible men, one jurist observed that, "in order for a rule of international law to be regarded as established, there should be something more than the declaration of the jurists. And if the rule is to be so manifestly embodying natural justice or 'the reason of the thing' as to be at once, of its own force, as part of law, such a principle must show that it has been approved if not *semper ubique ab omnibus* at any rate by great majority of sensible men, whenever it has emerged for consideration, within the limits of modern and perhaps classical civilization".³

1. See Article 38 of the Statute of International Court of Justice.

2. B.A. Wortley, *Expropriation in Public International Law*, Cambridge 1959, p. 33.

3. J.F. Williams, "International Law and the Property of Aliens" (1928) BYIL, pp. 1-4.

Decisions of Tribunals

The decision which is widely relied upon as a leading authority on the requirement of full compensation is that of Permanent Court of International Justice in *Chorzow Factory Case*.¹ In this case the Court was called upon to determine the construction to be put on the German-Polish Convention and decide on certain provisions of the Treaty of Versailles. In its decision, the Court observed in an *obiter dictum* that, the owner of expropriated property would be entitled to restitution in kind. Although this principle was first stated in an *obiter dictum* those who use the Case to demonstrate the establishment of the rule of full compensation have argued that "the principle was expressed in such general terms that it is difficult not to view it as a principle of reasoning having the value of a precedent".²

Commenting on the effect of this decision on the establishment of the rule of full compensation, one writer said that, "*The Chorzow Factory Case* so often resorted to as the source of wisdom on legal remedies for the taking of property, spoke of restitution in kind of nationalised property only because the violation of a treaty which provided for the taking of property subject to compensation under certain defined circumstances".³

Another case in which there was some support for the norm of full compensation is the *Anglo Iranian Oil Case*.⁴ In this case Judge

1. PCIJ, Ser. A. No. 17, p. 46.

2. See *Texaco Arbitration*, 17 ILM (1978), p. 32. The doctrine of precedent does not apply equally in international law as it applies in common law.

3. R. Baxter in foreword to R.B. Lillich, *Valuation of Nationalized Property in International Law*, Vol. I: Virginia.

4. [1952] ICJ, Rep. 93, p. 151.

Carneiro (dissenting) argued that, full compensation for expropriation of property must be paid as such a rule is a prerequisite of international co-operation in the economic and financial fields. This dictum was obviously based on the belief that foreign investments are necessarily beneficial to both capital importing States and foreign investors and therefore the norms that protects these investments should be stabilized. The Judge categorically observed that, when there are so many countries in need of foreign investments for their economic development, it would be a mistake to expose such capital without restrictions or guarantees to the hazards of legislations of countries in which such capital has been invited.⁵

It is probably true that there is a great demand for foreign investment in the developing countries. But to suggest that these countries' effort to control their economies through nationalization measures is hazardous, is to refuse to see the whole issue in its proper perspective.

In *Barcelona Traction Case*,⁶ Judge Gros stated in his separate opinion to the effect that, nationalization of regular kind would be followed by payment of compensation. But as the Judge was referring to a situation between two European States such as Belgium and Spain one may conclude that this view is based on a particular regional law. The regional customary international law sometimes has the effect of setting up certain standards higher than that generally accepted in international law.⁷ The best example of this is found in OECD countries' endorsement of the full compensation standard in the proposed multilateral investment guarantee convention.⁸

5. *Ibid.*

6. [1964], ICJ Rep.

7. H.W. Baade, [1968], ASIL Proc. 47.

8. *Ibid.*

Arbitral Awards

Apart from the decisions of international tribunals, arbitral awards have also been used to justify the application of full compensation theory. The *Lena Goldfields Arbitration*¹ is one of the most relied upon. But what should be pointed out in relation to this Award, is the fact that guarantees against expropriation were given to the investors by the host country prior to actual expropriation measure.

The most recent award in support of this view is the *Texaco Arbitration*.² The sole Arbitrator in this case made a statement accepting the principle of restitution in kind, despite the overwhelming view that restitution in kind is a proper remedy only where there is a breach of treaty provisions restricting nationalization or in cases where other remedies are practically impossible.³

Official and Unofficial Statements

Various standards of compensation have been articulated by governments and official bodies in their claims regarding investment disputes. The most important of such disputes is that between the United States and Mexico,¹ in which various diplomatic notes were exchanged, indicating different views of these two governments as to the compensation that was payable. While the Mexican notes denied the existence of a universally acceptable principle which made the payment of adequate compensation obligatory, the American notes

1. 3. Whiteman, *Damages in International Law*, 1737-40; Nussbaum, "The Arbitration between the Lena Goldfields Limited and the Soviet Government", (1950), 36 *Cornel Law Qrt.*, 31.
2. *Texaco Arbitration*, *supra*.
3. See notes 16, 17, and 18, *supra*.
1. See L. Kunz, "The Mexican Expropriations", 17 *NYULQ* (1940), 327.

insisted on the existence of such a norm. The dispute was finally settled through the parties agreeing to the sum recommended by an international commission.

In another dispute which involved the United States and Guatemala regarding expropriation of land taken over from the United Fruit Company, Guatemala argued that tax value was the proper method of valuating compensation due. The government said that, "it would be neither just nor lawful for the State to give such properties a valuation higher than that which the company itself had given to them and which served as a basis for taxes".² The United States protested this method of assessment and as one would expect, emphasized the requirement of full compensation.

If these statements can be regarded as representing the opinion of States concerned, one is bound to conclude that the developing countries involved in the disputes examined above, believe that there is an obligation under municipal law,³ to provide some form of compensation, although they reject the view that legality of a nationalization measure is contingent upon payment of prompt, adequate and effective compensation. Some of the developing countries, mostly Latin American countries, believe that aliens should not expect any reparation if such right is denied to the nationals due to some overwhelming economic consideration and national interests. This view is in direct conflict with the principle of international minimum standard which is stressed by the governments of capital exporting States. One author who supports the application of international

2. 8. Whiteman, Digest, 1158.

3. See e.g., The Mexican Government's note to the United States' Government, in 32 AMJIL (Supp.)(1938), 196-7 which, in reply to United States' note, it said that Mexico admits in obedience to her law that she is under obligation to indemnify in an adequate manner.

minimum standard said that,

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form part of international law of the world. The conditions upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its citizens is that its system of law and administration does not conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. ⁴

From an analysis of possible sources of international law undertaken above, it is obvious that there is absence of unanimity as to what should be the standard of compensation for nationalized property. The common feature in all examples seen above is the assertion on the part of capital exporting countries, of the existence of a rule requiring the payment of prompt, adequate and effective compensation while capital importing States on the other hand deny the existence of such a rule. Even if it is assumed that there is sufficient support for the norm requiring full compensation in the sources traced above, it should be emphasized that the context in which this norm evolved has undergone a tremendous change. The norm emerged when most of the capital importing States were colonies or dependencies of other countries and therefore not full members of the international community. Economic nationalism which followed the emergence of these countries from colonization together with the increased bargaining strength that these new States acquired, are changed circumstances that produced new norms with sufficient strength to displace the norm requiring full compensation, which never had

4. E. Root, "The Basis of Protection to Citizens Residing Abroad" [1910], ASIL (Proc.), 21; A. Akinsanya, *Expropriation of Multinational Property*, p. 41.

the absolute support of international community to be regarded as law.

New Norms

Having denied the existence of a rule requiring payment of full compensation, the capital importing countries developed new norms to regulate the payment of compensation for nationalized property. The need to formulate these new norms emerged out of their desire to use nationalization measures as means towards economic self determination which regards the payment of full compensation a contradiction.

Excess Profit Deduction

One of the new norms developed is deduction of excess profit from the amount of compensation due. This has been asserted by a more radical group within the developing world, especially those adhering to "dependence" school of economics. The basis for this norm is in their relationship with capital importing countries, the foreign companies reap excess profit and therefore upon termination of such relationship, the companies should pay back what they had exploited.¹

Chile is among the first countries to give this theory legal effect, through her 1971 Constitutional Amendments. Under this, Chile nationalized forty-nine percent shareholding in Kennecott and Anaconda, the American Copper Mining Companies, which were operating in joint venture with Codelco, a State-owned company. According to the nationalization law, compensation for the nationalized shares

1. See N. Girvan, "Expropriating the Expropriator: Compensation Criteria from a Third World View Point", in R.B. Lillich, *Valuation*, vol. III, p. 167.

as well as the assets of these two companies was to be in book value as determined by Comptroller General. After the amount payable had been determined by the Comptroller General, the President was empowered to determine the amount of excess profit to be deducted.²

The major criticism which the Chilean excess profit formulation faces is that, the determination of excess profit is arbitrary as the relevant law did not indicate the formula through which excess profit was to be determined.³

This formula however, may be useful in similar cases provided there is a genuine way of determining the excess profit made by the foreign company. It is more particularly attractive in extractive industries of the Third World Countries where investments were largely made in the context of unequal relationship. But care should always be exercised against blanket application of this formula as it can very easily be abused.

Claim for Revindication

Another claim which emerged is that nationalization is a revindication for which no compensation is necessary. This claim was made by the government of Peru in the *La Brea Y. Paríñas* dispute. This is very similar to the claim for excess profit deduction in that they both completely deny the legitimacy of profits made by the foreign investors. Although this norm may be justified in some specific circumstances it would be unfair to make its application universal.

Claim for Appropriate Compensation

The history of this norm, which enjoys the support of most of

2. See 10 ILM (1971), p. 1067.

3. *Ibid.*; R. Miskessell, *Foreign Investment in Copper Mining in Papua New Guinea and Peru* (New York), 1977.

the Third World Countries can be traced from the United Nation's General Assembly Resolution 1803 of 1962 in which the notion of permanent sovereignty over natural resources was asserted.

Under Article 4 of this Resolution, "appropriate compensation is to be paid in accordance with international law".⁴ The major problem associated with the wording of this resolution is lack of a definition for the term "appropriate compensation". It is precisely due to this ambiguity that some commentators construed the term "appropriate compensation" to mean "prompt, adequate and effective" compensation.⁵ This problem however, has already been resolved by a series of later resolutions passed by the World body, which made clear the intention of those who voted for Resolution 1803.

The subsequent resolutions include Resolution 3117 (XXVII) which seek to give each State the right to determine the amount of "possible compensation",⁶ the Resolution on New International Economic Order, which asserts the right of each country to determine the amount of compensation⁷ and the Charter of Economic Right and Duties of States which says that "appropriate compensation" should be paid in accordance with the State's relevant laws and regulations.⁸ This trend was followed in the resolutions of United Nations Agencies such as the United Nation's Conference on Trade and Development (UNCTAD).⁹

4. D.B. Furnish, "Peru Domestic Law Aspects of the La Brea Y. Parinas Controversy" (1970), Ky.L.J., 531.

5. See Para 4, GAOR 1803 (XVII) of 1962: P.J. O'Keefe "United Nations and Permanent Sovereignty over Natural Resources", 8 JWIL (1974), 239.

6. *Ibid.*

7. 13 ILM (1974) p. 238; 68 AMJIL (1974), 381.

8. 13 ILM (1974), p. 715. 83. 13 ILM (1974).

9. UNCTAD Resolution 3016 (XXVII) of 1973. See 1e ILM (1974).

Status of Resolutions

The question whether the concept of Permanent Sovereignty as embodied in the recent General Assembly Resolutions could be considered as constituting customary international law, was for the first time considered in *Texaco Arbitration*.¹ Prof. Dupuy, the sole Arbitrator concluded that these resolutions do not have law creating effect. This view is supported by Gillian White, who categorized the Charter for Economic Rights and Duties of States as representing only a collection of policy prescriptions.² She said further that the Charter can have legal force only if and so far as, "it declares or restates existing principles or rules of international law".³ According to this view these resolutions do not have the legal force because they were not accepted by capital exporting countries. If this is correct and since the value of such resolutions as evidence of the "opinio juris" of States can not be denied, one may say that these resolutions indicate the direction towards which customary international law will be shaped in the future. An examination of State practice today, regarding payment of compensation indicates that a custom confirming the norm of appropriate compensation is in the process of formation.

Discussing the legal effect of these resolutions, Brownlie pointed out that,

In general these resolutions are not binding on member States but when they are concerned with general norms of international law, then acceptance of the opinions of governments in the widest forum for the expression of such opinions. Even when they are framed as general principle, *resolutions of this kind provide a*

-
1. 35 ILR (1979), 309; 17 ILM (1978), 1.
 2. G. White, "A New International Economic Order?", 16 Va.J.INT. L. (1976), 330.
 3. *Ibid.*

*basis for progressive development of the law
and the speedy consolidation of customary rules.*⁴

[emphasis mine]

CONCLUSION

The norm requiring payment of full compensation represented by the formula "prompt, adequate and effective" developed by capital exporting countries to protect foreign investment abroad has almost been rendered inapplicable in modern times. This is so because the developing countries which have now joined the international community have formulated new norms in accordance with the concept of permanent sovereignty over natural resources. Although there is no uniform practice regarding the payment of compensation amongst the developing countries, circumstances and equities involved in new norms should be assessed and applied whenever possible. This should be the duty of the international community as a whole as it will be futile to cling to the monolithic norm of full compensation as it is not only difficult to establish it as a rule of traditional international law, but also because it is unacceptable to a large majority of States.

4. J. Brownlie, *supra* note 1, p. 4.

CHAPTER THREE

FORIEGN INVESTMENTS AND AFRICAN

ECONOMIC DEVELOPMENT

This study would be incomplete if no attempt was made to examine the role of foreign investments in economic development of African States. This chapter therefore, will examine the nature of foreign investments in general and the part they play in African economic development. Finally, the future of foreign investments in Africa will be examined, in view of the recent nationalization measures.

Foreign Investments in General

Like any other country in the world, African States would like to improve the living standard of their people through economic development. These countries are aware also that economic development can be brought about only through economic exploitation of natural wealth by employing capital, skilled manpower and technological know-how. It is also common knowledge that while most of these countries are endowed with abundant natural wealth, they seriously lack the other components necessary for economic development. Because of this shortage, these States, like other developing countries, look to developed countries for a supply of the components in different forms. The most common practice however is for these countries to attract foreign investments, which are normally accompanied by skilled manpower and technology.

The developed countries on their part have responded to this need differently. The general trend is that they have, for a number of different reasons, given aid or grants, short-term credits and more importantly, made investments in different development projects.

Aid or Grants

The term 'Aid' is normally used by different people to mean different things. However, the term is used here to mean a grant or an outright gift from one State to another or from an institution in one country to another institution in a different country. In other words, the use employed here should be distinguished from other meanings such as foreign aid or economic aid which do not necessarily mean an outright gift.¹ Aid in this context, is naturally given by one friendly country to another with the aim of helping the latter to overcome a certain difficulty. Sometimes aid may be geared towards general economic development, although in a great number of cases it is given as relief for a specific problem. Former Colonial Powers are the traditional donors in their efforts to help their former colonies, especially in their early days of nationhood.² However, other countries such as U.S.A. and Japan, U.S.S.R. and China, which are known not to have possessed colonies, are among the major aid donors.

There are a number of reasons, mainly politically oriented, behind the giving of aid. The one officially proclaimed is the concern of the donor for the recipient's economic development and general

-
1. The term 'aid' is sometimes used widely to include even Private Investment, see e.g. OECD, *The Flow of Financial Resources to Less Developed Countries, 1961-65* (Paris, 1967), p. 3. Aid is also used to imply long-term low interest loans as well as grants as contemplated by Special United Nations Fund for Economic Development (SUNFED), see generally *Public and Private Investment in Economic Development*, International Chamber of Commerce, I.C.C. Brochure, No. 179.
 2. Britain, for example, gave various grants to her former colonies under her Colonial development Programmes. These former colonies also received Treasury grants of various sizes. See, Cmnd 237.

welfare, based on purely humanitarian grounds.³ Whether this is the real justification or not is a matter which will not be examined here, suffice to say that the subject of foreign aid has attracted some considerable concern and controversy amongst scholars.⁴

Short-Term Credit

Short-term credits normally assume the form of export credit arrangements made by the export firm in a developed country in order to enable an importing establishment in developing countries to import capital goods from that country without the necessity of paying for the goods immediately. This being the case, it is true, as it has been rightly pointed out, that much as the system helps the capital importing countries as a credit facility, it also helps most of the industrialized capital exporting countries to increase their export sales.⁵ The importance of increased export sales to these countries can be appreciated more if one considers the level of competition amongst firms of different nationality producing similar industrial goods. Important as it may be, short-term credit, mainly due to its short-term nature, does not form part of the long-term investment capital requirement for economic development in capital

-
3. On this subject, see, e.g., H.B. Chenery, "Optional Pattern of Growth and Aid: The Case Study of Pakistan", *Pakistan Development Review*, Summer, 1966, p. 209; Teresa Hayter, *Aid as Imperialism* (Penguin Books, 1971); H.J.P.-Arnold, *Aid for Developing Countries*, London, 1962, and J. Bhagwati and R. Eckans (eds), *Foreign Aid* (Penguin Books), 1970.
 4. For the view that Aid is used for strategic as well as economic purposes of the donor countries, see e.g., N.B. Miller, "Underdevelopment and U.S. Foreign Policy" in N.D. Houghton (ed), *Struggle Against History - U.S. Foreign Policy in an Age of Revolution* (New York, 1968), p. 138; McAuley *et al.*, "Soviet Foreign Aid", 28 *Bulletin of Oxford University Institute of Economics and Statistics* (1966), pp. 261-71; L. Richards, "The Content of Foreign Aid: Modern Imperialism". *The Review of Radical Political Economics* No. 9 (1977), pp. 43-72; and Tereas Haytes, *ibid.*
 5. See E.L. Nwogugu, *The Legal Problems of Foreign Investments in Developing Countries* (Manchester Uni.Press), 1965, p. 3.

importing nations.

Inter-State Loans

As the name suggests, these are loans given by one State to another for implementation of a particular project in a recipient country. The loan is normally paid back with interest after a stipulated time. This type of loan constitutes a major source of project funding in developing countries and normally is regulated through treaty arrangements governed generally by International Law. Because the donor is always a foreign State or an international organization, critics of the system, who in most cases favour private investment, argue that inter-State loans are likely to have "strings" attached to them.⁶ However, the question whether a particular investment agreement has "strings" or not will not depend largely on the distinction of it being private or public. Experience shows that even private investments especially those undertaken by multinational corporations, are capable of having strings as well.

Private Investment

As opposed to public investment, private investment is normally carried out by private persons, legal or natural, in pursuit of profit. It is common knowledge that those who go out to invest their monies take advantage of cheap labour, availability of raw materials and a good market for the finished goods. These elements are clearly abundant in most developing countries and it is therefore no accident that the foreign investors have been busy establishing themselves in these countries, sometimes under difficult conditions.

6. See, F. Taylor Ostrader, "The Role of Foreign Capital in Africa", in Davis and Baker (eds), *Southern Africa in Transition*, Praeger, 1966, p. 349.

There are two types of foreign investments, namely portfolio investment and direct investment. While the former includes the purchase of equity security and loans, the latter involves the actual control of the undertaking and generally takes the form of a branch or a subsidiary of a larger foreign company.⁷

Portfolio investment and direct investment are quite similar in a number of respects and have certain characteristics in common. Like direct investment, portfolio investment provides a transfer of capital albeit in different institutional channels and frequently from different sources. The transfer of capital is made in response to profit incentives, reflecting relative expected rates of return, risk and uncertainties. There are however, several major differences between these two types of private investment. The first difference is that portfolio investment in credit institutions implies a fixed obligation to repay interest as well as principal, whilst in direct investment it implies a flexible repayment obligation directly geared to the success of the investment. The second difference is that portfolio flows tend to be "industry specific". Thirdly, portfolio investment does not directly affect local ownership and control as is the case with direct investment which gives rise to non-residential ownership and control. Fourthly, portfolio investment involves only the movement of capital while direct investment is normally a package of some auxiliary factors as well as movement of capital.⁸ It is mainly due to these differences, especially the last two differences, that some scholars have attributed direct investment with the creation of a variety of external economies and

7. Portfolio Investment does not necessarily entail commercial control of the enterprise. See, G.L. Reuber, *Private Foreign Investment in Development*, Clarendon Press, Oxford, 1973, p. 52; E.L. Nwogugu, *supra* note 5, p. 4.

8. G. Reuber, *ibid.*, pp. 52-4.

and disenconomies not associated with portfolio investment.⁹ Despite of the advantages that portfolio investment has over direct investment, it is of very little significance to the developing countries in that only in rare cases do businesses in these countries buy equity shares in multinational and other foreign firms. The only form of portfolio investment common in developing countries is short-term credits including bank loans, export credits and borrowing by bonds. Even then they are of less significance when compared to direct investment which constitutes the major source of these countries' capital needs.¹⁰ In brief, therefore, although foreign investment in Africa and the developing world as a whole comes through aid and public and private foreign investment, the bulk of capital needs of these countries is met through direct foreign investment.

The Need for Foreign Investments in Africa

While there is considerable controversy amongst development scholars regarding the role of foreign investments in the process of economic development in the developing countries,¹¹ it would appear

9. *Ibid.*; See also Nwogugu, *supra* note 5, p. 4.

10. *Ibid.*

11. This is one area in which there is a great deal of disagreement among scholars. On one side there are those who argue that foreign investments are necessary for economic development of LDCs, and in order to induce investors, specific attempts should be made to attract them, which include, E. Nwogugu, *supra* note 5, p. 4; F. Taylor Ostrader, *supra* note 6, p. 347; and M. Brandon, "Legal Ownership and Incentives to Private Foreign Investments", *Transactions Grotious Society*, 43 (1948), 39-40. While on the other, there are those, mainly radical development economists, who argue that foreign investment does not aid economic development but perpetuates dependence. See e.g. Paul Barran, *The Political Economy of Growth* (New York), 1957; Andre G. Frank, *Capitalism and Underdevelopment in Latin America* (New York), 1967 and *Latin America: Underdevelopment or Revolution?* (New York), 1967; T. dos Santos, "The Structure of dependence", *American Economic Review* 60 (1970) and Samir Amin, *Unequal Development* (London), 1976.

that most of the African leaders tend to accept the view that foreign investments are essential for economic development of their countries and therefore they should not only be encouraged to come but also protected while they are there, otherwise investors will be discouraged.¹² Because of this belief, the African leaders look for foreign investments not just to fulfil the promises of rapid economic development that they made to their people at the time of independence,¹³ but because they believe that economic betterment cannot be attained except by continually welcoming foreign capital which they badly need but seriously lack. The logic of post-independence economic policies in most African countries was to encourage the establishment of an industrial sector through private foreign investments and try to balance it with the agricultural sector which dominated the economies.¹⁴ However other forms of capital flow supplemented private foreign investment in the industrial sector. The dominance of direct foreign investment in the development of an industrial sector in Africa is explained by the fact that rapid growth and development of the international market for portfolio investment has been concentrated largely in developed countries rather than developing countries.¹⁵ In other words, the type of economy existing in these countries did not attract portfolio investments.

Because of the emphasis in direct foreign investment, there emerged a wholly foreign-owned and controlled growth of manufacturing industries and other businesses such as tourism, owned mainly by

12. See, The Investment Laws and Regulations in Africa, U.N. Doc. E/CN.14/INR/28, 30 Oct., 1963.

13. See, F. Taylor Ostrader, *supra* note 6.

14. See, Colin Leys, *Underdevelopment in Kenya*, University of California Press, 1974, pp. 118-147.

15. G. Reuber, *supra* note 7, p. 54.

the newly established subsidiaries of multinational corporations. When foreign dominance became obvious the nationalist governments attempted to encourage indigenous people to enter business, with the view that after some time they may take over from foreign investors. In some cases the governments introduced deliberate policies of not allowing the resident Asian commercial elite to exchange their commercial expertise for manufacturing.¹⁶ This is because the indigenous businessmen aspiring to enter into partnership with foreign multinationals feared to compete with the already business oriented Asian resident commercial elite. They therefore, appealed to the governments using nationalistic grounds, to eliminate the Asians in the manufacturing industry. These policies influenced the investment laws together with indigenization programmes, the details of which will be examined in an appropriate section below.

Economic Nationalism

As already pointed out, the effect of post-independence economic policies in Africa was the creation of a foreign-owned and controlled manufacturing sector which was basically import-substitution in character. Alongside this there was also the creation of an indigenous capitalist class deliberately encouraged by the governments hoping that it would ultimately take over from the foreign investors. It was this group which later managed to influence their governments in adopting policies geared towards Africanization, Indigenization and joint-venture, the driving force of which was the notion of economic independence. The argument put forward in support of this notion was that political independence did not make sense if the country's economy was still dominated by foreign capital. Writing on the same

16. Colin Leys, *supra* note 14, p. 54.

subject, Dr. Nkrumah, the first President of Ghana observed that, "Political and economic independence must come together or liberation would be a farce".¹⁷

The concept of economic independence therefore was militating against foreign ownership and dominance in economic activities of these States. Different countries took different approaches to try to limit this foreign dominance. Before examining the different methods used to arrive at the desired goal, it would be proper at this point to see what the term economic independence itself means to scholars of different ideological persuasion.

The term 'economic independence' has been used by people of different economic and ideological beliefs to mean different things. However, what is common is the fact that whether it is used by classical, socialist or Marxist economists, the term is regarded as being synonymous with economic freedom.

Economic Freedom

Laissez-faire economists define economic freedom as meaning freedom of choice of economic agents, namely producer, employer and employees. In other words, the notion of economic freedom according to this school of thought follows logically from the assumption underlying the system of competitive capitalism. This is so because the hallmark of the laissez-faire movement has always been the passionate denunciation of any government intervention in economic life and it stands for glorification of the "invisible" hand of the market in attaining efficiency, growth and maximum welfare. The earlier ideologues of this school of thought were the classical political economists

17. K. Nkrumah, *Neo-Colonialism, The Last Stage of Imperialism*, 1965, 15.

who wrote against the evils of government intervention in the economy.¹⁸

On the other hand, the socialist conception of economic freedom is based on economic equality. According to this school of thought, all systems based on private ownership of capital are exploitive, and thus real economic freedom can only be achieved through economic equality, which can be brought about through elimination of private property which, according to this school, is the most powerful instrument of economic coercion. It should be pointed out in the outset that the present work is not concerned with the merit or otherwise of these economic theories and for this reason, no detailed analysis of them will be done. The intention here is to demonstrate how the concept of economic freedom is conceptualised by these different schools of thought. Because of what has already been said about the meaning of economic independence it is also obvious that different African leaders mean different things when they talk of economic independence, depending of course on their ideological orientation. However, what is evident is the fact that the thrust of policies designed towards economic independence in Africa has aimed generally at progressive substitution of national for the foreign capital, skills and enterprise, in order to enhance the national component in the ownership, management and control of the economies¹⁹ although there are some countries in the Continent, mainly those with a socialist ideological outlook, which attempt to bring about structural

18. See, e.g., Adam Smith, *The Wealth of Nations* (1776); David Ricardo, *Principles of Political Economy* (1817) and J.S. Mills, *Principles of Political Economy* (1848). For more recent followers of this tradition, see in particular Milton Friedman, *Capitalism and Freedom* (Chicago, 1962); Peter T. Bauer, *Economic Analysis and Policy of Underdeveloped Countries* (Durham, 1956); Harry G. Johnson, *Economic Nationalism in Old and New States* (Chicago, 1967).

19. D.P. Ghai, "Concepts and Strategies of Economic Independence", 11 JMAS (1973), 25.

change in production and exchange. In other words, these countries consider economic independence as being more than just substitution of national for foreign capital.

Localization of Capitalism

Those who adopted this strategy employed a number of different methods, all geared towards the transfer of assets from aliens to nationals.²⁰ One of the methods used especially in the early days of independence was to appeal to non-African businessmen to assist African entrepreneurs in various aspects of business management. The governments also introduced different programmes aimed to increase the competitiveness of African entrepreneurs. This included training, advice and favourable loans and subsidies but as one could expect, this strategy did not work out and because of that governments felt compelled to play a more active role. This was normally done through transfer of assets by way of sale of these assets to Africans. One of the earliest large scale transfers of property of this nature in Africa was the purchase of European farms in the Kenya highlands by the government, for the purpose of settling African farmers. This programme worked very favourably from the point of view of the European settlers who were bought out not only because the prices were high but also because the Kenyan government guaranteed repatriation of the proceeds of the sales.²¹

Apart from an outright transfer of property through sale, the most frequent device used to accelerate Africanization is to place a number of restrictions on foreign ownership in certain business enterprises. Kenya again pioneered this method and her example was

20. Different labels were used and these include Africanization, Indigenization, etc.

21. Ghai, *supra* note 19, p. 34.

followed by Malawi.

Some African countries introduced legislations to restrict the right of non-national businesses to trade in certain localities or commodities. Nigeria which pioneered this method, banned aliens in 40 categories of business and required Nigerian participation in 39 others.²² Like Nigeria, Ghana excluded foreigners from retail trade (except department stores) and from many other small scale industries. Foreigners have also been restricted to fifty percent ownership in many other enterprises such as brewing, bicycle manufacturing, wholesale business and distribution, etc.²³ The effect of these measures is to create a monopoly in certain categories of commercial activities in favour of local businessmen. The question which comes almost immediately in relation to these monopolies is whether this may be regarded as a compensatable taking. This question was actually considered by the Permanent Court of International Justice in the *Oscar Chinn's Case*.²⁴ The court in this case said that the Belgian government's action in subsidizing a partly government owned water carrier, had thrown Mr. Chinn out of business. However, it has been argued that the court in this case was dealing with a "de facto" monopoly and that it is highly doubtful whether it would have had the same opinion had the Belgian government asked

-
- 22. Nigerian Enterprise Promotion Decree, 1977 in EEC, *The Investment Laws of ACP Countries* (Brussels-Luxembourg, 1979), p. 261-89. See also Alan Hutchison, "The Tension between Indigenization and Foreign Investment", December 1976, *Afr. Development*.
 - 23. L.L. Rood, "Foreign Investment in African Manufacturing", 13 *JMAS* (1975), p. 31; Ghana Investment Policy Decree NRCD 329 (1975), as amended by 1975 SMCD 6 Decree. See also Kojo Yelapaala, "Costs and benefits from Direct Investment: A Study of Ghana", 2 (1980), New York, *Journal of Int. and Comp. Law*, pp. 72-105.
 - 24. PCIJ, 1934, Series A/B, No. 63.

Mr. Chinn not to operate as a water carrier any more.²⁵ According to this view, therefore, indigenization measures are compensatable taking as they amount to forced sale but as pointed out earlier, if the alien decides to sell for what he can get then normally he should be prepared to sacrifice any future claims based on the inadequacy of his receipts from the sale. "If however the threats to the alien's property are accompanied by threats to his physical security, the rule should be otherwise",²⁶ similarly if the State in question flatly declares that it will not pay any compensation.²⁷

The Multinationals

While the African governments adopted policies of indigenization with regard to small and medium scale foreign business enterprises, it is evident that they followed a different approach with respect to large foreign-owned companies, together with their local subsidiaries. The governments promoted local participation in these firms by encouraging replacement of foreign personnel by nationals as well as the appointment of local people to the boards of these companies. Apart from this, local participation in the equity of these companies was encouraged by asking the firms to sell some of their shares to residents and citizens.²⁸ Africanization of senior posts and shareholdings in the private sector by locals was conceived as a way of controlling the power of private capital. However, it became abundantly clear that the local people who joined the management in foreign firms identified more closely with the aspirations, interests and values of foreign capital. As a result of this, the foreign

25. G.L. Christie, "What Constitutes a Taking of Property Under International Law", 38 BYIL (1962), 322.

26. *Ibid.*, p. 329.

27. *Ibid.*

28. Ghai, *supra* note 19, p. 35.

companies had the advantage of monopoly profits, high rates of surplus transfer and low shares of wages in the national income backed by tight control over trade unions.²⁹ This inconsistency in government policy towards the two groups of foreign owned enterprises originates from an analysis of their roles in economic development as seen by the host States. While the role of resident alien capitalist is often perceived as exploitive and disruptive of the growth of indigenous entrepreneurship, international companies are courted as carriers of modern technology, management, capital and new products. The Nigerian Enterprise Promotion Decree³⁰ and Ghana's Investment Policy Decree³¹ are but two examples of legislation reflecting the difference. The overall effect of such policies was the creation of a nationalist petty bourgeoisie which replaced to a certain extent, the resident commercial bourgeoisie and acted as an auxiliary of foreign capital.

Socialization Approach

The first African States to adopt this method in order to increase the national component in their economies are The United Arab Republic, Algeria, Guinea, Mali and Ghana. More recently, the socialization strategy has been pioneered by Tanzania, through her famous Arusha Declaration of 1967. Tanzania's example has been followed in rapid succession by Zambia, Somalia, Sudan, Uganda and Ethiopia, to mention just a few. Invariably these governments have sought to obtain complete or majority ownership of the large scale enterprises in sectors such as export/import trade, banking, insurance, mining, manufacturing, agricultural oriented enterprises and tourism:

29. Colin Leys, *supra* note 14, p. 147.

30. *Supra* note 22.

31. *Supra* note 23.

In most cases, compensation for the nationalized property has been paid out of future profits, over a period ranging from five to fifteen years. Although most of these States based their socialization measures on socialist philosophy, State ownership in itself does not make a country a socialist State. The State itself has to undergo structural change as well.³² It is also a well known fact that State ownership of the major means of production does not guarantee workers' control, which is the real meaning of socialism on the economic level.³³ However, one may say that in adopting nationalization measures the countries concerned are fairly equipped for national economic control.³⁴

If economic independence is to be interpreted as national ownership and control over economic activities, it is quite clear that nationalization is the most potent strategy. Nationalization of the key sectors and other enterprises such as banking, insurance, manufacturing, mining, plantation and so on, results in immediate national ownership of the "commanding heights" of the economy. The strategy which emphasizes localization of capitalism generally replaces foreign with national capitalists in small and medium scale enterprises. While this may be regarded as promoting local participation in managerial functions at grass root level, ownership and control of the so-called "commanding heights" of the economy continue to be in the hands of foreign companies.

32. See, Issa G. Shivji, *Glass Struggle in Tanzania* (Monthly Review Press, New York, 1976); J. Rweyemamu, *Under development and Industrialization in Tanzania* (Oxford University Press, Nairobi, 1973), p. 65.

33. J. Rweyemamu, *ibid.*

34. *Ibid.*

Protection of Private Foreign Investment: Capital Exporting States

Despite the limitations imposed on foreign investments in the majority of African countries, the fact still remains that the economies of these countries are heavily dependent on foreign investments. However, because of what has happened previously in relation to foreign investments in Third World in general, capital exporting States have found it necessary to formulate measures which will safeguard foreign investments in these countries. This section will examine the various methods used to protect foreign investment by capital exporting States as well as the extent of their effectiveness.

Legal Deterrence

Capital exporting States use different methods to deter capital importing States from expropriating foreign owned investments situated in their countries. The best example of such measures are the United States' Hickenlooper Amendment, the Gonzalez Amendment and the Trade Act of 1974 already referred to. These legislations were aimed at suspension of foreign assistance to those capital importing States which adopted policies hostile to American foreign capital including acts of nationalizations. Experience however demonstrates that suspension of bilateral assistance to Peru for taking IPC's property did not deter the Peruvian government from taking the assets of ITT, Grace, and other U.S. companies in the country.³⁵ Also the foreign aid sanctions against Sri Lanka, Peru and Bolivia did not deter the expropriation of U.S. properties in those countries.³⁶ Briefly, therefore, one may say that although foreign aid sanction was formerly regarded as deterrence, in practice it proved to be a

35. A.A.Akinsanya, *The Expropriation of Multinational Property in The Third World*, Praeger, 1980, p. 327.

36. *Ibid.*

vehicle which brought hostilities between capital exporting and capital importing nations and therefore endangered rather than protected foreign investments. Because of this, it was not long before a call was made for an outright repeal of the Hickenlooper Amendment.³⁷ The Foreign Assistance Act of 1973 provided for a discretionary rather than mandatory application of the Amendment.³⁸ Although on the other hand, the threatened application of a Hickenlooper-type amendment may have deterred the Honduran government from implementing its agrarian reforms³⁹ and the threatened application of the Trade Act of 1974 may have compelled the governments of Benin, Sri Lanka, Somalia and Congo (Brazzaville) to open compensation negotiations,⁴⁰ the point still remains that this method is not only ineffective but also exacerbates relations with the countries concerned.

Bilateral Agreements

As well as the method examined above, capital exporting nations have tried to protect investments abroad by concluding treaties with capital importing nations embodying the classical rules of international law with respect to expropriation of foreign-owned property. The United Kingdom for example, has signed treaties for the protection and promotion of foreign investment with Singapore and Egypt in 1975 and with Korea and Indonesia in 1976. France signed similar treaties with Tunisia in 1972, Egypt, Mauritius and Indonesia in 1974 and Morocco, Singapore, Zaire and Malaysia in 1975. The Netherlands also concluded such treaties with the Ivory Coast and Morocco in 1971, Uganda in 1970, Senegal and Tunisia in 1972, Cameroon in 1973 and

37. R.B. Lillich, "Requiem for Hickenlooper", 69 AMJIL (1975), 99.

38. *Ibid.*

39. A. Akinsanya, *supra* note 38.

40. *Ibid.*

Korea in 1975 while Italy entered into treaties of economic co-operation with the Ivory Coast in 1971 and with Chad in 1969.⁴¹

The United States has concluded bilateral treaties since the end of World War II with many capital importing countries. These treaties invariably contained a clause which provided that

Property of nationals and companies of either party shall not be taken within the territories of other party except for a public purpose, nor shall it be taken without payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provisions shall have been made at or prior to the time of taking for the determination and payment thereof.⁴²

Whether these treaties have ensured continued foreign investment in capital exporting countries is arguable, however what is certain is that they have ensured resolution of investment disputes between the contracting parties without the need of government confrontation.

Investment Guarantee Programmes

Together with bilateral treaties some capital exporting states have tried to protect their nationals' investments abroad by providing some form of insurance cover against common risks to which foreign investments are exposed such as inconvertibility, war, revolutions and more importantly, expropriation. In the United States, the Overseas Private Investment Corporation was created for that purpose. This corporation is said to have provided, by the end of September 1977, new insurance coverage of more than \$750 million out of which expropriation coverage accounted for \$252 million, convertibility

-
41. International Centre for Settlement of Investment Disputes, *Ninth Annual Report 1974/75* (Washington, D.C., 1975), pp. 21-26. International Centre for Settlement of Investment Disputes, *Tenth Annual Report 1975/76* (Washington, D.C., 1976), pp. 22-28.
42. See, "Expropriation of American-owned Property", A. Akinsanya, *Expropriation*, p. 328.

\$253 million and war risks \$217 million.⁴³ These contracts covered investments in 39 Projects located in 35 developing nations.⁴⁴

Japan has a similar system run by the Export Insurance Division of the Ministry of International Trade and Industry. The Scheme provides insurance against expropriation, war and inconvertibility for its nationals with equity, loans and other investments in all parts of the world.⁴⁵ Other countries which have similar agency, Denmark through the Danish International Development Agency, Australia through the Australian Export Finance Insurance Corporation.⁴⁶ The Netherlands, Canada, France, West Germany, Sweden and Great Britain, also have investment guarantee programmes for their nationals abroad.⁴⁷

An investment guarantee programme works by requiring capital importing states to enter into an agreement with a country initiating the scheme prohibiting expropriation (except for public purpose and on payment of prompt, adequate and effective compensation) and other risks mentioned above. In the event of expropriation, prompt compensation is paid to the insured while the insurer pursues agreed upon procedures for settlement. Because of the way these schemes work, it is quite obvious that they are very favourable from the point of view of foreign investors because they guarantee foreign investors payment of prompt, adequate and effective compensation, which would not be possible under the normal circumstances. It is because of these guarantees that one writer suggested that some foreign investors have in fact "welcomed and even forced nationalization in ... Peru, Venezuela and Chile, realizing that their tax and insurance protection

43. Overseas Private Investment Corporation, 1977 Annual Report (Washington, D.C., 1978), p. 12.

44. *Ibid.*

45. A. Akinsanya, *supra* note 38, p. 329.

46. *Ibid.*

47. *Ibid.*

will earn important short-term credits".⁴⁸ Also it has been alleged that many alien investors have, by different methods, welcomed or encouraged expropriations because nationalization may have some benefits which outweigh by far the benefits of continuing troubled business relations in a host country in which the business climate is growing increasingly hostile.⁴⁹ This may be the case in situations where the business climate is hostile but even in cases where hostility is not evidenced foreign investors may welcome nationalization especially when there is a possibility of joint ownership with management and technical consultancy.

Submission to International Arbitration: International Centre for Settlement of Investment Disputes

Partly because of the large number of countries that are party to the World Bank Convention for the settlement of investment disputes, it has become more successful than any other multilateral convention for the protection of private property.⁵⁰

48. See, Louis W. Goodman, "The Social Organization of Decision-making in the Multinational Corporation", in *Multinational Corporations and Social Change*, and David E. Apter and Louis W. Goodman (eds), (New York, Praeger, 1976), p. 80.

49. *Ibid.*

50. 80 states had become parties to the Convention as of February 1979; see also A.S. Miller, "Protection of Private Foreign investment by multinational conventions", 53 AMJIL (1959), pp. 371-78. For the working of ICSID see, C.F. Amerasinghe, "Submission to the Jurisdiction of International Centre for Settlement of Investment Disputes", 5 Journal of Maritime Law and Comm. (1974), 211-50; C.F. Amerasinghe, "Model Clauses for Settlement of Foreign Investment Disputes", 28 Arbitration Journal (1973), 232-57; C.F. Amerasinghe, "Jurisdiction *Ratione Personae* under the convention on the settlement of Investment Disputes between States and Nationals of other States", 47 BYIL (1974-75), 227-67; C.F. Amerasinghe, "Dispute Settlement Machinery in Relations Between States and Multination Enterprises with particular reference to International Centre for Settlement of Investment Disputes" II. Int. Lawyer (1977), 45-59; C.F. Amerasinghe, "The International Centre for Settlement of Investment Disputes through the Multinational Corporation", 9 VAJIL (1979), 793-816; P.C. Szasz, "The Investment Dispute Convention - opportunities and (contd)

The World Bank Convention whose purpose is "to promote private foreign investment by improving the investment climate for investors and host states alike", is essentially an instrument for the protection of private foreign investment. Thus many capital importing nations not only became parties to the Convention but have also enacted investment laws that provide for acceptance of the jurisdiction of ICSID as a means of settlement of investment disputes.

The major problem confronting this system is the fact that many developing countries do not generally accept international arbitration. Almost all Latin American countries, for example, reject international arbitration and in fact are not parties to the ICSID Convention because it conflicts with the concept of national treatment contained in most of these countries' constitutions.⁵¹ Apart from the Latin American countries, many nationalizing states do not submit investment disputes to arbitration because they regard the right to nationalize as not being an arbitral issue. Even those who are parties to the World Bank Convention sometimes, because of certain considerations, reject the jurisdiction of ICSID. The best example of such countries is Jamaica which refused to recognise the jurisdiction of the ICSID in the Bauxite case. Consequently the Reynolds Metal Company, Reynolds Jamaica Mines and the Kaiser Bauxite Company reached an agreement with the government of Jamaica to discontinue arbitration proceedings before the ICSID.⁵² However,

50. (contd) pitfalls", 5 Journal of Law & Econ. Development (1970), 23-44; A. Broches, "The Convention of the Settlement of Investment Disputes between States and Nationals of other States", of *Recueil de Cours* (1972), 332-405.

51. P.C. Szasz, "The Investment Disputes Convention and Latin America", II Virginia Journal of Int. Law (1971), 256-65.

52. See, International Centre for Settlement of Investment Disputes, *Ninth Annual Report*, pp. 5-6, and *Tenth Annual Report*, pp. 5-6.

Revere Copper and Brass Inc., another affected foreign company, commenced arbitration proceedings against the Overseas Private Investment Corporation (OPIC) seeking compensation of approximately \$80 million plus interest, for its bauxite-alumina operation in Jamaica.⁵³

Protection of Foreign Investment by Capital Importing Countries

Like the rest of the developing world, African States accept the need to improve their investment climate as a means of attracting more foreign investments, which is in accordance with the call by the United Nations General Assembly, requesting developing States to re-examine their policies and domestic legislations in view of improving their investment climate.⁵⁴ Thus they have, apart from being parties to the Convention for the settlement of investment disputes, taken different actions all geared towards provisions of incentives to foreign investment. These include investment laws, policy statements and other domestic regulations.

Economic Policy Statements

Some countries have made various policy statements promising certain incentives to a new specific class of development projects financed by foreign capital. Addressing his party's Annual Congress in December 1977, President Mobutu of Zaire, for example, announced a national economic recovery plan aimed at attracting foreign capital investment, giving assurance that the alien investor could transfer, in his own currency, his profits and dividends and eventually the initial capital.⁵⁵

53. See, "Revere Copper and Brass, Inc. - Overseas Private Investment Corporation: Arbitration Award in Dispute involving U.S. Investment Guaranty Programme", 17 ILM (1978), 1321-84.

54. U.N. General Assembly Resolution 824(IX) of 11th December, 1954.

55. *West Africa* (London), December 12, 1977, p. 2541.

Although in most cases these statements are made orally, in certain cases they are embodied in constitutions or development plans. However, whatever the source may be, all such statements are concerned with the need to increase the flow of foreign private capital from capital exporting states to their countries. The importance of such statements is only to show a foreign investor the area in which the government of a host state encourages foreign investment. In other words, the investor may not rely on the guarantees given through such statements to argue that nationalization is unlawful because it is contrary to the assurance given. They nevertheless give him an idea of the sector of an economy which the government has set aside for foreign investment.

Investment Laws

The government of capital importing States also pass investment laws in order to attract foreign investments. The investment incentives contained in these laws are, in most cases, in the form of fiscal concessions, which make the early years of investment projects very attractive. There are different forms of fiscal concessions but the important ones include the following:

(i) Income Tax Relief

Income tax relief is the most common incentive offered to foreign investors by capital importing States in general and in Africa in particular. The practice is either to extend total or partial exemption from tax for a period of five to ten years for new enterprises established through external financing. The Chad Investment Law for example, exempts profits earned by a new enterprise during the first five years of operation from income tax. Also the enterprise under consideration is entitled to a deduction for purpose of income

tax calculation of one half of the profits applied to the construction of industrial buildings and the purchase of heavy equipment.⁵⁶

In Ghana, a tax holiday of up to five years may be granted to an approved enterprise if the technology of that particular industry is necessarily capital intensive.⁵⁷ In other States such as Sierra Leone⁵⁸ and Gambia⁵⁹ the investment laws give the Minister or the Commissioner for Income Tax discretion to fix a tax holiday period applicable to each development project.

(ii) Custom Duties Relief

Apart from income tax relief, another common fiscal relief found in investment laws of most developing States is custom duties exemption. Like the income tax relief, this may be either full or partial exemption. They normally apply to building materials, plants and machinery and raw materials for new industries.

Under the Gambian law, an approved project may be granted an exemption of up to one hundred percent from import and customs duties for imported goods that are essential for the implementation of the projects, provided that the goods cannot be produced within reasonable time in the country.⁶⁰ The Decree provides that the exemption granted shall be for a period not exceeding ten years.⁶¹ Some countries extend this relief not only in respect to goods which cannot be manufactured from within but also to the goods purchased in the country which attracted import duty or customs duty when they were

56. The Chad Investment Code, 1973, Decree No. 156/PR.

57. S.14 of Ghana Capital Investment Decree, 1973.

58. S.12 The Development Ordinance 1960 of Sierra Leone.

59. S.4 of Development Act, 1973 of Gambia.

60. S.18(1) of Gambia Development Act, 1973.

61. *Ibid.*

imported. The Republic of Gambia is the best example of States with such exemptions. Under the Gambian Investment Law, a holder of a development certificate is entitled at any time between the effective dates of his certificate and the day the project starts production, to import into the country, subject to refund of customs duty, any of the articles and materials specified in the second schedule of the investment law.⁶² The materials which enjoy this sort of exemption are normally building materials, tools, plants, machinery, pipes, pumps, conveyor belts and other appliances, and materials necessary for and used in construction, alteration, reconstruction or extension of a mine, plantation or factory.⁶³

(iii) Remittance of Profits

Together with income tax and customs duty reliefs, remittance of profits abroad is used also by capital importing nations to attract foreign investment to their countries.

Usually this is done by assuring the potential investors freedom to remit profits that their enterprises will make sometimes subject to exchange control regulations. The degree of freedom that foreign investors enjoy obviously differs from one country to another. Some African countries such as The Republic of Sudan offer general profit remittance incentives. Under its investment law, all the profits resulting from investments of any foreign capital in the establishment, is entitled to be transferred abroad, after payment of all taxes, duties and other obligations that are due to the government.⁶⁴

62. S.12(1) of Gambia Development Act, 1973.

63. *Ibid.*

64. S.17 of The Development and Encouragement of Industries Investment Act, 1974 (Sudan).

The investment law of Zambia also allows enterprises which employ a significant amount of foreign capital to remit any accrued profit or dividends during the twelve months period immediately following the end of the financial year in question, subject to exchange control regulations.⁶⁵

The investment law of Somalia on the other hand, allows free remittance abroad of up to 30 percent of the capital invested. The law also provides for the transfer to be made in the currency originally invested.⁶⁶

Investment Guarantees

Apart from tax incentives, customs duty exemption and remittance of profits and dividends already discussed, capital importing states also provide various forms of investment guarantees to ensure that once the investments are in the country, they also are protected and encouraged.

Legal guarantees to foreign investment may take different forms. They may be in the form of an International Agreement, a Multilateral Convention embodying a code regulating treatment of foreign investors or, on the other hand, a host State may undertake to guarantee the security of foreign investors through its domestic laws.

The most important form of legal guarantee offered by developing countries is one in which a host State, through its investment laws and other related legislations, undertakes to provide some guarantees against nationalization and other related risks.

65. S.24(b) Zambia, Industrial Development Act, 1977.

66. Article 8 of Somalia Investment Law, 1977.

Guarantee Against Nationalization

As already pointed out, most of the African States have enacted investment laws embodying some guarantees to foreign investments. The investment laws generally contain clauses providing assurance against nationalization and normally guarantee that nationalization will be carried out only if it is for public purpose, whereupon fair compensation will be paid. The law protecting foreign investment in Tanzania, for example, provides for the payment of full and fair value of property nationalized.⁶⁷ The procedure to be followed according to this law is that full and fair value of the property concerned is ascertained by the government, after which a certificate in relation to the property or enterprise is issued to the affected alien investor.⁶⁸

Other countries prefer to give these guarantees through constitutional provisions rather than separate investment laws, the best example being Kenya. In her Constitution, Kenya provides conditions under which property or interest therein may be compulsorily taken into possession. The relevant article provides that "no property of any description shall be compulsorily acquired except where the taking of possession or acquisition is (1) in the public interest; (2) the necessity thereof is such as to afford reasonable justification for the causing of any hardship that may result to any person having interest in or right over the property and (3) provision is made by the law applicable to the taking of possession or acquisition for prompt payment of full compensation".⁶⁹

The first Federal Constitution of Nigeria as well as the Sierra

67. S.6 of Tanzania Foreign Investment Protection Act, 1963.

68. *Ibid.*

69. Schedule to Kenya Foreign Investment Protection Act, 1964.

Leone Independence Constitution have similar provisions to those found in the Kenyan Constitution already discussed.⁷⁰

Effect of the Guarantees

The question which is important especially from the point of view of a foreign investor is whether these guarantees have any legal impact. In other words, whether the foreign investor may rely on these guarantees to show that the taking of his property is unlawful. This question is very important because if the guarantees have no enforceability, they are bound to be devoid of the security which investors from capital exporting nations are keen to obtain and which the host countries are very anxious to provide, in order to attract flow of capital. Some commentators regard these guarantees as having legal effect only when they are incorporated into a contract between the host State and the foreign investor,⁷¹ because they are of the view that this is the only way that the guarantees receive legal validity and hence are capable of being enforced.⁷² If this view is accepted as right, one may say that investment guarantees contained in Constitutions and investment laws of capital importing nations are a purely unilateral measure which can be changed at any time. However, even if these guarantees do not give a foreign investor an automatic right of action against the host State, they nevertheless provide an expression of good faith that host States intend to apply in the regulation of foreign investments which come into the country.

On the other hand, municipal law which provides incentives and

70. The Constitution of the Federal Republic of Nigeria, 1963, Law No. 20 of 1963 and The Sierra Leone (Constitution) Order in Council, 1961.

71. See, e.g. E.L. Nwogugu, *supra* note 1, p. 61.

72. *Ibid.*

guarantees may be regarded as creating an estoppel against the host State.⁷³ The rationale of the principle of estoppel is clearly demonstrated in the maxim *allegans contrarius non audiendu est*.

The essential aim of the doctrine of estoppel is to preclude a party from benefitting from his own inconsistency, to the detriment of another party, who has in good faith relied on the representation of fact made by the former.

The principle of estoppel is common in most modern legal systems and has been recognised widely as a general principle of international law.⁷⁴

Apart from the question of legal effect that these investment guarantees have, another important question which has occupied the minds of some international lawyers as well as development economics scholars is whether these guarantees actually promote investments in capital importing nations. Because of the complexity of the issue, together with a lack of statistics to prove either way, one can hardly arrive at a straightforward answer to such a question. However, the available evidence tends to suggest that investments are attracted not only into countries which have no investment guarantees but in some cases go to countries which have investment laws but have dishonoured their commitments under such guarantees.⁷⁵ The case of three East African countries (Kenya, Uganda and Tanzania) may be used to illustrate this point.

A survey conducted in these countries indicates that although all

73. For this view, see, Friedmann, *Law in a Changing Society* (1959), p. 456; A. Fatouros in Friedmann & Pugh, *Legal Aspect of Foreign Investment* (1959), p. 722.

74. See, *The Temple of Preah Vihear Case*, ICJ, Rep. (1967), p. 6.

75. See, "Commercial Law and Foreign Investment: Why investment laws?" in *Afrika Spectrum*, March, 1969, p. 37.

three States have Foreign Investment Protection Acts in which similar guarantees are given to foreign investors, there is no evidence of any appreciable increase in foreign investments.⁷⁶

Is Nationalization a Deterrent to Foreign Investments in Africa?

There has always been a fear expressed by some scholars that nationalization without payment of prompt, adequate and effective compensation is an outstanding deterrent to increased flow of private foreign capital in developing countries.⁷⁷ Those who are of this view argue that developing countries should avoid this measure in order to attract foreign investment which is needed greatly. This view is of course based on an assumption that a developing country cannot develop economically except on the basis of continuously welcoming private foreign capital that it essentially lacks. Whether this proposition is correct is arguable. However, even assuming that it is correct, experience gathered by different African States already examined, shows that there is no evidence that fewer foreign investments go to those countries with higher incidences of nationalization than those with fewer or none at all.

A study conducted in Tanzania in relation to the effects of nationalization measures on foreign investments indicates that foreign investors were not deterred by the nationalization measures at all.⁷⁸ The study concluded that, "foreign investors realized that, minority shareholding together with management contracts will not only ensure them a regular flow of income in the form of royalties, patent fees,

76. *Ibid.*

77. See, e.g., Nwogugu, *supra* note 5, p. 21; M. Brandon, "Legal Deterrents and Incentives to Private Foreign Investments", 43 *Transactions Grotious Society* (1957), 39-60.

78. J. Rweyemamu, *supra* note 32, p. 64.

interest and miscellaneous fees, which to some extent will have similar result to export of capital, but will also enable them to pursue autonomous investment policies".⁷⁹ Although this study dealt specifically with one country, the conclusion that resulted from it may be applied generally to other African States, as the picture is very similar.

79. *Ibid.*

CHAPTER FOUR

NATIONALIZATION OF FOREIGN-OWNED PROPERTY IN SELECTED AFRICAN COUNTRIES.

In Africa, like in other developing countries, nationalization of foreign-owned property is a very common feature. The nationalization measures have affected the multinational corporations as well as small foreign-owned enterprises. The major takeovers however, have occurred in extractive industry where they have been accomplished in a manner that has become familiar in other developing countries: government take-over of ownership and policy control of the industry without necessarily being involved in its day to day management. These take-overs have more often than not been accompanied by promises of some form of compensation (other than prompt, adequate and effective compensation). There have been some protests by the companies as regards to these formulae but there has been little or no legal action taken against the host countries. The companies eventually accepted the situation and settlements were reached through negotiations.

There has also been selective nationalizations of some essential industries owned by foreign companies such as Banks, Insurance, Petroleum distribution and public utilities. These measures have occurred mostly in countries pursuing socialist policies.¹ Selective nationalization normally covers a broad range of industries which

1. Among the brands of socialism advocated by different African countries, includes "Socialism and Self-Reliance" (*Ujamaa na Kujitegemea*) by Tanzania; "African Socialism" by Kenya; and "Ethiopia First" by Ethiopian Military government.

although may represent lower value in monetary terms as compared to extractive industries yet they may be very significant to the economy of a country. Unlike in the first category where the emphasis was to take-over just one sector of the economy, considered to be the nerve centre of the country's economy, here the emphasis is on the take-over of all industries that have economic and strategic importance.

The third group is that in which countries have reserved some categories of enterprises mostly small and medium sized ones, for local ownership thereby forcing foreigners to sell out to citizens usually hurriedly and sometimes at a loss. Indigenization which is the name given to this phenomenon is not strictly speaking nationalization as the government is not taking the property for itself. But because of the effect that these measures have on the alien owner, some have considered them as creeping expropriation.²

Although most of the take-overs were accompanied by promises of some form of compensation, there is no uniform practice regarding the payment of compensation. While some countries promised to pay compensation out of future profits³ through government bonds,⁴ others

-
2. On "creeping expropriation", see e.g., Burns H. Weston, "Constructive Taking Under International Law: A modest foray into the Problem of "creeping expropriation"", 16 Virginia J. INT'L Law (1975) 105; G. Christie, "What constitutes a Taking of Property under International Law?", 38 BYIL (1962), 307; Creal, "Mexicanization: A case of creeping expropriation", 22 SWL.J.281 (1968) and K.C. Kotecha, "Comparative analysis of nationalization laws: Objectives and Techniques", 8 Comp. and INT'L L.J., S.Afr. (1975), 87. See also Collins, "The Political Economy of Indigenization: The case of Nigeria Enterprises Promotion Decree", 4 Afr. Review [Afri.Dev.] 491 (1974); Law of April 24 1975, Investment Policy Decree [1975] N.R.C.D. 329 (Ghana); As Amended by Investment Policy (Amendment) Decree S.M.C.D. 6 (1975).
 3. See e.g. Zambia's nationalizations, in Keneth Kanude, *Towards Economic Independence* (Zambia Information Service, 1969), Lusaka.
 4. See e.g., Sierra Leone's agreement with Sierra Leone Selection Trust, a major diamond mining company, in Afr. Recorder, (contd)

promised to pay out of consolidated funds.⁵

Using factual examples of some selected African nationalization measures, this section will examine historical as well as philosophical foundations for such policies and the nature and extent of compensation paid in respect of the properties nationalized.

-
4. (contd) Feb 13-25 [1971], p. 2440 and S.K.B. Asante, "International Transactions and National Development Goals", 10 Rev. of Ghana Law [1978], p. 12.
 5. See A.W. Bradley, "The Legal Aspect of the Nationalization in Tanzania" [1967], EALJ. 164.

PART ONE

NATIONALIZATION OF EXTRACTIVE INDUSTRIES

In August 1969 the Zambian government took over 51 percent ownership in Zambian Anglo-American Limited (ZAA) and Roan Selection Trust (RST), the two companies which dominated the country's copper mining industry.

In order to understand the power and influence that these two companies had over the mining industry of Zambia, formerly known as Northern Rhodesia,⁶ one has to examine the history of this country's mineral rights created by concessions signed between the local chiefs and Cecil Rhodes.

In the 1890s Cecil Rhodes, representing British South African Company (BSA), entered into some concession arrangements with local chiefs in what is today part of the Zambian copper belt.⁷ Through these concessions the BSA acquired exclusive mineral rights in the area, which enabled it to levy royalties in respect of minerals mined by other companies in the area. This continued up to 1950, when an agreement between the Territorial colonial government and BSA was signed, under which the Territorial government got the right to receive 20 percent of BSA's royalties in consideration of a confirmation of

-
6. Zambia got independence in 1964 under the name of Northern Rhodesia. It was part of Rhodesian Federation under British Rule. Although the Federation broke down some years before independence, this country retained the name Northern Rhodesia, while Zimbabwe was Southern Rhodesia.
 7. See A. Martin, *Minding Their Own Business* (Penguin Books), 13; G. Lanning with M. Mueller, *Africa Undermined* (Penguin Books, 1979), p. 50; P. Slinn, "The Legacy of BSA Company: The Historical Background", in M. Bostock and C. Harvey (eds), *Economic Independence and Zambia's Copper* (New York, 1972) and Patrick Keatley, *The Politics of Partnership* (Penguin Books, 1963). The BSA was a mining company and giant speculator with a character of an "empire" given to it by the Royal Charter.

BSA's mineral rights.⁸ In the early 1960s, when the country was about to become independent it became apparent that both the Colonial government and the UNIP⁹ leadership were of the view that the question of mineral rights had to be resolved before the granting of responsible Self-government. In 1963 a series of discussion was held in which a number of elaborate proposals were made.¹⁰ One of the proposals made was that BSA should remit its royalties to the Northern Rhodesia government in return for bonds to be issued by the government.¹¹ The negotiations broke off because the British government refused BSA's demand that it guarantees the bonds issued by the Northern Rhodesia Territorial government.¹²

When UNIP came to power in 1964, the new nationalist government commissioned a high powered historical research into the archives in Lusaka, which had the effect of casting doubt over BSA's claim to the mineral rights at all. The government put up an argument that, on the basis of the research conducted, what now constitutes the copper belt was actually outside the territorial jurisdiction of the chiefs from whom BSA had acquired concessions in 1890s. This argument was strengthened by the fact that the British government, the former colonial power, was also aware of the BSA's doubtful claim over the area. The British government became aware of this error through previous disputes over the area which took place towards the end of

8. J. Potter, "The 51% Nationalization of Zambia in Copper Mines", in M. Faber and J. Potter, *Towards Economic Independence* (Cambridge Uni. Press, 1971), 91-133.

9. United National Independence Party, the political party which led Zambia to Independence.

10. A. Martin, *supra*, *op.cit.*, note 7, p. 129.

11. *Ibid.* where he points out that, 3 per cent was somewhat arbitrary figure current at the time: a higher and more realistic discount would of course reduce the present value.

12. *Ibid.*

1940s.

This historical discovery obviously strengthened the Nationalist government's bargaining power. The findings were published in a White Paper on 21st September 1964, hardly a month before independence.¹³ Because of this discovery the Zambian government said that, it had no legal duty to pay any compensation to BSA in respect of the mineral rights and that it was the British government which, being a protecting power, signed an invalid agreement, that had an obligation to settle the matter. The Zambian government however, agreed under purely moral considerations to pay a nominal sum towards compensation payable, provided the British government agreed to pay the same amount.¹⁴ This was followed by long negotiations out of which an agreement was finally reached that both Zambian government and British government would each pay 2 million pounds to BSA as compensation for its mineral rights created by the concessions.¹⁵

This meant that the Zambian government had, by independence day, acquired the mineral rights formerly owned by BSA Company and through this it stepped into the shoes of BSA and levied royalties against the mining companies. This however, did not affect the mining companies which still owned and controlled the exploitation of copper and thereby controlling the country's economy, which relied heavily on the export of minerals.¹⁶

13. "Northern Rhodesia (Zambia) White Paper on British South African Company's Claims to Mineral Royalties" in 3 ILM (1964) 1133-1170; *The British South African Company's Claims to Mineral Royalties in Northern Rhodesia*, Govt. Printer, Lusaka, Sept. 21, 1964.

14. A. Martin, *supra*, note 7, p. 130, where he argues that in offering to pay this nominal sum, Zambia had the intention of ensuring the future investors of her good faith.

15. *Ibid.*, p. 132.

16. The importance of mining industry to Zambia's economy is demonstrated by the following statistics:- 40 percent of National Income is derived from the industry, 90 per cent of
(contd)

The Mulungushi Declaration

Although the Zambian government acquired the right to levy royalties, it soon became obvious that it was the mining companies which actually controlled the economy. Probably the mere realization by the government that these foreign companies were in control of the economy would not have worried the government very much had it not been for the fact that it was also evident that these companies were expatriating increasingly large amounts of money from the country in the form of dividends. This meant that there was very little capital left for further development of the mines or for opening of new ones.¹⁷

In order to remedy the situation, the Zambian government announced through the Mulungushi Declaration of 19th April, 1968, that, a company could not declare more than 40 percent of its profit as dividends and that repatriation would only be permitted if remittance did not exceed 30 percent of equity capital of the company.¹⁸

Through the Mulungushi Declaration, the government also invited twenty-seven foreign companies dealing with construction, transport, retail and brewing businesses to offer to the government 51 percent stake in their enterprises.¹⁹ One may wonder why the government even bothered to invite these businesses to offer 51 percent of their shares to the government instead of nationalizing them. The reason why it adopted this method is because the independence constitution contained an entrenched clause prohibiting among other things, expropriation of

16. (contd) the country's export earning originates from the mining industry and 60 percent of government revenue is from copper companies. *Source:* Afr. Development, Jan, 1970, p. 15.

17. See: Introduction to Mulungushi Declaration in K. Kaunda, *supra*, note 3.

18. *Ibid.*

19. *Ibid.*

foreign owner property.²⁰ Having realised the effect of this Constitutional safeguard, the companies simply ignored the government's invitation.

Before going any further, it would be appropriate to consider whether the restrictions regarding transfer of funds introduced by the Mulungushi Declaration amount to creeping expropriation. A similar question was raised in relation to the controversy over the Indonesian seizure of property of Dutch nationals, by the editors of the *Netherlands International Law Review*.²¹

In their comments the editors were of the view that, refusal on the part of Indonesian government to grant permission in advance for the transfer of funds abroad to the owners of the enterprises expropriated, in effect "deprived the owners of all enjoyment of their property and therefore amounted to expropriation".²² This view is apparently shared by Wortley, who seems to suggest that the British currency regulation in the late 1940s, which severely restricted the transferability of Sterling outside the Sterling area, may as well have amounted to an expropriation.²³

Commenting on restriction of transfer of funds abroad, Prof. Christie²⁴ pointed out that, experience gathered from successful repudiation of gold clauses suggests that in this field, when the

20. See Independence Constitution in Lanning and Mueller, *op.cit.*, note 7, p. 208.

21. 5(1958) *Netherlands International Law Review*, pp. 227-242, at p.235.

22. *Ibid.*, at p. 242. A 'Taking of Property' is defined in Paragraph 3(a), Article 10 of The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, to include not only an outright taking of property but also any such unreasonable interference with the use and enjoyment of property.

23. B.A. Wortley, *Expropriation in Public International Law* (1959), pp. 108-9. But cf. *Helbert Wagg and Co. Ltd.* [1956], 1 ch. 323.

24. G. Christie, *op.cit.*, note 2, p. 333.

necessity is great enough, almost any interference will be permitted. The Foreign Claims Settlement Commission also held that, the refusal to permit the transfer of funds abroad, does not constitute confiscation.²⁵ The fact that there is a difference of opinion on this question among commentators on International Law can hardly be denied. But the overwhelming view would seem to be that, the mere refusal to give permission for the transfer of funds abroad, does not by itself amount to expropriation. However, when this is coupled with other interferences with the use of property, the refusal may be a relevant factor in determining whether expropriation has occurred from the combined effect of all the interferences imposed on the alien's use of his property.²⁶

In the present case there was neither evidence of such other interferences nor were they alleged by the affected owners. It may, therefore be said that the restriction imposed by the Zambian government on foreign firms on repatriation of funds abroad was a normal foreign exchange measure which did not amount to expropriation.

The Matero Declaration

The Matero Declaration of the 11th August, 1969,²⁷ had the effect of accomplishing what was not possible under the Mulungushi Declaration: acquisition of majority shareholding in major mining companies. In order to prepare ground for this declaration, the government had to amend the constitutional clause regarding expropriation of foreign-owned property. This was done through a referendum held in June, 1969,

25. See, *Rex v. International Trustee and Co.* [1957], A.L.500, where the House of Lords gave effect to the United States' abrogation of gold clauses in bond agreement.

26. See, Christie, *supra* note 24, p. 333.

27. See, Kenneth Kaunda, *Towards Economic Independence* (Zambia Information Service, 1969), Lusaka, p. 36.

seeking approval to amend the constitution. The declaration provided among other things that, the government would take over 51 percent shareholding in major mining companies.²⁸ The companies mostly affected by this move were the two mining giants, ZAA and RST.

The official reason given by the government was that it wanted to ensure that new mines were developed and that the country's resources were utilized in the national interest.²⁹

Compensation

The Matero declaration contained a promise to pay compensation to owners of the affected companies.³⁰ It provided that compensation shall be negotiated between the companies on one hand and INDECO, a government owned corporation on the other. The government however, directed INDECO to negotiate compensation on fair value basis representing the book value of the property nationalized, to be paid out of future profits. The government also directed that, the advantages the shareholders will derive from association with the State should also be taken into account.³¹

28. *Ibid.* See also J. Potter, *supra* note 8; Muna Ndulo, "The Nationalization of the Zambian Copper Industry", 6 *Zambian Law Journal* (1974); "Anatomy of Zambia Copper Nationalization", *Afr.Dev.* [Jan. 1970], London, pp. 15-21; M. Burdette, "Nationalization in Zambia: A Critique of Bargaining Theory", Vol. II, *CJAS* (1977), 480. Martin, *supra* note 7; Lanning and Mueller, *supra* note 7, p. 206; and R. Libby and M. Woakes, "Nationalisation and Displacement of Development Policy in Zambia", Vol. XXIII, No.1. *Afr. Studies Rev.* [April 1980], pp. 33-50.

29. K. Kaunda, *ibid.*

30. *Ibid.*

31. *Ibid.*, p. 37.

When negotiations were opened both ZAA and RST indicated their objections to book value formula. RST, for example, argued that the accounting practice for the mining companies was so conservative that the assets could be expected to be valued well below their true value. Because of this, RST recommended that compensation be based on an inventory of assets, which would be given fair value.³² When this request was refused by the government, RST brought another request to the effect that one of its mines at Luansha, be treated differently because in its normal accounting practice, its assets were undervalued in its books of accounts. This was accepted by the government which promised to take it into account when computing compensation.

An agreement was finally reached between INDECO and the two companies, which became part of the Mining Acquisition (Special Provisions) Act, 1970,³³ enacted to implement the Matero Declaration.

Final Arrangement

Two separate agreements were reached between INDECO and the two companies. These agreements provided for payment of compensation as well as the management of two jointly owned firms, which emerged out of government participation.

As far as ZAA is concerned, it was agreed that the assets, undertakings and liabilities of Nchanga, Rhokana, The Rhokana Copper Refinery and Bencroft, in which the government acquired 51 percent

32. See Muna Ndulo, *supra* note 28, p. 57; A Martin, *supra* note 7, p. 169, see also "The Financial Times" of 4th October 1970.

33. Act No. 3 of (1970) Zambia.

shareholding, would be merged into one operating company to be known as Nchanga Consolidated Copper Mining Limited (NCCM). 51 percent of the shares in NCCM will be distributed to a newly formed government company called MINDECO Limited, while the remaining 49 percent together with the compensation security will be vested in a new company called Zambia Copper Investment Limited (ZCI).

The audited accounts of ZAA operating assets as at 31st December 1969, gave the book value of K.246.58 million,³⁴ 51 percent of which is K.125.76 million. If three months interest at 6 percent per annum is added the amount of compensation payable comes to K.127,643,137.

According to the agreement, the compensation stock would be payable in 24 semi-annual instalments with interest of six per cent per annum each being 10,551,639 U.S. dollars, to commence on 10th october, 1970.³⁵

Acceleration Terms

The Master Agreement provided that, if in any year after the fourth repayment, the total amount of interest and principle repayment in that year will be less than two-thirds of dividends that MINDECO had received from NCCM, there would be an accelerated repayment such that a total of two-thirds of the dividends would in fact be applied to the debt repayment.³⁶

In brief, the Zambian government had acquired 51 percent of ZAA's operating assets for the price of U.S. \$178,698,992 repayable over twelve years at 6 percent interest.

34. Until 1969, One Kwacha = U.S. \$1.40.

35. See, Master Agreement quoted in Potter, *supra* note 28, p. 109.

36. *Ibid.*

Compensation for RST

The direct financial compensation terms were similar to those under the agreement with ZAA.

The operating assets of RST were consolidated into one operating company known as RCM valued at K.165 million. Repayment was to be in 16 semi-annual instalments at 6 percent interest. Each instalment was to be U.S. \$9,519,638, payment to commence on the 10th October, 1970. RST Shareholders received 49 percent shareholding in RCM together with compensation stock.

Acceleration Terms

This agreement also contained acceleration terms similar to those discussed in relation to ZAA except that in this case the terms applied after the first year and not the second year.³⁷

Guarantees

Payment of both sets of bonds was guaranteed by the government. The bonds were ranked *pari passu* with all other unsecured indebtedness arising out of money borrowed or guaranteed by Zambia.³⁸

Tax Relief

The government promised that, the schemes of arrangement involving the reorganisation of ZAA and RST, pursuant to acquisition of 51 percent of their shares by the government, shall be exempt from all taxes, stamp duty, transfer fees and registration fees, which they would otherwise be subject to, under the Zambia Company Law.³⁹ The government also guaranteed that, all payments made with respect to

37. *Ibid.*

38. S.4. Act No. 28 of 1970.

39. See Section 5 of Act No. 28 of 1970; See also the Zambian Company Law, cap. 216, Law of Zambia.

the bonds and loan stock, would be exempt from all taxes in Zambia, and that both R.C.M. and NCCM would not be subject to any discriminatory stamp duty, excise tax or import duty.⁴⁰ The Master Agreement also contained an arbitration clause which provided that, "any dispute arising out of the Agreement would be referred to the International Centre for the settlement of investment disputes".⁴¹

Management Agreements

As pointed out earlier, most of African countries which nationalized high technology industries, found the need to enter into some arrangement with former owners of these enterprises, to ensure the continued flow of technology and skills necessary for the operation of the industries concerned. Zambia was by no means an exception.

Under the Master Agreement, each jointly owned operating company, i.e. RCM and NCCM, had to sign exclusive management and consulting agreements with its previous parent company. Pursuant to this, RCM signed an agreement with RST and NCCM with ZAA for managerial, financial, commercial, technical and other services, in consideration of a fee of $3\frac{3}{4}$ percent of gross sales proceeds, plus 2 percent of profit after 51 percent mineral tax.⁴² In addition there is an engineering service fee of 3 percent, with all costs reimbursable.⁴³

The services to be provided, include the normal administrative and technical services such as project consultancy, preparation of reports and financial statements, work studies, computer and management information services, industrial relations, recruitment of

40. See, Income Tax (Special provisions) Act 1970 and Income Tax (Amendment) Act, 1970.

41. See, the Master Agreement, *supra* note 35.

42. See, Potter, *supra* note 35, p. 110.

43. *Ibid.*

expatriate staff, external purchasing services and the provision of personnel.⁴⁴

As it has rightly been pointed out,⁴⁵ these management agreements cover some functions on which there is likely to be some divergence of objectives between the government and the companies providing services. These functions include preparation of business plans, viability studies and advising on production scheduling and policy towards ore reserves and research and development. However, in view of lack of expertise locally, together with the importance of the industry to the whole economy,⁴⁶ Zambia, like most of the other developing countries, had no option but to enter into such arrangements at least for the first few years.

Having seen the final arrangements contained in the Master Agreement, it would be appropriate at this juncture to examine the validity of 'book value' method, used in the assessment of compensation payable.

The book value method, which is favoured by the Third World governments,⁴⁷ involves the calculation of compensation due, based on the actual historical cost of the assets involved, less the amounts historically deducted and written off against income tax for depreciation. This amount will generally be much lower than the replacement cost,⁴⁸ favoured by developed countries, since the current cost

44. *Ibid.*; Bostock and Harvey, *supra* note 7, p. 235.

45. Potter, *ibid.*, p. 110.

46. See, note 16, *ibid.*

47. The method was used by Chile for its participation in the Anaconda Subsidiary in 1969, by Guyana for its participation in the Alcan Subsidiary in 1970-71, and by Arab oil producers in their participation agreements in 1972.

48. See, Joseph S. McCosker, "Book Value in Nationalization on Settlement" in R.B. Lillich, *Valuation of Nationalized Property in International Law*, Vol. II, (Virginia, 1973), p.51; See also, C.F. Amerasinghe, "The Quantum of compensation for

of capital goods is higher than in the past and since the capital is purchased at market price before deduction of depreciation. Because of this, the method has been criticised as being an unfair basis for settling nationalization claims and that it should not be used for that purpose.⁴⁹ However, those who advocate the use of this method argue that the equity of book value method is supported by the fact that it utilizes the value officially and formerly recorded by the nationalized company in its books, for purposes of its prior dealings with government authorities.⁵⁰ According to this school of thought therefore, these foreign companies should not be allowed to employ double standards.

The existence of dispute as to what standard should be used to determine the amount of compensation payable indicates how strong the conflict of interest is, in the question of quantum of compensation in nationalization cases, since practice does not seem to indicate an acceptance of any particular method of valuation, different standards should be applied in different situations, depending of course on the circumstances of each case.

2. Nationalization of Copper Industry in ZAIRE

In 1967, the government of Zaire, passed a law,⁵¹ nationalizing the properties and holdings of a Belgium owned mining company, Union

48. (contd.) Nationalized Property", *ibid.*, p. 91.

49. Joseph S. McCosker, *ibid.*

50. See, Norman Girvan, "Expropriating the Expropriators: Compensation criteria from a Third World Viewpoint", in R.B. Lillich, *Valuation*, Vol. III, p. 167.

51. Ordinance-Law No. 67-55 of January 28, 1967, Reprinted in 6 ILM (1967), p. 915. See particularly Article 3, which says: "The ownership of all property, real or personal, tangible or intangible, belonging to Union Miniere du Haut Katanga, as well as all rights, real or personal, movable or immovable, of the aforesaid company, shall be vested in the Congolese government".

Minière du Haut Katanga (UMHK). The law also prohibited UMHK from conducting any business in the territory of the Republic of the Congo.⁵² A government owned company, Société Générale Congolaise de Minerais (GECOMIN) was formed to take over the assets of UMHK.

In order to facilitate a better understanding of a chain of events that led to the nationalization of UMHK, it is important to trace the history of UMHK which is closely related with this country's colonial occupation.

History of UMHK

In 1878, Sir Henry Stanley and King Leopold II of Belgium, established a survey committee for the Congo. This committee was later replaced by what was to be known as The International Congo Association, which is considered to be the foundation of effective colonial occupation of the Congo. The area it occupied was regarded as the personal property of King Leopold II, by the Berlin Conference of 1884-85, called by the big powers of that time, to discuss "the scramble for Africa".

This area was ironically renamed the "Congo Free State". King Leopold, being a sovereign of the area in question, declared that, all mineral rights together with all unoccupied land in the area, belonged to his State. The property rights to the land in the Colony were subdivided into three different categories. The first category of land belonged to the natives, the second was made a private estate of the Crown which could transfer such land and issue concession for the purpose of its development, while the third category of land was registered land owned by the State in respect of which concessions

52. *Ibid.*; Zaire became independent on June 30, 1960, under the name of the Republic of Congo Leopoldville. In July 1966 the name was changed to Republic of Congo Kinshasa and finally in October, 1971, the country was renamed Republic of Zaire.

for mineral rights were issued.⁵³

In April 1891, a company called Compagnie du Katanga, was formed, in order to annex, occupy, organise, administer and create an economic infrastructure in the area. In consideration for this work, the company was given one-third of unoccupied lands in the territory, together with a 99 year concession for the exploitation of the subsoil with a 20 year option on any concession for mineral exploitation in respect of the lands owned by the State.⁵⁴

In June, 1900, Compagnie du Katanga in conjunction with the State, formed a company called Comite Special du Katanga (CSK), the stated aim of which was to facilitate development of the area owned by the State and Compagnie du Katanga.⁵⁵ The Statute incorporating CSK, provided among other things, an operation period of 99 years. At the end of this period, the assets were to be divided into two-thirds to the State and one-third to Compagnie du Katanga. When the Congo Free State formally became a colony of Belgium, CSK became a chartered company, with full concessionary powers.⁵⁶ It was during this period when it became a chartered company, that CSK entered into a prospecting agreement with another company called Tanganyika Concessions Limited, with the aim of jointly prospecting for minerals in Southwest Katanga.⁵⁷ According to the agreement forming this joint venture, each party would provide half of the capital required for

53. See, Alan P. Merriam, *Congo - Background of Conflict* (North-western University Press, 1961), p. 12; Wolf Radmann, "The Nationalization of Zaire's Cooper from Union Miniere to GECOMINES". 25 Afr.Today (1978), p. 26.

54. See, Jules Gerald Libais, *Katanga Secession* (University of Wisconsin Press, 1966), p. 316; W. Radmann, *ibid.*, p. 26.

55. *Ibid.*, p. 316. 56. Radmann, *supra* note 53, p. 26.

57. The Tanganyika Concessions Limited combines interests of Oppenheimer Group of Companies and of American interests mainly the Rockefeller Group. However when first established in 1899 the Company represented British interests only with its headquarters in Salisbury until recently when it has been moved to Nassau, Bahamas.

the development of mineral deposits that will be discovered, and that if there are any mineral deposits discovered, a company will be formed to carry out the exploitation of such minerals. This agreement provided further that CSK would receive 60 percent of profit from such operation, while Tanganyika Concession Limited will get 40 percent.⁵⁸

It was in accordance with this agreement between CSK and Tanganyika Concession Limited that on 28th October 1906, UMHK was established, and developed to become the world's third largest producer of copper, the largest producer of cobalt and radium and one of the world's most important producers of germanium.⁵⁹

By 1959 UMHK had already issued 414,000 voting shares, 134,016 of which were held by Tanganyika Concession Limited and 248,000 by CSK.

The Company was under the control of a six member board of representatives, four of whom were appointed by the Congolese Colonial government, while the remaining two were appointed by Campagnie du Katanga.

This arrangement, whereby the running of UMHK was done jointly by CSK, Congolese Colonial government and Tanganyika Concession Limited, worked perfectly well during the colonial era. This was so because it made little difference whether the four of the six member board of UMHK were appointed by the Congolese Colonial government or the Belgian government for they were in fact one and the same. However, this was not the case when the colonial rule came to an end. In the late fifties, when the country was heading towards independence, there were already some fears among the shareholders of UMHK, that

58. Radmann, *supra* note 53, p. 29.

59. *Ibid.*

the new nationalist government that was going to replace the Colonial government, would adopt some radical policies which may have serious repercussions both to CSK and Tanganyika Concession Limited, as far as the affairs of UMHK were concerned.⁶⁰

It is probably : this fear of impending radical changes which made the proprietors of UMHK allow themselves to be involved in the unfortunate events which followed the country's independence - the attempted secession of Katanga. It is undoubted fact that UMHK featured very prominently in the affairs connected with the attempted secession, the details of which are not within the limits of this work.⁶¹

Nationalization of UMHK.

The chain of events that led to the nationalization of UMHK began on 6th May, 1966, when the company made decisions on some matters relating to the price of copper without first consulting the government. The government retaliated against this move, by raising export tax on copper from 17 to 30 percent. The government also issued a directive providing among other things, that, "with effect from 1 January, 1967, all companies legally constituted in the Congo shall have their Headquarters in the country".⁶² In another move,

60. See, Lanning and Mueller, *supra* note 7, p. 253.

61. For detailed account of the attempted Secession of Katanga see e.g. Catherine Hoskins, *The Congo Since Independence* (Oxford University Press, 1965); See also the critical review of this book by C.C. O'Brien, in *New Left Review*, No. 31 (May-June, 1965); See also C.C. O'Brien, *To Katanga and Back* (Hutchinson, 1962); Kwame Nkrumah, *The Challenge of the Congo* (Nelson, 1967); Thomas Kanza, *Conflict in the Congo*, Penguin Books, 1972; Andrew Tull, *CIA: The Inside Story* (New York, 1962); J. Gerald-Libais, *Katanga Secession* (Uni. of Wisconsin Press), 1969; Allan P. Merriam, *supra* note 53; C. Young, *Politics of Congo* (Princeton Uni. Press, 1965); see also Alvin Wolfe, "Capital and the Congo" in A. Davis and J. Baker (eds), *Southern Africa in Transition* (Praeger, N.Y., 1966), and Lanning & Mueller, *supra* note 7.

62. See, Lanning and Mueller, *supra* note 7, p. 245. UMHK had its Headquarters in Brussels.

the government stopped the export of copper through the neighbouring Angola in a bid to increase the country's share of the revenue.

UMHK was not happy with these changes especially the one relating to movement of its Headquarters from Brussels to Kinshasa. According to the company executives, this move would have the effect of subjecting their company to higher taxes.⁶³

Bakajika Bill

Just ten days after the government directive on export tax, the President issued a Bill which empowered the government to take back all the rights over lands, forest and mineral resources given to UMHK before independence unless it complied with the requirement of shifting its Headquarters into the country. The company therefore had to choose between moving to Kinshasa and subject itself to high taxes and other regulations or stay in Brussels and risk the possibility of losing the mineral rights in Zaire. However, due to the company's strong bargaining position the government could not implement its threats contained in the Bill, and thereby decided to go to a negotiation table with UMHK.

Negotiations

The government opened negotiations with UMHK, to determine the future operation of the company. By November, 1966, it was apparent that an agreement in principle was already underway, at least it seemed so to the Congolese government. While the talks were still continuing the government made an announcement that UMHK would cease to operate from early January 1967, and its place would be taken by a new company called Union Miniere du Congo, in which the government was to hold

63. *Ibid.*

50 percent of the shares.⁶⁴ This plan did not materialize because although UMHK agreed on the formation of a joint company with the government, they insisted on retaining the control of copper marketing, a proposition which was not accepted by the Congolese government. Consequently the agreement collapsed.⁶⁵ In response to the collapse of this agreement on the formation of a joint venture company, the government suspended all shipments of copper from the country and announced the formation of a new company to take over the assets of UMHK. The government achieved this by ordinance law of 28th January, 1967, which transferred the ownership of the properties and holdings of UMHK in the country, to the State.⁶⁶ Apart from taking over the properties, the law also prohibited UMHK from carrying out any activity in the Republic of Congo.⁶⁷

The company, on the other hand, responded by announcing that, it would intervene in all sales of the metal originating from their expropriated concession area. But as the Congolese government had already stopped all copper exports through its decree issued towards the end of 1966, there was no way that UMHK's threat could be carried out.

The Belgian government, as expected, denounced the move, and declared that neither from political nor legal points of view, could it have any part in the act and that it would take measures to safeguard the shareholders and company's interests.⁶⁸ But as events turned out, there was no drastic measure taken by the Belgian government against the Republic of the Congo.

64. *Ibid.*, p. 246.

65. *Ibid.*

66. Ordinance-Law No. 67-55 of 28th January, 1967, *supra* note 51.

67. *Ibid.*

68. *Ibid.*; see, Radmann, *supra* note 53, p. 37.

GECOMIN

The new company formed by the Congolese government to take over the nationalized assets of UMHK was Société Générale Congolese de Minerais (GECOMIN). The government's initial plan was to split off Tanganyika Concession Limited from the Belgian companies by offering it 15 percent in the new company (equal to Tanganyika Concession's stake in UMHK). According to this plan, the government would hold 55 percent of the shares, Tanganyika Concession Limited 15 percent, and the remaining 30 percent would be offered for sale to the public.

But as one would expect, Tanganyika Concessions, a long time partner of CSK in UMHK, could not side with the Congolese government against UMHK. By the beginning of 1967 there was a need on the part of the government to review its plans in relation to the prospective shareholders in the new company, now that Tanganyika Concessions had turned down the offer.⁶⁹

The government therefore decided that it would take 60 percent of the shares and the remaining 40 percent would be offered to the public. But even this revised plan did not work out smoothly as the 40 percent shares offered to the public remained unsubscribed for a very long time, which made the government realize that the possible investors (mainly from outside the Congo) were not willing to invest in the new company. As a result of this hesitancy on the part of private investors, President Mobutu approached one Belgium based bank, Banque Lambert, with the view of forming a consortium. This bank on the other hand, approached some mining companies such as The Newmount Mining Corporation, Roan Selection Trust and The Panarroys Company, with a suggestion of forming the Consortium. When the news

69. *Ibid.*, p. 38; Lanning and Mueller, *supra* note 62, p. 246.

of the possible consortium between the Congolese government, Banque Lambert and these mining companies, reached UMHK Headquarters in Belgium, it issued a strong communique threatening legal action against anyone who acquired interest in GECOMIN.⁷⁰ As a result of this threat, the three mining companies withdrew from the proposed consortium.⁷¹ The UMHK also threatened that if the plan for the formation of the proposed consortium went ahead, it would withhold the maps of Katanga subsoil, compiled over a period of sixty years, which provide a key to the mineral deposits of the Katanga area.⁷²

Because of these threats, coupled with the fact that the Congolese government could not afford to continue the stoppage of copper mining, which in turn cut-off the much needed revenue, any more, the government decided to begin negotiations with UMHK. Because the government wanted to resume shipment of copper while negotiations for compensation were going on, it signed a marketing agreement with Société Générale des Minierais (SGM), a marketing organization subsidiary of UMHK.

Under this agreement GECOMIN agreed to pay a commission of 4.5 percent of the value of the products in Belgian francs. GECOMIN also agreed to pay salaries of foreign technicians on the basis of 130 percent of the cost of living in Belgium.⁷³

Final Accord

After the signing of the marketing and technical agreement

70. Lanning and Mueller, *ibid.*, p. 248; Richard Gott, *Mobutu's Congo* (Fabian Society, 1967), p. 24.

71. *Ibid.*

72. *Ibid.*

73. Union Minière's Directors' Report, Annual General Meeting of 20th May, 1970, and a Press release dated 6th October, 1969 in Radmann, *supra* note 68, pp. 39-40.

between GECOMIN and SGM in February, 1969, negotiations for compensation for the UMHK's nationalized assets went on up to September, 1968, when a final accord was reached. There was a compensation agreement in the accord under which SGM, the successor to the UMHK, was to be paid 6 percent of the value of the price that Zaire's copper export fetched on the world markets, for 15 years. 1 percent of this was to pay for the management and sales contract, under which SGM provided technical services. SGM also provided planning and various other services in return for exclusive right to market Zaire's copper, cobalt and other metals. The remaining 5 percent was to be compensation for the loss of UMHK's Zaire copper assets.⁷⁴

This accord was regarded as a very satisfactory arrangement by UMHK, through its communique issued following the signing of the accord, which said,

The provisions of the accord will allow Société Générales des Minerais, to provide our company during the next 15 years with satisfactory compensation for the loss of our Congolese assets. The exact amount of this compensation will depend on the production of GECOMIN and the value of its products. It is thus tied to the prosperity of the mining industry.⁷⁵

As one influential newspaper on financial matters put it, "the agreement is one of the major conditions for a sizeable World Bank loan to the Republic of Congo".⁷⁶

As payment of compensation was tied to the sales of copper, the government started to pay immediately after resuming the sales under

74. See, 6 Afr.Res.Bull. (1969)(Financial, Economic and Technical series), p. 1483; Radmann, *supra* note 68, p. 40; See also the statement by UMHK's chairman in Radmann, *ibid.*, p. 38.

75. See, the Communique in 6 Afr.Res.Bull.[1969](Fin., Econ. & Tech. Ser.), p. 1483; 17 Keesings Contemporary Arch, 23903; *The Financial Times* of 26th September 1969.

76. *The Financial Times*, *ibid.*

the new arrangement. By 1973, SGM had already received about 170 million U.S. dollars, which was more than half of the book value of the nationalized assets.

In 1974, the agreement was revised. Under the revised agreement Zaire was to pay a lump-sum of 4,000 million Belgian francs, in complete and final settlement of the compensation debt.⁷⁷ SGM on the other hand, agreed to collaborate with the government of Zaire in the construction of a copper refinery.⁷⁸ It is reported that by 1976, the government of Zaire had already paid about 90 percent of the 4,000 million Belgian francs.⁷⁹

3. SIERRA LEONE

Nationalization of major mining companies

The government of Sierra Leone announced, towards the end of 1968, that it would take over 51 percent shareholding in all major mining companies in the country.⁸⁰

Because of this announcement, the Sierre Leone Development Co. (DELCO) which is the iron ore mining subsidiary of William Baird Inc. of Scotland, decided to go into liquidation rather than be nationalized.⁸¹ The company started by writing down its assets from £10 million to £1 million in 1973, and registered a trading loss, which it reported to the government. Because of this "trading loss" the

77. See, *Financial Times* of 14 February 1974; 11 Afr.Res.Bull.[1974] (Fin., Econ., & Techn., Series), p. 3014.

78. *Ibid.*

79. 13 Afr.Res.Bull. [1976], p. 3814.

80. See, Afr.Recorder, Jan 1-14 [1970], pp. 2425-26.

81. See, The Report of Deputy Governor, The Central Bank of Sierra Leone, in *African Development*, December 1975, p. 19.

government abandoned its plan to take over 51 percent shares in the company and extended substantial amounts of money to the company in the form of loans, to keep the mine going. The company kept on asking for further loans from the government and in its attempt to keep the mine going, the government, which was already in financial crisis, scraped together the money to serve the mines, being the major source of revenue. At this time DELCO had not paid taxes to the government for four years,⁸² while it continued to bank the foreign exchange earned by the iron ore.⁸³

The government approached Bethlehem Steel, with an intention of inviting it to take over management of the mine. However, there was no agreement reached, as Bethlehem was more interested in the concession to mine Tonkilili iron ore deposit rather than taking over management of DELCO. In 1975, DELCO finally liquidated its assets and repatriated its capital, leaving Sierra Leone with an abandoned mine, a railway and a port. Moreover, the iron ore deposit was almost exhausted and the government was therefore left with a substantial and unsecured debt, a redundant work force and financial chaos.⁸⁴

The government however, went on with its 51 percent take-over plan, in relation to other mining companies. By early 1970 negotiations with three other mining companies affected by this move had already started. The three companies were The Sierra Leone Selection Trust (SLST), the Diamond producer, The Sierra Leone Ores and Metals (SIEROMCO), the bauxite producer, and Shirbro Minerals, the rutile

82. Lanning and Mueller, *supra* note 7, p. 440.

83. *Ibid.*

84. *Ibid.*; Afr.Development, December, 1975, p. 19; Afr.Development, April, 1976, pp. 383-5.

producer.⁸⁵

Diamond being the biggest foreign exchange earner, the government decided to start negotiations with SLST, the major diamond producer and use the agreement reached out of these negotiations as precedent for other companies.

Agreement with SLST.

By February 1970, an agreement had been reached, under which SLST's Sierre Leone assets were to be vested in a new company, DIMINCO in which the government holds 51 percent shares while SLST holds the remaining 49 percent.⁸⁶ According to the terms of this agreement, management of DIMINCO was left to SLST which will be under the supervision of a Board of Directors. The Chairman of the Board will be appointed by the government while SLST will appoint the Managing Director.⁸⁷

Compensation

The Agreement provides for payment of £2,550,000 to SLST as compensation for its nationalized assets, to be paid in the form of government bonds bearing interest of 5.5 percent.⁸⁸ The bonds were to be paid out in 16 equal half yearly instalments, the first falling due on 20th June, 1971. It was also agreed that all payments were to be made in Sterling Pounds, in London.⁸⁹

85. See, Afr.Recorder, Feb. 12-28 [1970], p. 2460.

86. See, Afr.Recorder, Feb. 13-23 [1971], p. 2740.

87. *Ibid.*

88. *Ibid.*; See also S.K.B. Asante, "International Transactions and National Development Goals", 10 Rev. of Ghana Law [1978], p. 12.

89. *Ibid.*, Afr. Recorder [1971], p. 2740.

Agreement with SIEREMCO

In February, 1976, the government announced that it had reached an agreement with SIEREMCO, the major bauxite producer.⁹⁰ Under the terms of this agreement, SIEREMCO will continue to operate without government participation, provided that taxes and royalties will be raised. The agreement provided that royalties and mineral fees will be doubled, while company tax will be increased from 52 percent to 60 percent up to 1978 when the mining lease will expire and will have to be renegotiated.⁹¹

CONCLUSION

Because of the leading role that extractive industry has in these countries' economies it is not surprising therefore to find that immediately after they became independent, these states sought to have a firm control over the exploitation and marketing of the minerals. It was realized that whoever was in control of the mining industry, was in fact in control of their economic and hence political survival. The question as to how far these countries have managed to control their destinies through nationalization measures, can be answered elsewhere. Suffices it to say however, that it can not be denied that through nationalization measures, these countries have acquired more say, power and revenue from the exploitation of minerals within their boundaries.

As far as payment of compensation is concerned, it has been pointed out above that, an agreement was reached between the Zambian Government and the two Mining Companies i.e. ZAA and RST as a result of this agreement, payment of compensation was guaranteed based on

90. Afr. Recorder, Jan 15 - Feb. 14 [1976], p.3784; supra, p.2358.

91. *Ibid.*

Book value of the assets taken over, to be paid in 12 years at an interest rate of six per cent per annum. The amount of compensation was to be paid out of future profits. According to the compensation Agreement reached between the Government of Zaire and SMG, UMHK's successor, the Company was guaranteed payment of 6% of the value of copper export earnings for 15 years. Out of this, 5% was to be paid as compensation for UMHK's assets, while the remaining 1% was to be paid to SMG as management fees. In 1974 the arrangement was revised and the sum of 4,000 million Belgian Francs was to be paid by the Government in final settlement of compensation debt.

The case of Sierra Leone is not different from that of Zambia. The Government agreed to pay the value of nationalized assets which was valued at £2.5 million. The amount was payable in Government Bonds bearing interest rate of 5.5%, to be paid in 8 years (in 16 half yearly instalments).

The Book value standard of valuation is one of the valuation methods recognised in international law. It takes into account the actual historical cost of the assets less amounts deducted annually as depreciation. The value of compensation reached through this way is of course smaller than that calculated through replacement value on full market value preferred by capital exporting nations. Since the standards of valuation which requires payment of full market value of assets nationalised has been refused by the larger majority of international community and since there is no universally acceptable standard of valuation, application of Book value whenever appropriate cannot be over-ruled.

As regards the lump sum compensation in case of Zaire's nationalization measures, it is important to note that although it is not clear what particular principle(s) has been deployed in reaching the agreement, the agreement was reached through negotiation and since both parties were happy with the final arrangement it can be assumed that the question of violation of international law principles cannot arise.

Regarding effectiveness of the compensation paid it can be said that since the term "effective compensation" normally refers to the currency used to make payments and that in all cases examined in this section payment of compensation was guaranteed to be made in convertible currencies, there could hardly be any dispute regarding this requirement. Having seen that the compensation paid was effective in accordance with the definition of the term "effective" it would be interesting to see whether they were also prompt and adequate.

As regards the requirement of promptness, it has been pointed out in all leading text books and judicial decisions that the term "prompt" refers to time of payment of compensation. Although some authorities maintain that prompt payment means immediate payment in cash, contemporary state practice however, tends to show that some governments are prepared to accept deferred payment as satisfying the requirement of prompt compensation in accordance with international law, if the total amount due is fixed immediately, allowance for interest for late payment is made and there are guarantees that future payments will be made. If this wider definition of the term prompt is acceptable, it follows therefore, that the three compensation agreements seen above provided not only the payment of prompt but also effective compensation.

The remaining question which needs to be answered is whether the requirement of "adequate compensation" was complied with. The definition of the term adequate has been the source of controversy between capital exporting and importing states. The definition which requires payment of full market value of the property taken over, has been rejected as being inconsistent with the meaning of nationalization. This fact has been clearly demonstrated in the case studies in that compensations based on standards other than market value have been given.

Although compensation made fell short of full market value of the properties affected it is interesting to note that such compensations were accepted by the mining companies concerned. This shows that the multinational companies are willing to accept standards of compensation other than those insisted by their home countries, if there is a possibility of continuing operations under new arrangements. Apart from the new arrangements which are in the form of equity participation and marketing arrangements other factors which had bearing on the bargaining position of the Mining Companies were the Management Contracts tied to the final accords as well as the technical skills and the backing the Mining Companies had from their home governments and international agencies such as World Bank and IMF, themselves being major sources of foreign aid.

On the part of the host states the major factors which have determined their bargaining power include their over reliance on the mining sector, lack of managerial and technical skills to run the mines independently and fear not to scare other foreign investors, whose home countries are the traditional suppliers of financial and technical assistance.

In brief therefore, the compensation agreements examined in this section of the study, indicate that whenever there are some benefits which will accrue to the foreign party, out of the new arrangements, the multinational companies are prepared to accept standards other than those insisted by their home governments.

In this particular case the amounts of compensation agreed, were not conforming with the definition of the term "adequate compensation", which is interpreted by the capital exporting states to mean full market value of the property nationalized, an interpretation which has always been rejected by the capital importing states. It may be too early to conclude on the acceptability of the new norms propagated by developing countries, but what has been seen above is a clear evidence of the fact that whenever appropriate, the notion of "appropriate compensation" may be used in assessment of compensation payable.

PART TWO

NATIONALIZATION OF ESSENTIAL INDUSTRIES

1. Nationalization in Tanzania

Although public ownership has been part of Tanzania's economic policy since independence,¹ it was not until February 1967, with the adoption of Arusha Declaration, that, for the first time, it was categorically stated that, the country was aiming at building socialism, through public ownership of major means of production and exchange.²

Arusha Declaration

This document, which may be considered as the philosophical foundation of all nationalization measures in Tanzania after 1967, was adopted by the Party's National Executive Committee on 5th February, 1967. The declaration contained a statement on public ownership of means of production and exchange, apart from the general theme regarding the policy of socialism and self-reliance. As far as public ownership is concerned, the document emphasised that,

The way to build and maintain socialism is to ensure that the major means of production are under the control and ownership of peasants and workers themselves through their Government and co-operatives... These major means of production are: land; forests; mineral resources; water; oil and electricity; communications; transport; banks; insurance; import and export trade; wholesale businesses; the steel, machine tool, arms, motor-car, cement and fertilizer factories; the textile industries; and any other big industry upon which a large section of the population

-
1. In each of the three East African States, many forms of public ownership were already present through the East African Common Services organisation.
 2. See, *The Arusha Declaration and Tanu's Policy of Socialism and Self Reliance*, Dar-es-Salaam, 1967.

depend for their living, or which provides essential components for other industries; large plantations, especially those which produce raw materials.³

The declaration may be regarded as the Party's directive to the government, to implement the policy of socialism and self-reliance. As the events turned out, the government responded to the directive very quickly. Within a week from the announcement of Arusha Declaration, the government made it public that all commercial banks, a dozen importing and exporting firms, eight milling firms, and the National Insurance Corporation were wholly brought under public ownership.⁴ The government also announced that it would acquire a monopoly of the insurance business. In taking over these businesses, the government promised to pay "fair and full" compensation to the affected owners.⁵

The government's decision to nationalize was legalized by the National Assembly, which unanimously approved and passed five nationalization Bills.⁶

The main characteristics of the nationalization legislations which resulted from these Bills is that they did not nationalize all firms carrying out a certain business but they specifically related to a particular firm to be nationalized. The only exception is the insurance business, whereby there was an outright nationalization,

3. *Ibid.*, p. 3.

4. See President Nyerere's speech on "Public ownership", *The Sunday News* (Dar-es-Salaam), 12th February, 1967. Reprinted in J.K. Nyerere, *Freedom and Socialism*, Oxford University Press, 1968, pp. 251-56.

5. *Ibid.*, p. 253.

6. The Acts of Parliament which came out of these five Bills are: (1) The National Bank of Commerce (Establishment and vesting of Assets and Liabilities) Act, Act. No. 1, 1967. As Amended by Act No. 21 of 1967; (2) The State Trading Corporation (Establishment and vesting of interests) Act, Act No. 2 of 1967. As Amended by Act No. 14 of 1967; (3) The National Agricultural Products Board (vesting of Interests) Act, Act No. 3 of 1967. As Amended by Act. No. 14 of 1967; (4) The Insurance (Vesting of interests and
(contd)

through the creation of a monopoly of insurance businesses in the National Insurance Corporation.⁷

(a) Nationalization of Commercial Banks

The nationalization of Commercial Banks in the country was done through The National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act. The first two parts of this Act, deal with the establishment of a government owned commercial bank, called the National Bank of Commerce, while the actual taking over of banking businesses is provided for under the third and fourth parts of the Act. As far as the assets and liabilities of the nationalized banks are concerned, the Act provides that, "All the assets of the banks which are Tanzanian Assets, subsisting upon 6th February 1967 (the effective date) shall by virtue of this Section be vested in the National Bank of Commerce",⁸ and that all the liabilities of the banks so nationalized shall be vested in the National Bank of Commerce as well.⁹

Compensation

The Act provides that, "the United Republic shall pay 'full and fair' compensation in respect of net value of the assets taken over".¹⁰ The Act however does not specify the way the amount of compensation payable shall be determined. But it says that, when the amount of compensation payable to any person entitled has been determined, "the Minister shall issue a certificate setting out the amount which shall constitute a charge to be paid out of the consolidated fund, provided

6. (contd) Regulations) Act, Act No. 4 of 1967; (5) The Industrial Shares (Acquisition) Act, Act No. 5 of 1967.

7. See Act No. 4 of 1967, *ibid.*

8. See S. 8(2) of Act No. 1 of 1967.

9. See S. 8(3) of Act No. 1 of 1967.

10. See S.10(1), *ibid.*

that the said amount of compensation shall be payable in such manner and in such instalments as the Minister for Finance, after consultations with the person entitled, shall determine".¹¹

The banks whose assets and liabilities were taken over by virtue of part three of this Act were The National Grindlays Bank; The Standard Bank; Barclay's Bank DCO; Algemene Bank Nederk and N.V.; The Bank of India Ltd.; Commercial Bank of Africa Ltd.; The National Bank of Pakistan, and Tanzania Bank of Commerce Limited.¹²

(b) Nationalization of Trading Companies

In this category, the government, through the State Trading Corporation (Establishment and Vesting of Interest) Act, 1967, took over Import/Export firms, wholesale dealers and other trading companies. The Act established a public corporation called The State Trading Corporation whose main function was to take over the businesses of the nationalized firms. The Act provides that "with effect from 11th February 1967, the State Trading Corporation shall take over prospective businesses in Tanganyika of some firms registered in Tanganyika while for those registered outside the country, the Corporation will take over the assets and liabilities existing within Tanganyika upon the effective date".¹³

The affected firms included: Smith McKenzie and Co.Ltd., incorporated in Kenya; Dalgety (E.A.) Limited, incorporated in Kenya; Dalgety and Co. Ltd., incorporated in England; A. Baumann and Co. Ltd., incorporated in Kenya; Twentsche Overseas Trading Company Ltd., incorporated in Kenya; African Mercantile Company (Overseas) Ltd., incorporated in England; Wiggleworth and Co. Ltd., incorporated in England;

11. Section 10(2), *ibid.*

12. See, Schedule I to Act No. 1 of 1967.

13. S.9 Act No. 2 of 1967.

Co-operative Supply Association of Tanganyika, registered under Cap. 211 of Tanzania Laws; and East African Cotton Export Ltd., incorporated in Uganda.¹⁴

Compensation

The Act provides two different ways under which compensation is payable, depending on the nature of nationalization. Where the nationalization involved a foreign firm and therefore it is only the Tanzanian assets and liabilities of the company subsisting on the effective date, that were affected, the government undertook to pay "full and fair" value of the assets, less the liabilities also taken over.¹⁵

But if the company affected is registered in the country and therefore it is the Tanzanian business that was taken over, the government offered to pay full and fair value of the shares now vested in the new Corporation.¹⁶ The mode of payment as well as the issuance of a certificate by the Minister for Finance, are identical to those found in Act No. 1 of 1967.

(c) Nationalization of Agricultural Companies

Through the National Agricultural Products Board (Vesting of Interests) Act, 1967, the government nationalized the shares in local companies dealing with agricultural products and like in the case of Trading firms, took over the assets of those firms which were registered outside the country.¹⁷ The firms whose businesses were taken over include: Rajwani Mills and Pure Food Products Ltd., while those whose assets and liabilities were taken over are: Pure Food Products (T.) Limited; Tanzania Millers Limited; Nurmohamed Jessa & Company Limited; Associated Traders Ltd. and Kyela Satter Rice Mills Ltd.

14. *Ibid.*

15. S.12(2) of Act No. 2, 1967.

16. S.22(1) of Act No. 2, 1967.

17. S.4, Act No. 3, 1967.

Compensation

The Statute contains provisions relating to payment of "full and fair" compensation and the procedure to be followed is similar to that found in Act No. 2, 1967 above.

(d) Nationalization of Insurance Businesses

Through the Insurance (Vesting of Interests and Regulations) Act, 1967, the government nationalized the minority shareholding in the National Insurance Corporation and thereby making the National Insurance Corporation a wholly government owned corporation.

The relevant Section dealing with the nationalization of the privately owned minority shares in the Corporation provides that,

All shares in the Corporation (National Insurance Corporation of Tanganyika Limited) other than the shares already vested in the Treasury Registry, shall and without further assurance vest free of any trust, mortgage, charge, lien, interest or other incumbrances whatsoever, vest in the Treasury Registry and shall be deemed to have so vested upon the effective date.¹⁸

The Act provides for the payment of "full and fair" compensation in respect of the shares taken over by the government.¹⁹ It also contains similar provisions relating to the certificate to be issued by the Minister.

In brief, therefore, the government here, unlike in other cases, created a monopoly by taking over minority shareholding in the only insurance corporation, in which it had already majority shareholding.

(e) Nationalization of majority shareholding in Industrial firms.

The government also passed the Industrial Shares (Acquisition) Act 1967, which had the effect of acquiring a majority shareholding in some

18. S.3, Act No. 4, 1967. The effective date is 12th February, 1967.

19. S.6, *ibid.*

specified industrial companies.²⁰ In most cases the number of shares taken did not exceed 60 percent. The specified industrial companies are: The Metal Box Company of Tanzania Limited; Kilimanjaro Breweries Limited; Tanzania Breweries Limited; BAT Tanzania Limited; Tanganyika Export Company Limited; East African Tobacco Company (T.) Limited and Tanzania Bata Shoe Company Limited.

The Act also contained similar compensation provisions found in other nationalization legislations already examined.²¹

SUMMARY

What may be said in relation to the nationalization measures in Tanzania is that the government made a distinction between the companies registered in the countries and those which were incorporated under foreign law. Whenever the take-over concerned companies registered under Tanganyikan law, acquisition of entire share capital of the company was enough to bring it under public ownership. But if it is foreign company, the rule against extra-territorial expropriation made the government refrain from acquiring more than the Tanzanian businesses of the companies concerned and therefore the government took over the local assets.

Another common feature in all nationalization legislations examined above, is that they all have provisions for payment of "full and fair" compensation. This is so, even though in some cases compensation is paid in respect of the value of local assets taken while in others in respect of the shares. In every case however, the liability to pay compensation was imposed on the United Republic of Tanzania. There is no reason given why the liability to pay was

20. S.3 Act No. 5, 1967.

21. *Ibid.*, S.4.

imposed on the United Republic, to be paid out of consolidated fund and not out of future profit of the new companies formed. But it may well be that this is one way of ensuring the foreign investors of the government's intention to pay. It is a foregone conclusion that an investor whose property has been nationalized will be more in favour of this formula than the one in which payment is payable out of future profits.

What is "Full and Fair" Compensation?

Although all nationalization legislations employ the phrase "full and fair" compensation, it is not easy to determine exactly what the phrase implies, since the legislations do not contain any definition of such term. Examination of the way it has been used however, reveals that although the term has been used equally in cases where it was the shares that were nationalized as well as in those cases where it was the assets which were taken over, what is actually payable in case of assets is the net value of the assets less liabilities while in case of shares, is the interest in the business as a going concern. If this is the case, one may say that, although the phrase "full and fair" has been used indiscriminately, what it actually meant is that, where it is the local businesses that were nationalized, the phrase refers to the net-value of the assets taken, while if it is the shares that were acquired, the phrase refers to the value of the shares.²²

Assessment Procedure

The nationalization legislations mentioned above, provide that, once the amount of compensation payable has been determined, the Minister for Finance will issue a certificate setting out the amount

22. See, A.W. Bradley, "The Legal Aspects of the Nationalizations In Tanzania" [1967], EALJ, p. 164.

to be paid as compensation. The amount payable shall be paid out of the consolidated fund.²³ But it is not clear who determines the amount to be paid as compensation. Even if one assumes that it is the Minister for Finance who determines it, as it is he who issues the certificate, the procedure to be followed in assessing this compensation is not indicated. In the absence of such information one is forced once again to assume that, the legislature gave the Minister a discretion to determine the procedure to be followed. Experience however, shows that settlements were reached through negotiations between the government and the affected owners. But the important question to be asked is, what if no agreement was reached between the former owner and the government? In other words, can the government go ahead and unilaterally fix the amount payable as compensation which the former owner considers to be inadequate? and if so, what are the remedies open to the former owner?

It would appear that if such a situation happens, the affected former owner has a choice between taking the matter before the High Court or before an arbitration tribunal. If he chooses to refer the matter to the Court system, the owner has to comply with the provisions of the Government Proceeding Act,²⁴ which provides a machinery for suing the government. If this procedure is complied with, the affected owner could seek a declaration against the government of the amount of compensation due to him. But what should be borne in mind is the fact that, even if the High Court determines the amount of compensation payable, the actual recovery of the sum will still depend on the government's willingness to pay. This is so because the provisions of the Government Proceedings Act, 1967, do not authorise

23. See, Act No.1, S.12(2); Act No. 2, SS.12(2), 22(2); Act No. 3, SS 7(3), 17(2); Act No. 4, S.6(2) and Act No. 5, S.4(2).

24. Act No. 16 of 1967.

execution against the government.²⁵ Whether the court system is the best forum for assessment of compensation payable is another matter but what may be said here is that the courts could not do more than determine the total amount due and the principle on which it should be assessed. They could not determine the manner of payment of compensation. In a way, therefore, the discretionary power given to the Minister to determine the amount of compensation payable may be reviewed by the Courts, in cases where the Minister fixes the amount of compensation unilaterally or if he refuses to fix any amount. However, judicial assessment has not often been used in these instances of nationalization.

The other alternative would be for the parties to go to arbitration, which appears to be the most satisfactory course especially on the point of view of the previous owner. But apart from those cases in which the Foreign Investment (Protection) Act²⁶ apply, there is a need for both parties to agree to assessment through arbitration. The government which decides to fix the amount of compensation unilaterally may very easily refuse to submit to an arbitration and there is no way (apart from political and economic pressure from other countries) that the government could be compelled to adopt this method.

But as pointed out earlier, this discussion is of academic value only as events following the nationalization measures in Tanzania proved that most of the compensation claims were settled through negotiations between the parties concerned, and therefore there was no need to refer any case to an arbitration tribunal or a court of law.²⁷

25. *Ibid.*

26. Cap. 533, Rev.Laws. Under this Act, there is recourse to arbitration in cases of dispute arising as to what is full and fair value of property concerned.

27. O.C. Eze, *The Legal Status of Foreign Investments in East African Common Market* (1977), Nijhoff, p. 296; The Afr.Recorder [1969], pp. 2394-5.

2. Nationalization Measures in Ethiopia

The history of Ethiopian nationalization of key sectors of the economy, is related to the coming to power of the military government, which overthrew Emperor Haile Selassie in 1973. The ruling council of the military government proclaimed a socialist policy based on "social and economic equality"²⁸ which, among other things, provided for effective control over the financial institutions and the principal means of production. The declaration gave categories of enterprises that were preserved exclusively for the State, joint ownership between the State and private investors and those which were exclusively preserved for private ownership.

The Sector which was exclusively preserved for the State ownership included mineral exploitation; large scale salt mining; basic industries such as iron and steel; cement; leather and leather products manufacturing; large scale rubber manufacturing and fertilizer industry; drugs and medicines; tobacco; glass and bottle manufacturing; large scale printing and publishing; electricity generation; water, rail and sea transport; radio, television, post and telecommunication.²⁹

The enterprises preserved for joint venture were exploration of carbons and hydrocarbons, e.g. petroleum and coal; mining of ferrous and non-ferrous metals; mining of chemical and fertilizer materials e.g. potash, phosphate and sulphur; processing, canning and preserving of meat, fruits and vegetables (which are mainly export oriented); paper and pulp industry; manufacturing of plastics and other synthetic materials; large scale construction work and tourism.³⁰

Finally those which were preserved for private ownership include:

28. See. Afr.Res.Bull. [1974], p.3359, quoting Radio Ethiopia's Broadcast of 20th Dec. 1974; Afr.Cont.Records [1974-75], p. B195.

29. Afr.Cont.Recorder, *ibid.*, p. B195.

30. *Ibid.*

food processing, canning and marketing; quarrying, dairy, grain milling and pressing of oil seeds; bakery; manufacturing of wood and wood products; fabricated metal products; small scale weaving, knitting, spinning, sewing and tailoring; and other small businesses.³¹

Following this political declaration, the government announced on 1st January, 1975, the nationalization of all banks, insurance companies and financial institutions.³²

The government announced further nationalizations on 3rd February, 1975, under which some 72 foreign and locally owned manufacturing and trading businesses were taken over by the government. The government also took majority shareholding in 29 other businesses in the same move.³³

The nationalized companies included 14 textile companies; 13 food processing plants; 9 leather and shoe factories; eight beverage companies including Coca-Cola and Pepsi-Cola; eight chemical companies; five iron and steel works and four printing establishments.³⁴ While the Sector in which the government took over the controlling stake included oil companies (Shell, Agip, Tobal and Mobil); foreign manufacturers; two major Dutch sugar firms and several other companies owned by foreign firms.³⁵

Compensation

The government promised to pay "appropriate" compensation to the affected owners, based on the net asset value of the property

31. *Ibid.*

32. See [1974] Afr.Res.Bull., p. 3360. Six Banks and fourteen insurance companies were affected.

33. Afr.Res.Bull. [1975], p. 3491; Afr.Cont.Record [1975-76], p. B207.

34. *Ibid.*

35. *Ibid.*

at the time of nationalization.³⁶

The actual assessment of the amount of compensation payable was to be done by a special body set by the Governor of the Central Bank.³⁷

3. UGANDA

(a) Government take-over of Industries in 1970

In accordance with the socialist policies contained in "The Common Man's Charter", the Ugandan President, Dr. Milton Obote, announced in his 1970 May-day speech, that his government would take over certain sectors of the economy.³⁸ Through this, the government acquired majority shareholding in export/import businesses; all manufacturing and plantation industries; banks; oil companies; public transport companies and the Kilembe copper mine.³⁹

Nationalization Bill

In order to give legal validity to this presidential proclamation, a Bill was presented to the National Assembly and unanimously approved, enabling the government to take over 60 percent shareholding in 85 major firms.⁴⁰ The Act provided that, compensation for the acquired shares, shall be paid from future profit within a period of 15 years.⁴¹

36. Afr.Res.Bull. [1975], p. 3464A.

37. *Ibid.*

38. The Common Man's Charter was a socialist manifesto announced earlier which was the foundation of Socialism, Uganda under Obote, wanted to build

39. See, O. Eze, *supra*, note 27.

40. See, The Companies (Government and Public Bodies Participation) Act, Act No. 3, 1970 (Uganda).

41. *Ibid.*, S.2(3).

Assessment of Compensation

The Nationalization Act, provided two regimes through which compensation due, may be determined. The first one involved direct negotiations with the companies whose shares were taken by the government. According to the Act, the government may enter into direct negotiations with the companies concerned and if any agreement is reached, that agreement becomes the basis of payment of compensation, in which case the Act ceases to apply.⁴² But if there is no direct negotiations between the parties, or if there were negotiations but no agreement was reached, the value of shares or premises' fixture or fittings (whichever the case may be) will be determined by the valuer appointed by the Minister and that valuation will be the basis for the payment of compensation.⁴³ An appeal from the decision of the valuer lies to a special tribunal formed under the Act, from which appeal lies to the High Court and East African Court of Appeal.⁴⁴

Constitutional Amendment

The National Assembly also approved an amendment to the Constitutional clause relating to the payment of compensation for expropriation of foreign owned property. The amendment had the effect of substituting the words "prompt payment of adequate compensation" for payment of "reasonable compensation",⁴⁵ thereby dropping the word "prompt" and substituting "reasonable" for "adequate". But there was a need to amend the Foreign Investment Protection Act as well which also contained a clause providing for "adequate compensation".⁴⁷ This was also done by dropping the word "prompt" and substituting

42. *Ibid.*, S.2(3).

43. *Ibid.*

44. *Ibid.*

45. Afr.Rec. [1970], p. 2599.

46. The Foreign-Investment Protection Act, 1964 (Uganda) as amended by the 1970 Amendment Act, Act No. 3, 1970.

"adequate" for "reasonable".⁴⁷

The overall effect of these Amendments in relation to the 1970 nationalizations is that the government could acquire 60 percent shareholding in different firms and promised to pay "reasonable" compensation to be paid out of future profits.

There is no definition of the term "reasonable" compensation. But in view of the assessment methods provided by the Nationalization Act, one would consider reasonable to imply that the amount reached out of negotiations between the parties or the amount determined by the valuer (whichever case is applicable) is reasonable compensation.

(b) Further Nationalizations, 1972

In 1972 the Civilian government was replaced by a Military government headed by Iddi Amin. This military government introduced further nationalizations through a Decree which came into force on 18th December, 1972.⁴⁸ This however, should not be understood to imply that the military government shared the philosophy contained in the Common Man's Charter.

Through the 1972 Decree, the government took over complete ownership of some foreign owned businesses. Included in the businesses taken over are: some tea companies; British Metal Corporation; the Uganda Transport Company Limited and the Uganda Urgus (Newspapers) Limited.

The military government's Decree provided that compensation

47. See, Schedule No. I of Act No. 3, 1970.

48. The Properties and Business (Acquisition) Decree, No. 32, 1972.

payable for any property or business acquired

shall be based upon the excess of value of property or obligations...attaching to such property or business and such liabilities or obligations shall include any taxes, rates, or other levies imposed on the said property or business by law. ⁴⁹

Valuation of compensation payable

The Decree also provided that compensation payable will be paid in accordance with a valuation made by a Board of Valuers appointed by the Minister for Finance. Like the 1970 nationalizations, appeal from the determination of the Board, lies to the Special tribunal and thence to the High Court.⁵⁰ The Decree also provided for payment of compensation payable out of future profits. To be sure, the Decree provided that "when the amount of compensation has been determined, that amount shall be paid within such period as the Minister shall determine, having regard to the period within which such property or business may generate sufficient income to offset the amount payable".⁵¹

(c) Expulsion of Non-Citizen Asians (1972)

In 1972 the Military government also took over the properties of some non-Ugandan Asians whom it expelled from the country.

The events leading to their expulsion started on 9th August, 1972, when a Presidential Decree was issued, revoking most entry permits and certificates of residence of non-citizen Asians and giving them 90 days to leave the country. Those mostly affected by the Decree were the Asians of British, Indian, Pakistan and Bangladesh citizenship.⁵²

49. S.2(2) of Decree 32, *ibid.*, as amended by Decree No. 28 of 1973.

50. S.2 of Decree 32, 1972.

51. S.2(3), *ibid.*

52. See Supplement to Ugandan Gazette, 11th August 1972.

Another decree was issued on 4th October, 1972, to be applied retrospectively from 9th August, 1972, providing among other things, that those departing non-citizen Asians might not transfer their properties and other business concerns to any other person.⁵³

The decree also contained a prohibition against mortgaging the property.⁵⁴ It however, required the departing Asians to make declaration of their assets. This declaration was registrable with the Ministry of Industries and Commerce, and failure to make such declaration resulted in vesting the property in the government.⁵⁵ Although the decree allowed the departing Asians to appoint agents for the sale of their properties,⁵⁶ it categorically prohibited the agents appointed by virtue of S.2(2)(d) of the decree from selling or leasing the property in question.⁵⁷ Because of this contradiction, the decree was amended on 24th October, 1972, by Decree No. 27. The new decree gave the agents appointed in accordance with Decree No. 27 of 1972, the power to sell, lease, acquire and transfer Asian property, provided that a consent of a Board appointed for that purpose is given.⁵⁸

The Board was also empowered to declare property to be vested in it, which was abandoned by departing Asians, or left in such a way that no adequate arrangement had been made for its proper and efficient management.⁵⁹

Although the properties vested in the government were to be sold, the government later decided to rent them to indigenous Ugandans.

53. Decree No. 27, 1972.

54. S.1(a), *ibid.*

55. SS.1(a), 1(1)(b) and 4(5), *ibid.*

56. S.2(2)(d), *ibid.*

57. SS.2(4)(a)-(e), *ibid.*

58. S.8, Decree No. 29, 1972.

59. S.4(1)(e), *ibid.*; see also Uganda Statutory Instruments 169 and 172 of 1972 for a list of properties which vested in the Board according to this Section.

The rentals accruing from such properties are to be paid into a fund, and compensation is payable from this fund to the former owners.⁶⁰

Payment of Compensation

Decree No. 29, provided for the appointment of valuers for the purpose of determining the value of abandoned properties vested in the Board, in respect of which compensation was payable.⁶¹ Those who were aggrieved by the decision of the valuers could appeal to an appeal tribunal appointed for that purpose, from where appeal lies to the High Court.⁶²

Details regarding the actual payment of compensation are very scarce. However, in 1975 an agreement was reached between India and Uganda, under which the Ugandan government agreed to pay compensation in respect of the properties of about 1,000 Indian citizens, expelled from the country.⁶³

Also in 1978 the Ugandan government entered into an agreement with the UNHCR to pay the sum of shillings, 40,510,000, being the total value of assets belonging to Asians of "undetermined nationality", settled in different countries as refugees.⁶⁴ The government agreed to pay the first instalment of shillings 510,000 immediately, while the remaining amount was to be paid in equal half-yearly instalments, without interest, for a period of 10 years. The payments

60. Decree No. 5 of 1973, SS.6 and 7(a); See also Presidential Decree of 16th December 1973 in which President Amin reiterated his intention to pay compensation to the expelled Asians from the income of assets left by them.

61. S.16(2), Decree No. 29, 1972.

62. SS.16(3) and 16(4), *ibid.*

63. See, Afr.Cont.Record.[1975-76], pp. B364-70; the cheque was actually handed over to the visiting Indian Government Minister.

64. See, 32 U.N. GAOR Para 68(1978): Daniel Nsereko, "The Right to Return Home", 21 IJIL (1981), p. 349.

were to be in convertible currency.⁶⁵

There was no agreement reached in respect of about 40,000 Asians with British Passport. Although several attempts were made, negotiations finally broke down, when Britain suspended diplomatic relations with Uganda.⁶⁶ The value of the assets of British citizens in Uganda was estimated to be £250m.⁶⁷

The major criticism that the Ugandan government received regarding the expulsion of non-Ugandan Asians is that the subsequent expropriations were discriminatory and therefore contrary to international law.⁶⁸ This criticism is mainly premised on the ground that it was the property of Aliens which was affected while that of nationals was left intact.⁶⁹ But the measure does not become discriminatory simply because it was directed towards foreign nationals. The test of discrimination is the intention of the government. If the measure was governed by economic or social motives and carried out in good faith, it is immaterial whether it only affected aliens or not.⁷⁰ In other words the emphasis is not on the quantity of property or businesses nationalized but whether in exercising its rights to nationalise, the State did so in compliance with its economic or

65. *Ibid.*

66. Afr.Cont.Rec., supra, note 64.

67. *Ibid.*

68. See, e.g., F. Wooldridge and V. Sharma, "The Expropriation of the property of Ugandan Asians", 14 IJIL (1974), 61.

69. For those who consider the measure to be discriminatory simply because the property affected was that belonging to aliens and not that of nationals as well, see M. Domke, "Foreign Nationalizations", 55 AMJIL (1961), pp. 500-03; S.D. Blanchard, "The Threats of U.S. Private Investments in Latin America", 5 JIL & Econ. (1971), 230; F. Wooldridge and Sharma, supra.

70. On this view, see C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford, 1967), p. 141; see also I. Brownlie, *Principles of International Law* (Oxford), p. 524.

social motive and in good faith.

In the Ugandan situation, it should be pointed out that the government did not set out to nationalize the Asian properties. But it started by terminating residence certificates in respect of the non-citizen Asians. The take-over of the property left by the departing Asians was subsequent upon their being expelled. In fact the government took over only those properties and businesses which were left undeclared by their owners in accordance with Decree No. 27, 1972.

In principle the power of a State to expel non-nationals is within the domestic jurisdiction and it can be exercised according to the discretion of the State.⁷¹ However, this discretion is not without limitations. Tribunals and some writers have at times, asserted that the power of expulsion must not only be exercised in good faith, but it must also be measured against human rights standards.⁷² Whether the expulsions were carried out in good faith or not is arguable. However, what is certain is the fact that the government take-over became necessary only after the departing aliens refused to comply with the requirement of the Decree relating to their properties.

In brief, therefore, one may submit that even if it is assumed that the expropriation of the property left by the departing Asians was discriminatory in that only the property of people belonging to one race was involved, the social motivation behind the whole move (the expulsion of non-citizen Asians) makes the expropriation justifiable. And the fact that the Ugandan government made available the machinery under which compensation may be paid, demonstrates the good faith which the government had. This however, does not mean that compensation

71. See Brownlie, *ibid.*, p. 519.

72. *Ibid.*

was paid to each and every alien affected by these measures. But this should be viewed as a problem of implementation rather than evidence of bad faith.

4. MOZAMBIQUE

When Mozambique became independent in 1974, the Nationalist government issued a directive,⁷³ outlining its intention to nationalize all major means of production in accordance with its socialist economic policy. In pursuance of this policy the government nationalized all private banks in the country with effect from 1st February, 1977.⁷⁴ The only private bank which was not affected by this move is Banco Standard de Mocambique, which had local ownership of about 20 per cent. Those taken over included Casa Bancaria de Mocambique; Banco de Credito Comercial and Banco Commercial de Angoloa.⁷⁵

73. See [1978] Afr. Res. Bull. (Econ. Tech and Financial Series) p.4922.

74. See the government's statement in [1977] Afr. Rs. Bull. (Econ; Financial; Technical Series), p.4550.

75. *Ibid.*

The assets and liabilities of the three nationalized banks were transferred to the Bank of Mozambique, the State Central Bank. According to the Statement issued by the government, anyone entitled to compensation had to lodge his claim with the Central Bank within thirty days.⁷⁶ Apart from these three commercial banks, the government in another move, took over the assets and liabilities of Banco de Fomento National and Banco Pinto e Setto Mayor, which were transferred to Peoples Development Bank.⁷⁷

Insurance Firms

Through a Decree of the Council of Ministers published on 11th January, 1977, the government took over all insurance and reinsurance business in the country.⁷⁸ In this move, twenty firms were affected. Only four of the twenty firms affected had their headquarters in the country, while the rest operated through agencies.⁷⁹ The government created a State owned company Empresa Mocambicana de Seguros, EE [EMOSE] having a share capital of 150 million Escudos, to carry out the businesses of the nationalized firms.

Compensation

The decree provided that nationalization to the shareholders in the nationalized companies, now integrated into EMOSE, would be

76. *Ibid.*

77. *Ibid.*

78. See, *Ibid.*, p.4132.

79. *Ibid.*

80

assessed by the Minister for Finance. There is no indication however of the method that was to be adopted by the Minister.

Further Nationalizations

In early 1978, the government carried out further nationalization measures, in which Camphania Carbonifera de Mozambique, the only coal mining company in the country⁸¹ and Camphania Mozambican de Navigacao, a big shipping company, were nationalized.⁸²

Compensation

The communique announcing the take-over of the coal mining company promised that compensation to the ex-owners will be paid in accordance to the procedure to be fixed. However, it specifically stated that compensation shall not cover land rights and concessions granted before independence.⁸³ The government did not specify whether the former owners of the nationalized shipping company will receive any compensation. However the Statement issued said that, the nationalized company owed the Mozambique government the sum of 60 million Escudos.⁸⁴

Abandoned Businesses

Apart from the nationalization measures carried out in accordance with its economic policy, the Mozambique government also took over a number of businesses which were abandoned by their owners just after independence. Among the firms affected included eight different companies taken over towards the end of January, 1976,⁸⁵

80. *Ibid.*

81. See, the Government's Communique of 12th May, 1978 in [1978] Afr.Res.Bull. (Econ; Financial; Technical Series), p. 4713.

82. *Ibid.*, p. 3713.

83. *Ibid.*, p. 4713.

84. *Ibid.*

85. See the Statement of Minister of Commerce and Industry of 28th January, 1976 in [1976] Afr.Res.Bull. (Econ; Fin; Tech Series), pp. 3779-81. Five out of the eight companies were owned by Kruger

and the country's only fertilizer company, Quimica Generale.⁸⁶

The government categorically stated that no compensation will be payable to the former owners of these companies.⁸⁷

5. ANGOLA

When Angola became independent in 1975, its government declared its total commitment to Socialism and said further that it intends to make Angola "a model Socialist State in African Continent".⁸⁸ In accordance with this commitment therefore, the government published an economic plan under which the country's natural resources were to become the "collective property of all Angolans".⁸⁹

In accord with this declared policy the government nationalized various industries ranging from oil companies to mining companies and agricultural companies. Among the big foreign-owned companies affected are Diamang Diamond Company in which the government increased its shareholding to 60.8 percent,⁹⁰ and Secil Ultramar, a cement company, from which the government also took over the majority shareholding.⁹¹

Compensation

In both cases the government promised to pay compensation to the former shareholders, as shall be determined by the government.⁹²

86. (contd) group of companies of South Africa.

87. See, the Government Statement [1979] Afr.Res.Bull., p. 5353.

88. *Ibid.*

89. See, The Prime Minister's Speech in [1976] Afr.Res.Bull.(Econ; Fin; Tech.Series), p. 3910.

90. *Ibid.*

91. [1977] Afr.Res.Bull. (Econ;Fin;Tech.Series), p. 4405.

92. [1978] Afr.Res.Bull. (Econ;Fin;Tech.Series), p. 4815A.

93. *Ibid.*

However the case of the cement company, the government Statement provided that compensation shall be determined after the publication of government investigations on alleged acts of sabotage on the part of some of Ultramar's shareholders.⁹⁴

Abandoned Firms

Like Mozambique, Angola also took-over some foreign firms, abandoned by their owners, just after independence for fear of reprisals from the new nationalist government, due to their collaboration with the Portuguese Colonial government during the War of Independence. Among the firms taken over are 36 Agricultural companies, including Campanhia Angole de Agricutural (CADA), the country's biggest coffee empire and one of the biggest in the world,⁹⁵ occupying about 15,000 hectares. The others were eleven different companies, including four largest fishing companies.⁹⁶

In 1978 the government announced the take-over of more abandoned companies.⁹⁷ This covered over twenty foreign-owned companies such as glasswork factory, a furniture factory, a plant for manufacture of electric apparatus, and a rubber plant, and a number of industrial enterprises in Cabinda, Huambo, Benquela and Lubango.⁹⁸ The government completed its programme of taking over abandoned firms in June, 1978, by taking over seventy other firms, bringing to a total of 178 industrial and commercial concerns taken over this way.⁹⁹

As was the case with Mozambique, no compensation was payable to the owners of the abandoned firms.

94. *Ibid.*

95. [1976] Afr.Res.Bull. (Econ; Fin;Techn.Series), p. 3935.

96. *Ibid.*

97. [1978] Afr.Res.Bull. (Econ; Fin;Techn.Series), p. 4573.

98. *Ibid.*

99. *Ibid.*, p. 5135.

CONCLUSION

The nationalization measures examined in this category were mainly based on ideological reasons. The countries concerned had already made it clear that they wanted to build their economies through Socialist ideology and therefore these measures should be viewed as the means through which these countries sought to have firm control of major means of production and exchange.

The main characteristic of these nationalizations is the fact that it is not a whole sector which is nationalized but individual business concerns which are regarded by the host country concerned, as important in its economic survival.

These nationalization measures also demonstrate the rather conflicting situation in which African countries find themselves when trying to implement Socialist economic policies e.g. trying to have firm control of key sectors of their economies through nationalization, while at the same time attempting to encourage private investment especially in those industries involving high level technology.

Regarding payment of compensation, the study has demonstrated that despite the radical nature through which these measures were carried out almost all governments paid or promised to pay some form of compensation in respect of the foreign-owned nationalized property. Although this may be interpreted as one way of creating confidence to foreign investors however it is, more than anything, an evidence that these governments realized that there is a duty to pay compensation. This being the case it will be interesting to see the standard of compensation paid and whether it complied with the "international law standards of compensation".

Starting with Tanzanian nationalization measures, almost all nationalization legislations enacted following Arusha Declaration promised payment of "full and fair" compensation to be paid out of consolidated funds. Although the Acts do not contain a definition of the phrase "full and fair" examination of what has actually been paid or agreed to be paid shows that the term means the net value of the assets in case it was the assets which were taken over and the value of the shares if it was the shares that were nationalized. As to the method of assessing the amount of compensation payable the Minister was given discretion to determine the procedure to be adopted. Although it is hard to pin-point exactly what assessment procedure was employed in each case (as each case was being dealt with separately) it is however certain that the notion of full market value was not employed in any of these cases.

The case of Ethiopia is not very different from that examined above. When the Government nationalized various businesses following the 1973 "revolution" appropriate compensation was promised, to be based on the net asset value at the time of nationalization.

The Ugandan nationalization law on the other hand, promised payment of compensation out of future profits within a period of 15 years. The law provided further that assessment of compensation payable was to be done through negotiations, failing which a government valuer will be appointed to value the property concerned on the basis of which compensation will be paid. Although it is not clear what standards were used by the Government valuer certainly they could not use the market value method as there is a constitutional provision saying that in case of nationalization reasonable compensation will be paid to the affected owner.

In brief therefore, like in the first category of nationalizations examined above the countries concerned settled compensation issues through negotiations the outcome of which is payment of what may be termed as "appropriate compensation".

It is probably worth noting that though valuation methods used fell well below that insisted by the investors' home governments, the arrangements were finally accepted by the companies concerned and although some of the nationalization laws provided machinery for arbitration or lodging of appeals against government valuation, these were hardly put into use. What one can learn out of this is the fact that whenever it is possible for the foreign investors to benefit, through new arrangements, some of the "cardinal principles" can easily be compromised.

PART THREE

INDIGENIZATION

(a) NIGERIA

Although Nigeria has taken majority shareholding in major petroleum companies in the country,¹ it is famous for its indigenization programme initiated through the 1972 Nigerian Enterprise Promotion Decree, strengthened and extended in 1976.

The Indigenization programme involves prohibition of aliens from participation in certain categories of enterprises, either wholly or in part, depending on the amount of capital investment in that particular industry. The Nigerian Enterprise Promotion Decree, provides categories of enterprises which should have 100, 60 and 40 percent Nigerian interest.²

The category in which the investment decree requires full Nigerian ownership includes a wide range of small businesses such as furniture manufacturing, passenger bus services, small department stores, supermarkets, etc. While the 60 percent Nigerian ownership applies to businesses such as banking, insurance, brewing, mining, fertilizer manufacturing, plantation agriculture, textile, large department stores and supermarkets, construction industries and other

-
1. In 1970, the government formed the Nigerian National Oil Corporation (NNOC) to take over stake in main oil firms. In 1977 NNOC merged with the Federal Ministry of Petroleum resources and a new body, Nigerian National Petroleum Corporation (NNPC) was created. NNPC increased its stake in oil operations from 55 to 60 percent in July 1979. In August, 1979, it nationalized BP's interests in Nigeria in retaliation of that Company's "Oil Swap" which led to the oil being made available to South Africa. See, Afr.Res.Bull. [1973], p.2755; Africa South of the Sahara [1981-82], p. 770.
 2. See, Nigerian Enterprises Promotion Decree, 1972, as amended by 1976 Decree: Alan Hutchinson, "Tension between Indigenization and Foreign Investment" [Dec.1976], Afr.Development, 1283.

similar medium scale enterprises.

All other enterprises not included in the first and second categories above, are to have a minimum of 40 percent Nigerian participation.³

(b) GHANA

Like Nigeria, Ghana initiated an indigenization programme in order to "capture the commanding heights of the economy". This was done through the Investment Policy Decree of 1975⁴ as subsequently amended by the Investment Policy (Amendment) Decree, 1975.⁵ These two decrees divided the economy of Ghana, for investment purposes, into four broad categories.

The first category deals with sectors which are preserved for the State, such as public utilities and the manufacture of arms and ammunition. The second category delineates areas in which there can be joint venture between the State and foreign ownership whereby the equity participation of the State ranges between 55 percent and 20 percent. In the third category, joint Ghanaian/foreign ownership is required.⁷ In those industries where Ghanaian participation is mandatory, the decree stipulates a date by which participation is to commence.⁸ The fourth category deals with areas where foreign investors can operate freely; enterprises that require high level of technology and foreign skill usually fall under this category.⁹ In addition to

3. Afr.Development, *ibid.*; Afr.South of the Sahara, *supra* note 1, p. 771.

4. Investment Policy Decree N.R.C.D. 329 (1975).

5. Investment Policy Decree S.M.C.D. 6 (1975).

6. Investment Policy Decree N.R.C.D. 329(1975) as amended by Investment Policy (Amendment) Decree S.M.C.D. 6 Part III (1975).

7. *Ibid.*, Part II.

8. *Ibid.*, Part I.

9. *Ibid.*

the categories already mentioned above, there is a fifth category previously designated only for Ghanaian private citizens. This includes enterprises that do not require substantial capital outlay and high level of technology. In this category, aliens are effectively eliminated.¹⁰

As already pointed out earlier, indigenization is not strictly speaking an expropriation measure. However, because of its effect on foreign-owned property, some commentators have categorized it as "creeping expropriation".¹¹ Discussing this problem, Christie concluded that, due to the difficulty and inconvenience of claims based on forced sales, the alien must in most cases take his chance of ultimately obtaining compensation from the State involved.¹² But if he decides to sell to the first buyer, for what he can get, then he should normally be prepared to sacrifice any future claims based on inadequacy of receipts from the sale. Unless the threats to an alien's property are accompanied by threats to his physical security, whereby the rule should be otherwise;¹³ similarly if the State in question flatly declares that it will not pay any compensation for alien-owned property in question.¹⁴ The author states further that, even in situations where there is threat to his physical security or a flat denial on the part of the host State to pay any compensation, the alien should be denied the right to assert a claim based on the insufficiency of the price he has received, unless he can show that he received an obviously inadequate price for his property.¹⁵ In

10. See, Ghana Investment Policy Decree, Part I (1975).

11. See, Note 2, Part I, *supra*.

12. C. Christie, "What Constitutes Taking of Property under International Law", 38 BYBIL (1962).

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

biref, what is suggested is that, the rule regarding "creeping expropriation" involving forced sales, should require the alien not to sell his property at a lower price unless there is threat of his physical security or a denial by the State to pay any compensation. And even then the burden of proof in relation to the existence of such circumstances will be on the alien owner.

If this is accepted as the right position in law, it would follow that the indigenization measures carried out in Nigeria and Ghana would not justify any claim for compensation, because there was neither evidence of threats to physical security nor flat denial by the States concerned regarding payment of compensation. It is true that both the Nigerian Enterprise Promotion Decree, 1972 (as amended by 1976 Decree) and the Ghana Investment Policy Decree, 1975, did not contain provisions regarding payment of compensation. But this does not imply that these two governments flatly ruled out the possibility of payment of compensation, in case it was necessary to take over the enterprises concerned.

It is interesting to note that in both cases, the issue of compensation did not arise because the aliens affected by these indigenization programmes chose to sell their enterprises, and it would appear that they were satisfied with what they got.

CONCLUSION

Like other developing countries, African States have made it abundantly clear that they do not wish to be bound by the traditional norms of international law, regarding payment of compensation, upon nationalization of foreign-owned property. This departure from the classical international law position, which can be attributed to the desire of these new nations to have their economic interests accommodated, gave rise to formulation of new norms. The new norms which were developed include deduction of excess profit from the amount of compensation due, claims that nationalization is revindication for which no compensation is necessary and more importantly, the claim that nationalization should be accompanied by payment of "appropriate compensation".

While the first two norms have been very rarely put into effect, the one requiring payment of appropriate compensation, seems to enjoy the support of most of the Third World countries. This concept was asserted for the first time in 1962 when the United Nations' General Assembly passed a resolution regarding permanent sovereignty over natural resources.¹ The norm was strengthened by subsequent resolutions passed by the United Nations as well as its agencies. Resolution 3117 (XXVII) for example, sought to give each State the right to determine the amount of "possible compensation"² while the resolution on New International Economic order asserted the right of each State to determine the amount of compensation³ and the Charter of Economic Right and

1. See Article 4, GAOR 1803 (XVII) of 1962.

2. See 12(1974) ILM, p. 238; 68 AJIL (1974), 381.

3. 13 (1974) ILM, p. 715.

Duties of State demanded that, "appropriate compensation" be paid in accordance with the domestic laws and regulations of nationalizing states.⁴ Although it is true that these resolutions have no law creating effect⁵ it is however conceded even by those who are against these resolutions, that they are at best *de lege ferenda*.⁶

Regarding valuation of compensation it has been demonstrated that not even in a single case has compensation been assessed on the basis of the nationalized property's market value. The case studies have demonstrated that payment of compensation has in most cases been based on the book value of the assets concerned, lump sum amounts reached through negotiations and sometimes the parties concerned reached agreements to pay compensation in respect of the nationalized properties but left the question of valuations open, to be discussed in future.

While it is possible to ascertain the extent of compensation in cases of lump sum and book value compensation it is extremely hard to do that in those cases where governments promise payment of compensation according to future legislations. Book value methods have been criticised as being unfair methods as they do not take into account contingent assets and liabilities".⁷

The rejection of the book value method by capital exporting nations is understandable as it is in direct conflict with the notion of full compensation represented by "prompt adequate and effective" compensation,

4. 13 (1974) ILM

5. See e.g. Dupuy's decision in *Texaco Arbitration* 35 ILR (1976), 389; 17 (1978), ILM Pg.1

6. *Ibid.*, R.C. White, "A New International Economic Order" 24 (1975) ICLQ 544-7; I. Brownlie *Principles of International Law* (3rd Ed. 1976) 54-45

7. See J.S. McCosker, *Book Value in Nationalized Settlements* in R.B. Lillich,, *Valuation* Vol. II. pg.51.

which has in some cases been interpreted to mean the market value of the property affected by nationalization measures.

Although there is no uniform practice among developing countries regarding the payment of compensation, circumstances and equities involved in new norms advocated by these countries should be assessed by the international community as a whole and applied wherever possible. This is believed to be important since it will be futile to cling on the monolithic norms such as full compensation as it is not only difficult to establish that it has at any time been accepted as a rule of international law but also because it is now obvious that it is unacceptable to a large majority of States.

Regarding the question of foreign investment in general, this study has shown that investment protection policies on the part of capital exporting countries (these include suspension of bilateral assistance, withdrawal of support or non-support of multilateral loans) have not been effective as bilateral treaties in deterring nationalization or protecting alien investments. It has also been demonstrated that foreign aid sanctions against States taking alien investments without prompt, adequate and effective compensation have been generally counterproductive. Although the investment guarantees provided by most of the developing countries are of little legal effect, they are nevertheless helpful to the investors, in that they give the general direction regarding investment policy in a particular country.

While some foreign investors may have decided to move their capital and put it to use in a country or region providing more favourable investment climate (which includes less instances of

nationalizations) this study has demonstrated that some alien investors are still capable of satisfactorily using their capital in an atmosphere of economic nationalism. This is even more so if they are assured of some sort of monopoly and smooth operation through joint ventures with the State-owned companies as well as technical and management consultancy.

SELECTED BIBLIOGRAPHY

- Akinsanya, A.A. *The Expropriation of Multinational Property in The Third World*, New York, Praeger, 1980.
-
- "Permanent Sovereignty over Natural Resources and the future of Private Foreign Investments in The Third World", 18 (1978), *Indian J.Int'l. L.*, pp. 175-86.
-
- "Host Governments' Responses to Foreign Economic Control: The Experience of Selected African Countries", 30 (1980), *ICLQ*, pp. 769-90.
-
- Economic Independence and Indigenisation of Private Foreign Investments: The Experience of Nigeria and Ghana* (Columbia, S.C.; Institute of International Studies, University of South Carolina, 1981).
-
- "Indigenisation or Nationalisation of Private Foreign Investments: Alternative Strategies for dealing with transnational corporations in member-States of ECOWAS" in *Development Planning Priorities and Strategies for the 1980s in the ECOWAS*, Ibadan: Heinman.
- Akinwamu, A.M. "A Plea for the Harmonization of African Investment Laws", 19 (1975), *JAL.*, pp. 134-53.
- Alexandrowicz, C.H. *The Law Making Function of the Specialized Agencies of the United Nations*, London, 1973.
- Amerasinghe, C.F. *State Responsibility for Injuries to Aliens*, Oxford: Clarendon Press, 1967.
-
- "Choice of Law in Concession Contracts", 58 (1964), *AMJIL*.
- Amin, S. "Underdevelopment and Dependence in Black Africa - Origins and contemporary forms", 10 (1972), *JMAS*, pp. 503-24.
- Armstrong, "The Future of Mining Investment in Africa", 10 (1976), *Afr.Sev.*, p. 581.
- Anand, R.P. "The Role of the 'New' Asian Countries in the Present International Order", 56 (1962), *AMJIL* 384.
- Asante, S.K.B. "International Transaction and National Development Goals", 10, *Review of Ghana Law* (1978).

-
- "Stability of Contractual Relationship in Transnational Investment Process", 28 (1979), ICLQ, pp. 401-23.
-
- "Restructuring Transnational Mineral Agreements", 73 (1979), AMJIL, p. 334.
- Baade, H.W. "Indonesian Nationalization Measures before Foreign Courts: A Reply", 54 (1960), AMJIL, p. 801.
- Babatunde, T.D. *Capital Accumulation and Technology Transfer: A Comparative Analysis of Nigerian Manufacturing Industries*, New York, Praeger, 1973.
- Balasubramanyan, V.N. *International Transfer of Technology to India*, New York, Praeger, 1973.
- Barnet, R. and Muller, R. *Global Reach: The Power of the Multi-national Corporations*, New York, Simon and Sebuster, 1974.
- Barran, P. *The Political Economy of Growth*, New York, 1957.
- Bergerol, J. "Industry: Nothing Attracts like Success", 7 Afr.Dev. (Nov. 1973).
- Bernstein, H. *Underdevelopment and Development*, Penguin Books, 1973.
- Bishop, W.J.R. *International Law - cases and materials*, Boston: Little Brown, 1962.
- Blankenheimer, B. "The Foreign Investment Climate in Nigeria", 10, Va.J.Int'l.L., 589.
- Boker-Szegó, H. *New States and International Law*, Budapest, 1970.
- Bonte, P. "Multinational companies and national development Mifrema and Mauritania" [1975], Rev.Afr.Pol.Econ., p. 93.
- Borchard, E.M. *Diplomatic Protection of Citizens Abroad*, New York, 1915.
- Bostock, M. and Harvey, C. (eds) *Economic Independence and Zambian Copper: A Case Study of Foreign Investment*, New York, Praeger, 1973.
- Bradley, A.W. "Legal Aspects of the Nationalization in Tanzania" [1967], EALJ, pp. 149-76.
- Bradley, D.G. "Managing Against Expropriations: An Analysis of Risk Factors" [1977], Harvard Bus.Rev., pp. 75-83.
- Breton, A. "The Economics of Nationalism", 74 (1964), Journal of Political Economy, pp. 376-86.

- Briggs, H.W. *Law of Nations*, New York, Appleton-Century-Crofts, 1952.
- Brown, R. "Choice of Law Provisions in Concession and Related Contracts, 39 (1976), MLR, 625.
- Brownlie, I. *International Law and Use of Force by States* London: Oxford University Press, 1963.
- _____ *Principles of International Law*, Third Edition, Clarendon, 1979.
- Burnett, R. "Negotiation of International Agreement in the field of commerce and investment - Problems of Relevance to Newly-Independent States", 9 (1975), JWTL, pp. 231-65.
- Caporso, J.A. "Dependency Theory: Continuities and Discontinuities in Development Studies", 34 (1980), Int.Org., 4.
- Castanada, J. *The Legal Effect of United Nations' Resolutions*, New York, 1968.
- _____ "The Underdeveloped Nations and the Development of International Law", 15 (1961), Int.Org., 38.
- Chenery, H.B. "Optional Patterns of Growth and Aid: The Case Study of Pakistan", [1966], Pakistan Development Rev., 209.
- Cheng, B. *General Principles of Law*, London, Stevens, 1953.
- _____ "The Rationale for Compensation for Expropriation". 44 (1948), Grotius Trans., 267.
- _____ "The Anglo-Iranian Oil Dispute Case" [1951], World Affairs, 387.
- Christie, G.C. "What Constitutes a Taking of Property Under International Law?", 38 BYBIL (1962), pp. 307-38.
- Chudson, W. "Africa and the Multinational Enterprise" in *Nationalism and the Multinational Enterprise* (H.R. Hahlo, J. Smith and R. Wright, eds), 1973.
- Cliff, L. "Arusha Declaration Challenge to Tanzanians", 3 (1967), EALJ, pp. 3-9.
- Coleman, F. *The Northern Rhodesia Copperbelt 1899-1962*, Manchester University Press, 1971.
- Creel, L.J. "Mexicanization: A Case of Creeping Expropriation", 22 (1968), S.W.L.J., 281.
- Cronje, S., Ling, M. and Cronje, G. *Lonrho Potrait of a Multinational*, Penguin Books, 1976.

- Curry, R. and Rothchild, "Economic Bargaining Between African Governments and MNCs", 12 (1974), JMAS, pp. 173-89.
- Dawson, J.P. *Unjust Enrichment*, Boston, Little Brown, 1952.
- Dawson, F.G. and Head, I.G. *International Law National Tribunals and Rights of Aliens*, Syracuse University Press, 1971.
- Doman, N.R. "Postwar Nationalization of Foreign Property in Europe", 48 (1948), Columbia L. Rev., p. 1125.
- Drucker, A. "Compensation for Nationalized Property: The British Practice", 49 (1955), AMJIL, 477.
- Dunn, F.C. "International Law and Private Property Rights", 28 (1928), Columbia L.Rev., 166.
- Egloton, E. *The Responsibility of States in International Law*, New York, 1928.
- Emmanuel, A, *Unequal Exchange: A Study of Imperialism of Trade*, New Left Books, 1972.
- Ewing, A.F. "Prospects of Economic Integration in Africa", 5 (1967), JMAS, pp. 53-67.
- Eze, O.C. *The Legal Status of Foreign Investments in East African Common Market*, Sijthof, 1977.
- Faber, M.L.O. and Potter, J.G., *Towards Economic Independence*, Cambridge University Press, 1971.
- Fachiri, A.P. "Expropriation and International Law" [1925], BYBIL, pp. 159-71.
- Fatauros, A.A. "International Law and Internationalized Contract", 74 (1980), AMJIL, pp.134-41.
- _____ "Towards more Diplomatic Protection of Private Claims: Aris Gloves, Barcelona Traction and Beyond", 65 (1971), ASIL (Prods.) 316; 65 (1971), AMJIL, 333.
- _____ *Government Guarantees to Foreign Investors*, New York, 1962.
- _____ "The Quest for Legal Security for Foreign Investments - Latest Developments", 17 Rutgers Law Review, 257.
- Foighel, I. *Nationalization*, Copenhagen, 1957.
- Fortman, D. *After Mulungushi*, Nairobi, EAPH., 1968.
- Francioni, F. "Compensation for Nationalization of Foreign Property: The Borderland between Law and Equity", 24 (1975), ICLQ, 255.

- Frank, A.G. *Capitalism and Underdevelopment in Latin America*, New York, 1967.
- _____ *Latin America: Underdevelopment or Revolution?*, New York, 1967,
- _____ *Capital Investment in Africa*, Wedenfeld and Nicolson, 1967.
- Friedman, S. *Expropriation in International Law*, London, 1953.
- _____ *Law in Changing Society*, 2nd edn., Penguin Books, 1972.
- Friedman, W.G. *The Changing Structure of International Law*, New York: Columbia University Press, 1964.
- Friedman, W.G. and Pugh, R.C. *Legal Aspect of Foreign Investments*, London, Stevens, 1959.
- Friedman, W.G. and Benguin, J. *Joint International Business Ventures in Developing Countries: Case Study and Analysis of Recent Trends*, New York, 1971.
- Fucham, R. "Economic Dependence and Development of Industry in Zambia", 18 (1980), JMAS, pp. 297-313.
- Garcia-Amador, F.V. "The Proposed new International Economic Order: A new approach to the law governing nationalization and compensation", 12 (1980), Lawyer of Americas.
- _____ *Fourth Report on International Responsibility* [1959], 2 YB Int'l.Comm., U.N. Doc. A[CN4], Ser A/1954.
- Gardner, R.N. "International Measures for the Protection of Foreign Investments [1959], ASIL (Prods), 255.
- Garibaldi, O.M. "The Legal Status of General Assembly Resolutions: some conceptual observations" [1979], ASIL (Prods), 324.
- Ghai, D.P. "Concepts and Strategies of Economic Independence", 11 (1973), JMAS, 37.
- Girvan, N. *Corporate Imperialism: Conflict and expropriation*, Monthly Review Press, 1976.
- _____ "The Question of Compensation: A Third World Perspective", 3 (1972), Vend.J., Trans.-L. 340; In Lillich, R.B., *Valuation of Nationalized Property in International Law*, vol. 3, Virginia, 1972, p. 180.
- Grantz, D.A. "The Marcona Settlement: New forms of negotiations and compensation for foreign-property", 71 (1977), AMJIL, 474.

- Gregory, T. *Ernest Oppenheimer and the Economic Development of South Africa*, Oxford University Press, 1962.
- Greig, D.W. *International Law*, 3rd. edn, London, 1979.
- Guha-Roy, S.N. "Is the Law of Responsibility of State for Injuries to Aliens a Part of International Law?" 55 (1961), AMJIL.
- Hayter, T. *Aid as Imperialism*, Penguin Books, 1971.
- Herz, J.H. "Expropriation of Foreign Property", 35 (1941), AMJIL, pp. 243-63.
- Heiben, A.N. "The Chilean Copper Nationalization: The foundation for the standard of appropriate compensation", 23 (1974) Buffalo Law Rev., 765.
- Huggins, R. *The Development of International Law and the Organs of the United Nations*, London, Oxford University Press, 1963.
- Jessup, P.C. *A Modern Law of Nations*, New York: Macmillan, 1948.
- Kalsi, S.S. "Encouragement of private foreign investment in the developing countries: Provisions in the laws of Kenya", 6 (1972), Int.Lawyer, 599.
- Kamanu, O. "Compensation for Expropriation in the Third World", 10 (1975), Studies in Comparative Int. Development, 3.
- Kanza, T. *Conflict in the Congo*, Penguin Books, 1972.
- Katzarov, K. *The Theory of Nationalisation*, London, Oxford University Press, 1964.
- Kaunda, K.D. *Zambia, Independence and Beyond: The speeches of Kaunda*, London, Nelson, 1966.
- Keatley, P. *The Politics of Partnership*, Penguin Books, 1963.
- Killick, T. "Trends in Development Economics and their Relevancy to Africa", 18 (1980), JMAS, 367-86.
- Kimaro, S.N. "The Growth of Economic Imperialism in Africa", Vol. VI, EAJ (1969).
- Kotecha, K.C. "Comparative Analysis of Nationalization Laws: Objectives and techniques", 8 (1975), Comp. & Int.L., Jour. of Southern Africa, p. 87.
- Kunz, L. "The Mexican Expropriations", 17 (1940), NYULQ, 327.
- Kuusi, J. *The Host States and Transnational Corporations: An Analysis of Legal Relationships*, Teakfield, 1979.

- Lanning, G. and Mueller, M. *Africa Undermined: Mining Companies and Underdevelopment of Africa*, Penguin Books, 1979.
- Lauterpacht, H. "The Contemporary Practice of the United Kingdom in the Field of International Law", 6 (1968), ICLQ, 327.
- Leonard, H.J. *MNCs and Politics in Developing Countries*, Boulder, Westview, 1979.
- Leys, C. *Underdevelopment in Kenya*, University of California Press, 1974.
- Lillich, R.B. "The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack", 69 (1975), AMJIL, 539.
- _____ *The Protection of Foreign Investments: Six Procedural Studies*, Syracuse, New York, 1965.
- _____ *Valuation of Nationalized Property in International Law* (Volumes I, II & III), Charlottesville, University of Virginia.
- Lillich, R.B. and Weston, B.H. *International Claims: Their Settlement by Lump-sum Agreements*, Charlottesville, Va. University Press of Virginia, 1975.
- Lubar, C.G. "Government Protection of Foreign Investments in East Africa", 7 EALJ (1971), pp. 108-27.
- McLaughlin, R.U. *Foreign Investments and Development in Liberia*, Praeger, New York, 1966.
- Mann, F.A. "Outline of a History of Expropriation", 75 (1959), LQR, pp. 188-219.
- _____ "State Contracts and State Responsibility", 54 (1960), 574.
- Martin, A. *Minding Their Own Business: Zambia's Struggle Against Western Control*. Penguin Books, 1972.
- Martin, R. "The Use of State Power to Overcome Underdevelopment", 18 (1980), JMAS, pp. 315-25.
- Meagher, *An International Redistribution of Wealth and Power*, New York, 1979.
- Mehren, R.B. and Kourides, P.N. "International Arbitration between States and Foreign Private Parties: The Libyan Nationalization Cases", 75 (1981), AMJIL, 477.
- Michelman, F.I. "Property Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law", 80 Harv.L.J. (1967), 1165.

- Mikessell, R. *Foreign Investments in Copper Mining in Papua-New Guinea and Peru*, New York, 1977.
- Mittelman, J.H. "Underdevelopment and Nationalization: Banking in Tanzania", 16 (1978), JMAS, pp. 597-617.
- Morran, T.H. *The Politics of Dependence: Copper in Chile*,
- Muller, M.H. "Compensation for Nationalization: A North-South Dialogue", 19 (1981), Columbia, J.Trans.Law.
- Mummary, D.R. "The Content of the Rule to Exhaust Local Judicial Remedies", 58 (1964), AMJIL, 401.
- Murphy, C. "Economic Duress and Unequal Treaties", 11 Virginia Journal of Int. Law, p. 51.
- Nabudere, D.W. *The Political Economy of Imperialism*, London, 1977.
- National Christian Council, *Who Controls Industries in Kenya?*, Nairobi, 1968.
- Ndulo, M. "The Nationalization of the Zambian Copper Industry", 6 (1974), Zambian Law Journal.
- Niki, T. "Legal Aspect of Foreign Investments in Nigeria", 18 (1978), Indian J.Int.L., pp. 175-86.
- Nkrumah, K. *Neo-Colonialism The Last Stage of Imperialism*, 1965.
- _____ *The Challenge of the Congo*, Nelson, 1967.
- Nwogugu, E.L. *The Legal Problems of Foreign Investment in Developing Countries*, Manchester, 1965.
- Nyerere, J.K. *Freedom and Socialism*, Oxford University Press, 1968.
- _____ *Arusha Declaration: Ten Years After*, Government Printer, Dar-es-Salaam, 1977.
- O'Brien, C.C. *To Katanga and Back*, Hutchinson, 1962.
- O'Connell, D.P. *The Law of State Succession*, Cambridge University Press, 1956.
- _____ *International Law* (Vol.2, 2nd Ed.), London, 1970.
- O'Keefe, P.J. "United Nations and Permanent Sovereignty over Natural Resources", 8 (1974), JWTL, 239.
- Okeye, F.M. *International Law and the New African States*, London, Sweet and Maxwell, 1972 (Law in Africa Series).

- Orego-Vicuna, F. "The International Regulation of Valuation Standards and Processes: Re-examination of Third World Prospective", in Lillich, R.B., *Valuation of Nationalized Property in International Law*, Vol. 3, Virginia, 1975.
- Rado, A. "Czechoslovakia Nationalization Decrees: Some International Aspects", 41 (1947), AMJIL, pp. 795-806.
- Reuber, G. *Private Foreign Investment in Development*, Clarendon Press, 1973.
- Richards, L. "The Content of Foreign Aid: Modern Imperialism", *The Review of Radical Political Economics*, No. 9 (1977), pp. 43-72.
- Rodman, L.L. "The Nationalization of Zaire's Copper from Union Miniere to Gecamines", 24, *Afr.Today* (1978), pp. 25-47.
- Rohwer, J.A. "Nationalization: International Minimum Standard - Chilean Excess Profit Deduction", 14 *Harvard Int. L.J.*, 383.
- Rood, L.L. "Compensation for Takeovers in Africa", 11 (1976-77), *JIL & E.*, 521.
- Root, E. "The Basis of Protection of Citizens Residing Abroad", (1910), *ASIL (Proc.)*, 21.
- Rweyemamu, J.S. *Underdevelopment and Industrialization in Tanzania*, Oxford University Press, Nairobi, 1973.
- Seidl-Hohenveldern, I. "The Social Function of Property in Present-day International Law". In F. Kalshovel *et. al.*, *Essays on the Development of the International Legal Order*, Sijthoff, 1980.
-
- "Chilean Copper Nationalization before the German Courts", 69 (1975), AMJIL, 110.
- Schwalzenberger, G. *Foreign Investment and International Law*, London, 1969.
- Schwebel, S. "The Story of the U.N's Declaration on Permanent Sovereignty over Natural Resources", 49 (1963), *ABAJ*, 463.
-
- "The effect of Resolution of the United Nations on Customary International Law", 73 (1979), *ASIL (Proc.)*, 301.
- Shaw, T.M. *Dependency and Development: The Development of Foreign Policy in Zambia*, Ohio, 1976.
- Shea, D. *The Calvo Clause a Problem of Inter-American International Law and Diplomacy*, 1955.

- Shivji, I.G. *Class Struggle in Tanzania*, Monthly Review Press, New York, 1976.
- Simpson, A. *The Seven Sisters*, New York, 1975.
- Sinha, S.P. "Perspective of the Newly-Independent States On the Binding Quality of International Law" (1965), ICLQ, 1.
- Sornarajah, M. "Compensation for Expropriation: The Emergence of New Standards", 13 (1979), JWTL.
- _____ "The Myth of International Contract Law", 15 (1981), JWTL, pp. 181-217.
- Starke, J.G. *Introduction to International Law*, 8th Ed., London, 1977.
- Steiner, H.J. and Vegts, D.F. *Transnational Legal Problems*, 2nd Ed., 1975.
- Taylor-Ostrander, F. "The Role of Foreign Private Capital in Africa" in J.A. Davis and J.K. Baker (eds), *Southern Africa in Transition*, Praeger, New York, 1966.
- Temu, P. "Nationalization in Tanzania" [1967] EALJ.
- Umuzorike, U.O. "Nationalization of Foreign Owned Property and Economic Self-Determination", 6 (1970), EALJ, pp. 79-99.
- Vegts, D.F. "Coercion and Foreign Investment Rearrangement", 72 (1978), AMJIL, 28.
- Vernon, R. *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises*, Penguin Books, 1971.
- Walde, T.W. "Review of Transnational Agreements: Contractual Flexibility in Natural Resources Development", 10 (1978), Lawyer of Americas, pp. 265-298.
- White, G. *Nationalization of Foreign Property*, London, 1961.
- _____ "A New International Economic Order?", 16 (1976), Va.J.Int'l.Law, 223.
- White, R.C.A. "Expropriation of the Libyan Oil Concessions: Two conflicting international arbitrations", 30 (1981), ICLQ, pp. 1-19.
- Williams, J.F. "International Law and the Property of Aliens" (1928), BYBIL, pp. 1-4.
- Windstrand, C. (ed.) *Multinational Firms in Africa*, Uppsala, 1975.

- Wolfe, A. "Capital and the Congo", in A. Davis and J. Baker (eds.), *Southern Africa in Transition*, Praeger, New York, 1966.
- Wolfe, R. "The Nationalization of Zaire's Copper from Union Miniere to GECAMINES", 25 (1978), *Africa Today*, pp. 425-47.
- Wooldridge, F. and Sharina, V., "The Expropriation of the Property of Ugandan Asians, 14 (1974), *Indian Jour.Int. Law*, p. 61.
- Wortley, B.A. *Expropriation in Public International Law*, Cambridge University Press, 1959.
- Yelpaala, K. "Costs and Benfits from Foreign Direct Investment: A Study of Ghana", Vol. II (1980), *New York Journal of Int. and Comp. Law*.