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EXPROPRIATION OF FOREIGN PROPERTY IN INTERNATIONAL LAW

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by

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To My Wife, Fatemeh

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Table of Abbreviations

A.B.A.J.	American Bar Association Journal
A.J.C.L.	American Journal of Comparative Law
A.J.I.L.	American Journal of International Law
A.L.I.	American Law Institute
A.S.E.A.N.	Association of South-East Asian Nations
B.F.S.P.	British and Foreign State Papers
B.Y.I.L.	British Yearbook of International Law
C.L.J.	Cambridge Law Journal
C.L.P.	Current Law Problems
Col.J.I.L.	Columbia Journal of International Law
Col.J.T.L.	Columbia Journal of Transnational Law
Cornell L.Q.	Cornell Law Quarterly
E.C.H.Rep.	European Court of Human Rights Reports
East A.L.J.	East African Law Journal
Encycl.P.I.L.	Encyclopedia of Public International Law
F.Y.I.L.	Finnish Yearbook of International Law
Ford.L.R.	Fordham Law Review
H.R.L.J.	Human Rights Law Journal
Hague Recueil	Hague Recueil de Cours
I.C.C.	International Chamber of Commerc
I.C.J.Rep.	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.C.S.I.D. Rev-F.I.L.J.	International Centre for the settlement of International Disputes Review - Foreign Investment Law Journal
I.L.A.	International Law Association
I.L.C.	International Law Commission
I.L.C.	International Law Commission
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
Ind.J.I.L.	Indian Journal of International Law
Int.Lawyer	International Lawyer
Iran-US C.T.R.	Iran-US Claims Tribunal Reports
J.A.C.L.	Journal of Armed Conflict Law
J.E.N.R.L.	Journal of Energy and Natural Resources Law
J.Int.Arb.	Journal of International Arbitration
J.Int.L.& Eco.	Journal of International Law and Economic
J.P.L.	Journal of Public Law
J.Pol.Phil.	Journal of Political Philosophy
J.W.T.L.	Journal of World Trade Law
L.& C.P.	Law and Contemporary problems
L.& P.I.B.	Law and Policy in International Business
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review

N.A.F.T.A.	North American Free Trade Agreement
N.I.L.R.	Netherlands International Law Review
N.Y.I.L.	Netherlands Yearbook of International Law
N.Y.U.J.I.L.P.	New York University Journal of International Law and Politics
O.E.C.D.	Organisation for Economic Co-operation and Development
O.I.C.	Organisation of the Islamic Conference
P.U.J.I.E.L.	Pennsylvania University International Economic Law Journal
R.I.A.A.	(United Nations) Reports of International Arbitral Awards
S.A.C.I.L.J.	South African Comparative International Law Journal
S.A.L.J.	South African Law Journal
Tex.L.R.	Texas Law Review
T.N.Cs.	Transnational Corporations
UN	United Nations
U.N.T.S.	United Nations Treaties Series
Virg.J.I.L.	Virginia Journal of International Law
Y.B.I.L.C.	Yearbook of the International Law Commission
Y.B.W.A.	Yearbook of World affairs

Table of Cases (National and International)

Table of Cases (Iran-US Claims Tribunal)

INTRODUCTION

1. General Introduction

Expropriation of foreign property is not a new phenomenon. However, since World War II the issue has gained a new lease of life. With the decolonisation and independence of numerous States of Asia and Africa, the controversy over the rules relating to this branch of international law has intensified. There is a lot of disagreement as to the amount of compensation that must be paid to the affected person. The attempts at codification of the law on this issue by several private bodies,[1] and under the auspices of the League of Nations, as well as the United Nations indicate the importance attached to the subject under discussion.

The main parties in the controversy are the capital exporting States which invest in Latin American, erstwhile socialist, Asian and African countries (referred to as developing States). The latter States, in pursuance of their economic programmes, resort to the nationalisation of those investments. Thus, the post-World War II period witnessed dramatic nationalisations and other forms of economic restructuring in many countries, with widely differing ideological, political and economic systems, throughout the world, even Western European countries, such as Britain and France. This nationalisation of foreign property reached its peak in the mid-1970s.

The problem came to the fore with the Russian nationalisations of foreign property in the early 1920s, and was followed by the Mexican expropriation of foreign-oil interests in 1938. Since then, it seems that the positions of the

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[1] Private bodies, such as the Institute of International Law, Harvard Law School and the International Law Association.

contesting parties have not changed or improved substantially. Therefore, in the case of Mexican measures, in a celebrated exchange between the United States and Mexican Governments, two entirely different views on the principles governing the treatment of foreign property were articulated.

Six decades later, the Government of Iran, before the Iran-United States Claims Tribunal, has substantially taken a similar position to that of the Mexican Government, and the Government of the United States has also maintained the stance that it took in the Mexican expropriation. This indicates that since then, the parties to the dispute have maintained their positions.

The developing States have sought to assert their views in international forums in which they enjoy a numerical majority. They have used that majority to pass resolutions which incorporate their views on expropriations. Thus, during the 1960s and 1970s the United Nations General Assembly was the main forum for their efforts. They have also taken positions during disputes involving foreign nationalisations indicating that they are not prepared to accept rules which have been formulated without their active participation.

The capital exporting States, however, have shown a rigid adherence to the rules governing expropriation of foreign property developed in the early twentieth century (referred to as the traditional doctrine). They have sought to reiterate their position in the disputes involving foreign nationalisations, and in bilateral investment treaties.[2]

Under the traditional doctrine, the expropriation of foreign property is governed by international law, and must be for a public purpose, non-discriminatory in form, effected with due process of law and accompanied by prompt, adequate and effective compensation. The doctrine does not distinguish between expropriation and nationalisation in the application of the above rules.

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[2] Before the traditional principles of international law moved away from the illegality of nationalisations of foreign property towards the recognition of their legality, the capital exporting States' strategy was to use domestic courts to pursue nationalised property which was brought into the jurisdiction of these courts. For an excellent account of the issue, see M. Sornarajah, *The Pursuit of Nationalized Property*, Martinus Nijhoff, Dordrecht (1986).

Moreover, expropriation is not limited to direct taking of property, but also to other forms of State intervention, which fall short of direct taking, but which are subject to the law relating to the expropriation of foreign property.

In responding to the traditional rules, however, the developing States have asserted the following basic principles:

1. The expropriation of foreign property is governed by the national law of the expropriating State.

2. The right to nationalise foreign property is not subject beyond the duty to pay (appropriate) compensation having regard to all the circumstances.

3. In the case of large-scale nationalisations, the nationalising State's ability to pay compensation should be taken into consideration.

Despite the above conflict between the two parties over the rules governing the expropriation of foreign property, they have in effect derogated from their positions. In settling the compensation disputes, the capital exporting States have relinquished their stance on full compensation, and agreed to amounts well below that standard. On their part, the developing States, through adoption of bilateral investment treaties, have accepted the traditional concepts and standards in this respect.

Current global economic circumstances and trends are favourable to foreign investment. However, these circumstances and trends may change. "Dormant economic nationalism may be aroused if the dominance of the foreign investor within an economy is seen as established."[3] Then, expropriation may once more come into vogue. Thus, expropriation, and particularly compensation, could become hotly debated issues in the future.

Apart from this argument which is hard to deny, the contemporary international tribunal practice, viz., the Iran-United States Claims Tribunal, continues to deal with the issue under consideration. In its recent awards in dual

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[3] M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press (1994) at 281.

national cases, the Tribunal, for the first time in the history of the subject, has recognised the impact of dual nationality status on the quantum of compensation. This finding itself justifies a study of the subject which takes the new developments into account.

2. Terminology

Although the expropriation of foreign property is not a new phenomenon, the terminology in this respect is by no means settled.[4] There are various terms used by authors in this field, such as 'expropriation', 'nationalisation' 'socialisation' 'confiscation', 'taking', 'wealth deprivation' and 'requisition'.

Up to the end of World War II, writers often called all types of takings 'expropriations'. Wortley, for instance, defines "nationalisation" as an "expropriation in pursuance of some national political programme."[5] Some publicists distinguished between expropriations and confiscations. To them, expropriations are any takings accompanied by payment of an adequate compensation, whereas confiscations are takings without indemnity.[6] According to Brownlie, "if compensation is not provided, or the taking is regarded as unlawful, then the taking is sometimes described as confiscation."[7] Some authors, however, wish to reserve the term 'confiscation' to forfeiture of the property of a convicted criminal, or forfeiture of property smuggled into the State.[8] However, in modern law, the terms illegal or unlawful expropriations have replaced the word confiscation.

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4 I. Brownlie, *Principles of Public International Law* (5th ed.), Clarendon Press, Oxford (1998) 534.

5 B. A. Wortley, *Expropriation in Public International Law*, University Press, Cambridge (1959) at 36.

6 Note that the issue of whether the payment of adequate compensation is a condition of the legality of an expropriation will be considered in chapter 2 of this thesis.

7 Brownlie, op. cit., at 534.

8 S. Friedman, *Expropriation in International Law*, Stevens & Sons Ltd., London (1953) at 1. It has been stated that in the United Nations debates on permanent sovereignty over natural resources, Resolution 626 (VII), the terms 'expropriation', 'nationalisation', and 'confiscation' have been interchangeably used to denote a taking of private property under government authority without adequate compensation. J. N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources", 50 A.J.I.L. (1956) 854 at 854 n. 1.

Moreover, Friedman distinguished between 'nationalisation' and 'socialisation', asserting that the former is a measure of an "economic character and permitting the reorganisation of certain forms of property within a given sector of economy in order to ensure their survival amid new conditions of production." He further noted that the object of "socialization" is "to secure the benefits of technical reorganization to new social classes acceding to power."[9] However, for Wortley, this distinction is of no avail, and he observes that "this distinction seems to be without much value in international law, because the term 'socialisation' seems to refer more directly to communist or fascist theory than does the term 'nationalisation.'"[10] Similarly, one commentator considers 'nationalisation' and 'socialisation' identical.[11]

Some scholars use the term 'taking' as a neutral term embracing all types of acquiring of foreign property.[12] It was also used in the Harvard Draft Convention on State Responsibility,[13] the ALI Third Restatement,[14] and the Iran-United States Claims Tribunal's awards. However, Garcia-Amador took a critical view of the term 'taking'. While accepting that it has a wider meaning than that of expropriation, he states that when the term 'taking' is translated into other languages, it may be inexact.[15]

Other authors, such as Weston, prefer the term 'wealth deprivation'.[16] When a State deprives an owner of his property the State may not keep the

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9 Friedman, op. cit., at 6.

10 Wortley, op. cit., at 37.

11 Brownlie, op. cit., at 535.

12 I. Seidl-Hohenveldern, *International Economic Law* (2nd ed.), Martinus Nijhoff, Dordrecht (1992) at 139.

13 L. B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of aliens", 55 A.J.I.L. (1961) 560. See also M. Domke, "Foreign Nationalizations, Some Aspects of Contemporary International Law", ibid., 585 at 588.

14 American Law Institute, Restatement of the Law (Third) *Foreign Relations Law of the United States* (1987), Section 712, 196.

15 F. V. Garcia-Amador, Fourth Report to the International Law Commission on the subject of the "Responsibility of State for Injuries caused in its territory to the Persons or Property of Aliens", *reprinted in* 2 Y.B.I.L.C. (1959) 1 at 11, para. 39.

16 B. H. Weston, "The International Economic Order and the Deprivation of Foreign Proprietary Wealth: Reflections upon the Contemporary International Law Debate", in R. B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, Charlottesville, University Press of Virginia, (1983) 89 at 130 n. 29. See also F. G. Dawson and B. H. Weston,

property concerned. In the case of an agrarian reform, the State usually distributes the lands to landless farmers. Weston maintains that there may be wealth deprivation without any taking by the State. For example, a group of persons, often aliens, may be obliged to sell their property to another group of persons - i.e. nationals (referred to as indigenisation). This occurred in many African countries under the label of "Africanization."[17] Referring to the definition of the terms 'wealth deprivation' suggested by Weigel and Weston,[18] Piran observes that it "can easily cover taxation and other forms of legal wealth deprivations which normally are not considered to come under the concept of expropriation as understood commonly."[19] Additionally, Weston's terminology - wealth deprivation - has been used by the Iran-United States Claims Tribunal only on one occasion.[20]

The term 'requisition' has been defined as seizure of private property (movable and generally food and consumer goods[21]) by a State in an emergency situation justified in the public interest.[22] Thus, according to Fawcett:

> The state may ... take possession of private property for the time being, without or with payment for its use, and this may be called *requisition*. For example, the requisition of ships for war service (emphasis added).[23]

Before leaving the definition of the subject, it is worth a brief look at the issue of whether 'nationalisation' has special characteristics which distinguish it from other forms of State interference with private property. There is no

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"Prompt, Adequate and Effective: A Universal Standard of Compensation?", 30 Ford.L.R. (1961-62) 727.

17 Seidl-Hohenveldern, op. cit., at 138-139.

18 For the definition of the term, see H. Piran, *Nationalization of Foreign Property in International Law and Iran-United States Tribunal* (unpublished PhD thesis, University of Liverpool, 1992) at 8.

19 Ibid., at 9.

20 *Tippetts, Abbett, McCarthy, Stratton v. The Islamic Republic of Iran*, Award No. 141-7-2 (29 June, 1984), *reprinted in* 6 Iran-United States Claims Tribunal Reports (hereinafter Iran-U.S. C.T.R.) (Grotius Publications, Cambridge) 219 at 224-225.

21 K. Katzarov, *Theory of Nationalisation*, Martinus Nijhoff, the Hague (1964) at 146.

22 Wortley, op. cit., at 29.

23 J. E. S. Fawcett, "Some Foreign Effects of Nationalization of Property", 27 B.Y.I.L. (1950) 355 at 356.

consensus among authorities on the issue. Thus, juristic opinions are divided into two main groups. The first group consists of scholars such as Foighel,[24] Katzarov,[25] Francioni,[26] Piran,[27] Brownlie[28] and White who see nationalisation as a hopeful trend. For example, having enumerated the common features between expropriation and nationalisation measures, the latter jurist comments:

> on the international level the presence of these common features does not entail the automatic application of rules relating to expropriation to a measure of nationalisation.[29]

In the same vein, Amerasinghe[30] points out that there are three elements which are often mentioned for justifying the differentiation of nationalisation from other forms of expropriation, namely: economic motivation, public ownership and exploitation for the public benefit. While nationalisation may be a species of expropriation, the elements which form its composition are of enough significance to require that it be distinguished from expropriation in view of the requirements of legality.

In contrast, members of the second group are more pessimistic, either denying that the term 'nationalisation' has any place in the language of international law, or expressing doubts as to whether it does. Thus, Wortley states that "Nationalization differs in its scope and extent rather than in its

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[24] I. Foighel, *Nationalization: A study in the Protection of Alien Property in International Law,* Stevens & Sons Ltd., Copenhagen (1957) at 17-19.

[25] Katzarov, op. cit., at 142-144 and 335.

[26] F. Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity", 24 I.C.L.Q. (1975) 255 at 258.

[27] Piran, op. cit., at 66:
"These factors compel one to submit that there are enough reasons to believe that nationalization has a character distinct from other forms of expropriations both in structure and in its juridical nature."

[28] Brownlie, op. cit., at 534-535:
"Expropriation of one or more major natural resources as part of a general programme of social and economic reform is described as nationalisation."

[29] G. White, *Nationalisation of Foreign Property,* Stevens & Sons Ltd., London (1961) at 50.

[30] C. F. Amerasinghe, *State Responsibility for Injuries to Aliens*, Clarendon Press, Oxford (1967) at 123.

juridical nature from other types of expropriation."[31] O'Connell takes a similar view.[32]

Likewise, to some, such as Doman[33] and Fawcett,[34] expropriation is a form of nationalisation, while others consider nationalisation as a special form, not distinct from expropriation.[35]

In view of the foregoing, it is fair to say that while 'requisition' is often used in a particular case (e.g. when a State intervenes with private property in an emergency situation) 'confiscation' is virtually no longer used in modern law. Moreover, due to the problems indicated above, the terms 'taking' and 'wealth deprivation' may not be appropriate for the present purposes. The present author does not consider 'socialisation' and 'nationalisation' identical. It seems that socialisation is based on Marxist ideology. Since the collapse of Communism in 1990, the term socialisation has not been welcomed by even the erstwhile Communist States. The term nationalisation also may not be used as a suitable word in this respect, because it would include only a measure of expropriation which is a part of a general economic reform or is planned to achieve greater social justice.[36] In such circumstances, 'expropriation' is still the most appropriate term to describe any deprivation by State organs of a right of property, or transfer of the power of control. While nationalisation is the main species of expropriation it is also a separate concept in international law.[37]

The present study is concerned with the expropriation of private, not public, foreign property. Similarly, we confine ourselves only to expropriation in

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31 Wortley, op. cit., at 36.

32 D. P. O'Connell, *International Law* (2nd ed.), Vol. II, Stevens & Sons Ltd., London (1970) at 769.

33 N. R. Doman, "Post-war Nationalization of Foreign Property in Europe", 48 Col.L.R. (1948) 1125 at 1125.

34 Fawcett, op. cit., at 356.

35 Friedman, op. cit., at 12.

36 For the definition of nationalisation, see, e.g., the definition suggested by the Institute de Droit International in 1952 (cited by Domke, op. cit., at 587-588); Katzarov, op. cit., at 160, and Francioni, op. cit., at 257.

37 Note that in this thesis the term expropriation refers to a general concept which covers all forms of State interference with foreign property, including large-scale expropriation, namely nationalisation, and expropriation of isolated items of property.

peace time; intervention with foreign property during war time does not form part of our thesis.

In the light of these developments and controversies, the principal aim of this thesis is not to propose any simple solution to the problem of either expropriation in general or compensation in particular. It is rather to suggest the development of a conceptual framework within which these issues may be re-evaluated and out of which a more clearly defined and positive set of structures may be hoped to emerge. In this regard, a number of helpful developments will be emphasised. These include the modern jurisprudence of the Iran-US Claims Tribunal which, for all its difficulties, has made significant advances, e.g., in the area of 'indirect expropriation' and the problem of claims by dual nationals. Finally, is the eternally problematic area of standards of compensation. The flexible concept of 'appropriate compensation' will be examined as an area of potentially very significant promise.

CHAPTER ONE

THE DEVELOPMENT OF CONCEPTS AND PROCEDURES IN EXPROPRIATION

1. Expropriation Cases Prior to World War I

Referring to the fact that legal rules relating to the expropriation of foreign property have been determined by the economic, political, and social processes of the time, Dawson and Weston described the status of State interference with private property rights before World War I as follows:

> From about the mid- nineteenth century to World War I, the international scene, dominated by European cultures, was characterized by impressive material transformations ... in respect of which the State played a comparatively negative role, protecting a regime of *laissez faire* and assuring the 'sanctity' of private wealth.[1]

The period from the middle of the nineteenth century to 1914 displayed certain economic characteristics, of which its outstanding feature was an enormous expansion of overseas investment by British and American investors.[2]

Therefore, State interference with private property rights during the nineteenth century "was confined principally to the *regulation* of private wealth." Expropriation of foreign property took place rarely, and only for limited purposes. These measures were never the major national policy, but were confined to *limited* deprivations involving the expropriation of isolated items of property.[3]

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[1] F. G. Dawson and B. H. Weston, "Prompt, Adequate and Effective: A Universal Standard of Compensation?", 30 Ford.L.R. (1961-62) 727 at 728-729.

[2] B. A. Wortley, *Expropriation in Public International Law*, University Press, Cambridge (1959) at 58.

[3] Dawson and Weston, op. cit., at 729.

Having stated the important features of the period with regard to the expropriation of foreign property, it is timely to examine the cases which were considered in this period. They are generally presented in chronological order.

The *Sicilian Sulphur Monopoly* case. In 1836 the Sicilian Government granted a monopoly for purchasing and exporting sulphur to a French company.[4] The British Government protested on the ground that the rights of British subjects trading in sulphur were infringed by the monopoly. The protest was based upon the Treaty of 1816 between Great Britain and the Kingdom of the Two Sicilies. Matters became serious and the British Government ordered warships to prepare for an attack on Naples, whereupon the Sicilian Government abolished the monopoly and agreed to the establishment of a Commission for the settlement of disputes. Eventually, the sums awarded by the Commission were paid.

The *Finlay* case.[5] This case concerned Mr. Finlay, a British subject, whose land was taken for the garden of King Otho's palace, by the Greek Government in 1836. There was a dispute between the two Governments concerning the amount of compensation. After considerable negotiation Greece consented to refer the dispute to arbitration and in 1850, Lord Palmerston awarded a sum of 30,000 drachmas in favour of Finlay.

The *Savage* case.[6] In 1852 a decree was promulgated by the Government of Salvador by which a monopoly of gunpowder was declared, and the decree further provided that all unsold gunpowder should be removed from the country on pain of confiscation. The result of this decree was to make the sale of gunpowder by a United States national, Savage, impossible. He offered it to the Government, without result, and finally they confiscated the property. Consequently, through his Government, he claimed for an indemnity. The two

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4 27 B.F.S.P. (1839-40) at 1163-1242, and 29 ibid., (1840-41) at 111-120.

5 39 Ibid., (1849-50) at 410-479.

6 J. B. Moore, *History and Digest of International Arbitration to which the United States has been a Party*, Vol. 2, Government Printing Office, Washington D.C. (1898) at 1855.

Governments agreed to refer the case to arbitration. The panel of three arbitrators adjudicated the case and awarded Mr. Savage a sum of money $ 4,497 compensation plus interest at 6 percent.

The *Jonas King* case.[7] In this case, similar to that of Finlay, the Greek Government expropriated a piece of land belonging to Jonas King, an American national, without compensation. The Government of the United States subsequently took up the case and sought compensation for the expropriation in 1853. After some negotiation as to the amount due, the Government of Greece paid a sum of $ 25, 000 to Mr. King, in satisfaction of his claim.

The *Delagoa Bay Railway* case.[8] In 1883 Edward McMurdo, an American national, obtained from the Portuguese Government a concession for the construction and operation of a railway. McMurdo transferred his concession to a Portuguese company in return for fully paid shares and cash, and the rights of this company were in turn acquired by an English company registered in London. In 1889 the Portuguese Government issued a decree cancelling the concession and the railway was also seized. Protests were made by the United Kingdom and the United States, and after some negotiation the Portuguese Government accepted in principle the liability to pay compensation. In 1891, the dispute was referred to arbitration, and in 1900, the arbitral tribunal rendered its award, under which Portugal was obliged to pay damages.

The *Religious Properties* case.[9] After the revolution of 1910, the Portuguese Government dissolved religious associations and confiscated their property. The British, French and Spanish Governments protested on behalf of their nationals, and in 1913 it was agreed to submit their claims to a tribunal of the Permanent Court of Arbitration. After the proceedings had been interrupted by World War I, in 1920 the British and French claims were decided by the

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[7] Moore, *Digest of International Law*, Government Printing Office, Vol. 6, Washington D.C. (1906) at 262-264.

[8] M. M. Whiteman, *Damages in International Law*, Vol. 3, Government Printing Office, Washington D.C. (1943) at 1694-1703.

[9] 1 R.I.A.A. (1920) 7.

tribunal by consent. The Portuguese Government was confirmed as owner of the expropriated property but was obliged to pay to the British and French Governments *lump sums* as compensation to the claimants represented. Moreover, the Spanish Government did not join in the *compromis,* dated 31 July, 1913 between the other governments, and consequently the claimants concerned brought claims directly before the tribunal. However, the tribunal rejected seventeen claims as inadmissible, on the grounds that the claimants failed to establish their Spanish nationality.

The last case which will be examined is the Italian *Life Insurance Monopoly* case.[10] In 1912 the Italian Government established a life insurance monopoly, a measure under which the entire life insurance business of the country was to be entrusted to the State, and it was provided that no compensation could be claimed by existing insurance companies. Several countries, including Austria-Hungary, France, Germany, Great Britain and the United States protested against this law. Consequently, it may be presumed that because of these protests certain amendments were introduced into the original Bill, under which the foreign insurance companies were allowed time to wind up their businesses, although their real property was not to be affected.

The authority of these cases as precedent regarding the expropriation of foreign property in international law was the subject of a debate, between Fachiri [11] and Sir J. Fischer Williams,[12] in three volumes of the *British Year Book of International Law.* The former author took the view that these cases constitute a satisfactory authority for a general proposition that the confiscation of alien property is contrary to international law, however, the latter took a contrary position. After examining the same cases, Friedman also rejects any weight of

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[10] G. H. Hackworth, *Digest of International Law* (1940-44), Vol. 5, Government Printing Office, Washington D.C. at 588. In 1911 a similar law was proposed by Uruguay, but faced protests by Britain and France. Consequently, the Uruguayan Government abandoned her proposal. In ibid.

[11] A. P. Fachiri, "Expropriation and International Law", 6 B.Y.I.L. (1925) 159, and the same author's other literature, "International Law and the Property of Alien", 10 ibid., (1929) 32.

[12] J. Fischer Williams, "International Law and the Property of Aliens", 9 B.Y.I.L. (1928) 1.

authority for them and concludes that "The value of the precedent would therefore seem to be negligible."[13]

Unlike the nineteenth century in which State interference with private property was confined to limited expropriations involving isolated items of property, "a unique feature of the twentieth century ... is the direct interference and participation of the State in the national and international economic order."[14] Dawson and Weston further state that:

> Two World Wars, the Great Depression, the 'bipolarization' of the world, the spread of nationalism, the development of the corporate and welfare states, the formation of state trading monopolies, and the consequent dislocation of traditional social, economic, and political patterns have precipitated demands for long-overdue social and economic reforms ... the growing intensity of unsatisfied demands for wealth, power, knowledge, respect, health, security ... may be often met only through centralized planning and large-scale public participation in finance and technology ...[15]

Thus, the above factors, and particularly two World Wars, led to wave of nationalisations, which differed significantly from the previous wave, both in strength and in nature. Our study of these measures, therefore, falls into two parts: the first dealing with nationalisations in the inter-war period,[16] and the second relating to post-war nationalisation measures.

2. Expropriation and Nationalisation Measures in the Inter-War Period

This period witnessed great changes in the economic structure of the world. As Katzarov observes:

> The First World War had an intense effect on the solution of economic problems, especially on the aspirations which had taken shape with regard to the effect of legislation on property. Whereas before the First World War legislation had disregarded these problems and concentrated on political events, leaving economic

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13 S. Friedman, *Expropriation in International Law*, Stevens & Sons Ltd., London (1953) at 69.

14 Dawson and Weston, op. cit., at 730.

15 Ibid.

16 Note that two celebrated cases, *Norwegian Shipowners' Claims* and *the Chorzow Factory* case, on the expropriation of foreign property which were considered in this period, will also be examined.

> questions to struggle to make headway painfully and slowly, after 1917 there was a complete change in this field.[17]

The Russian revolution of 1917 introduced a new concept of property. As a result, a new form of taking emerged which was by no means comparable to the types of takings discussed in the last sub-section. This new phenomenon, which both in character and extent was completely different from the classical expropriations, entailed the taking of private property on a large-scale.

The period was characterised as "the high noon of arbitral tribunals and claims commissions."[18] Among many international disputes concerning requisitioned property after World War I, significant cases, such as Russian nationalisation measures, the *Norwegian Shipowners' Claims*, the *Chorzow Factory* case and Mexican oil nationalisation will be considered.[19]

2.1 Russian Nationalisations (1917)

Following the 1917 social revolution and the emergence of Marxist ideology a number of nationalisation measures were taken in Russia. The new regime then attempted to socialise all economic activities within its territory.

By a decree of 8 November, 1917, private ownership of land was abolished.[20] The Decree of 17th December nationalised the Russian banks and, consequently, banking operations became a State monopoly; existing private banks were merged into the State Bank. A further Decree of January 26, 1918, provided that "the assets of the former private banks were to be confiscated for the benefit of the State bank and their shares annulled."[21] On December 5, 1917, the Supreme Economic Council was established "with the widest powers of organising the national economy, including the power of confiscation." The Decree of January 26 nationalised the merchant navy and introduced a State

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17 K. Katzarov, *Theory of Nationalisation,* Martinus Nijhoff, the Hague (1964) at 34.

18 C. Parry, "Some Considerations upon the Protection of the Individuals in International Law", 90 Hague *Recueil* (1956-II) 635 at 660.

19 For the classification of nationalisation measures in this chapter, I have benefited from Piran, op. cit., at 14-59.

20 Katzarov, op. cit., at 34.

21 Friedman, op. cit., at 17.

monopoly in matters affecting merchant shipping. The same Decree also nationalised all large companies, including the railways.[22] Finally, the nationalisation of insurance undertakings was effected by the Decree of the 28th of November. In fact, before 1920, complete nationalisation had been achieved, although it has been said that the decrees were not always carefully drawn up, and were often obscure.[23] The public debt had been repudiated, and "no compensation was granted for any of this legislation which made no distinction between nationals and foreigners."[24]

The Russian nationalisation measures were the subject of diplomatic protests. In February, 1918, the then United States Ambassador in Petrograd presented to the Russian Ministry of Foreign Affairs a Note on behalf of the United States and all the other States, allied and neutral. The Note reads in part as follows:

> In order to avoid any misunderstandings in future, the representatives at Petrograd of all the foreign powers declare that they view the decrees relating to the repudiation of the Russian State loans, the confiscation of property and all sorts and the analogous measures as without effect in so far as their nationals are concerned.[25]

In order to settle the various claims and counter-claims, several conferences were held. The first one involved only the principal Western Powers and took place in Cannes in January, 1922. These powers decided to invite Russia to attend the next conference. The only result of the Cannes conference "was the recognition of the sovereign right of every State freely to regulate the system and form of property within its own borders." At the other conferences which were held at Genoa in April, and at the Hague in June-July, 1922, there was a complete failure to reach a possible settlement on the issue.[26]

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22 Katzarov, op. cit., at 34-35.
23 Wortley, op. cit., at 61.
24 Friedman, op. cit., at 18.
25 Ibid.
26 Ibid., at 19-20.

After the failure of these two conferences, the Powers began to conclude bilateral trade agreements with Russia. In the case of Great Britain, a Treaty was reached on August 8, 1924, whereby "Great Britain agreed in principle to the Russian counter-claims based on the intervention and recognised the possibility of setting them off against claims by British nationals in respect of the Russian confiscations", and she also "promised a loan." Russia, for her part, undertook to negotiate with British interested parties. However, this Treaty never came into force as the British Conservative Government then came to power.[27]

Likewise, in 1925, a separate agreement was reached between the Russian Government and the Lena Goldfields company, a British mining undertaking which operated in Russia before the revolution, in which Lena's properties were nationalised. Under the agreement, the company "renounced its claims in return for a concession of its former properties."[28] However, the conduct of business for the Lena company, like other foreign undertakings, became impracticable. Consequently, the company instituted legal proceedings against Russia, and eventually the dispute was referred to arbitration.[29] An award was rendered by the arbitral tribunal in favour of the company, and it is often quoted for its statement concerning the legal basis for the payment of compensation (the doctrine of unjust enrichment) which will be considered in chapter four.

It is interesting to note that the Russian Government gradually, even *de jure,* was recognised by some States, and further that one after another they "ceased to press their claims arising out of the Russian nationalisation measures."[30] As regards the recognition of the new Government of Russia (former Soviet Union) and its connection with the Russian nationalisation measures, the *Luther v. Sagor* case[31] is worthy of mention. In 1920, the defendant company purchased a quantity of timber from the new Russian

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27 Ibid., at 21-22.
28 Ibid., at 22.
29 Wortley, op. cit., at 61-62.
30 Friedman, op. cit., at 22-23.
31 D. J. Harris, *Cases and Materials on International Law* (5th ed.), Sweet & Maxwell, London (1998) at 169-172.

Government. The Russian company, which was the plaintiff, claimed title to the timber in England, on the ground that it had come from a factory in Russia that had been owned by it before being nationalised by the Russian Government. The company argued that the Russian nationalisation should be ignored before the English courts, since the United Kingdom had not recognised the Russian Government. The lower court agreed with this contention and the case was referred to the Court of Appeal. In the meantime the United Kingdom recognised *de facto* the Russian Government and the Foreign Office informed the Court of Appeal of this in writing. The result was that the higher court was bound to take note of the Russian nationalisation and accordingly the plaintiff lost the case, since a court must give effect to the legislation of a recognised State or government. It was also ruled that the fact that the Russian Government was recognised *de facto* and not *de jure* did not affect the issue.

2.2 The Norwegian Shipowners' Claims (1922) [32]

In this case, fifteen Norwegian nationals entered into contracts with shipyards in the United States for the building of ships to be used by Norway in World War I. After the United States declared war on Germany in 1917 it adopted emergency measures authorising the requisitioning of these ships in its own war effort against Germany. The claims of nationals affected by these measures were taken up by their government and after diplomatic negotiation a special agreement, a so-called compromise, was signed on June 30, 1921, whereby Norway and the United States referred the dispute to the Permanent Court of Arbitration at the Hague. The arbitral tribunal rendered its award on 13 October, 1922, in Norway's favour. The award is often cited for its statement regarding the standard of compensation.

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[32] *Norwegian Shipowners' Claims* (*Norway v. The United States*), Permanent Court of International Arbitration, Award of 13 October, 1922, 1 R.I.A.A. (1948) 307-346. The award also *reprinted in* 17 A.J.I.L. (1923) at 362-399.

2.3 The Certain German Interests in Polish Upper Silesia Case (1928) [33]

Although the facts of the case are very complex, they may be summarised as follows: a German company, Bayerische Stickstoffwerke, established a nitrate factory at Chorzow in Upper Silesia following an agreement it concluded with the German Government in 1915. Four years later, the land and the factory were sold by the German Government to another German company, Oberschlesische Stickstoffwerke. The control and management of the factory remained in the hands of the first company. Upper Silesia passed into Polish hands, in accordance with the Treaty of Versailles which concluded after World War I (1919). Under Article 297 of the Treaty, property, rights and interests of German nationals were not liquidated by the Polish Government except in certain conditions. Moreover, in accordance with Article 6 of the Geneva Convention of 1922 between Germany and Poland, the latter was given the right, subject to the provisions of the Versailles Treaty, to expropriate major industries in Polish Upper Silesia, but again with the exception of property of German nationals or of companies controlled by them. Despite these limitations, in 1922, a Polish court declared the registration of the Oberschlesische company to be null and void, and ordered the land on which the factory was situated to be transferred to the Polish Treasury. Also, under a Polish ministerial decree, the management of the factory was given to a Polish official.

In 1925, an application was submitted by the German Government to the PCIJ, claiming that the expropriation of the Chorzow factory by Poland constituted a violation of the Geneva Convention. The Court rendered its judgment in this case in favour of Germany. As in the *Norwegian* case, the judgment has been referred to extensively in the context of compensation, particularly when advocating the standard of full compensation.

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[33] *German Interests in Polish Upper Silesia* and *the Factory at Chorzow* (*Germany v. Poland*) (1928) (Merits), Permanent Court of International Justice, Series A, No. 17, 1.

2.4 The Mexican Oil Nationalisation of 1938

Although the new attitudes adopted towards private property in Mexico differed in several aspects from those in Russia, "one finds underlying these superficially different events the same ideological motives, namely the desire to implement the long maturing principle of the transformation of property."[34] During the nineteenth century, while Mexico experienced economic development, the conditions of the peasant class got worse. The benefits of industrial progress accrued mostly to foreigners, who controlled a large part of Mexico's industrial wealth. In Friedman's view, "these circumstances gave rise to a dual aspiration; agrarian reform and oil nationalisation."[35] By the new Constitution of 1917, the Mexican Government assumed ownership of all national lands and waters to ensure private use of these resources to conform to the needs of the general welfare. The Alien Land Law of 1925 also limited the ownership of land by foreigners. These measures mainly affected the nationals of the United States. The latter raised no objection in principle but merely criticised the rate of compensation. Eventually, a settlement was made with the United States on the issue in 1941.[36]

As regards oil nationalisation, it is significant to note that before Mexico resorted to this measure more than 95% of its petroleum and mining industries were foreign-dominated.[37] The oil controversy followed three steps. The first move against private oil rights was carried out in the Constitution of 1917, where in Article 27 it was stipulated "that the nation has direct ownership of petroleum and all solid, liquid, or gaseous hydrocarbons."[38] Thus, the article raised the question of oil rights acquired by foreigners prior to 1917 under the mining laws of 1884, 1892 and 1909. It led to "legal and diplomatic conflict involving

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[34] Katzarov, op. cit., at 34.
[35] Friedman, op. cit., at 23.
[36] Ibid., at 24.
[37] E. N. Baklanoff, *Expropriation of US Investments in Cuba, Mexico, and Chile*, Praeger, New York (1975) at 53.
[38] Ibid., at 50. See also L. H. Woosley, "The Expropriation of Oil Properties by Mexico", 32 A.J.I.L. (1938) 519.

Mexico, the foreign-controlled oil companies, and the Governments of the United States and Britain."[39] In 1921, the Mexican Supreme Court held that the 1917 Constitution was not retroactive with respect to petroleum rights acquired prior to the adoption of the Constitution. Following this decision, after considerable negotiation a compromise was made.[40]

The second step took place in December, 1925, when the Mexican Congress enacted the petroleum law, which required "the foreign oil companies to exchange their sub-soil titles of unlimited duration for 50-year concessions."[41]. The US Government protested, and two years later the law in question was declared unconstitutional by the Mexican Supreme Court. Eventually, extended negotiations again led to an amicable settlement of the conflict.[42]

The last move was initiated with the Expropriation Law of 1936, "in conjunction with new labor legislation, enabled the Cardenas administration to exert the necessary pressure to create a 'labor squeeze' on foreign-owned petroleum, mining and agricultural enterprises."[43] In 1936, the Syndicate of Oil Workers demanded a collective labour contract together with an increase in wages, but the demand was rejected by the oil companies. Then, on request of the Syndicate, the Mexican Labour Board appointed a committee of experts to investigate the companies' economic capacity to pay the workers' claims. In 1937, the Board made a decision on the dispute in favour of the Syndicate. The oil companies, claiming inability to comply with the decision, appealed to the Supreme Court of Mexico. In 1938, the decision of the Board was upheld by the Supreme Court, and the oil companies gave notice of their inability to comply with the Supreme Court's rulings. The Labour Board then officially terminated the contract between the oil companies and the workers. In these circumstances, on 18 March, 1938, President Cardenas issued the nationalisation decree.[44]

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39 Ibid.
40 Ibid., at 51.
41 Ibid.
42 Ibid.
43 Ibid.
44 Ibid., at 52.

It is interesting to note that Mexican agrarian reform and oil nationalisation gave rise to an extensive diplomatic exchange between Mexico and the United States.[45] There the latter had the opportunity to articulate the 'Hull formula' on the standard of compensation, which will be referred to in appropriate occasions in this thesis. The notes reveal that the two governments were in agreement on several issues, including the right of a sovereign State to expropriate the property of aliens within its border, and that the expropriations must be for public purpose. However, the real controversy centred on the issue of compensation under international law. The United States contended that Mexico could not lawfully take alien property except upon payment, in advance, in a "prompt, adequate and effective" manner.[46] Mexico argued that:

> There is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation, nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land.[47]

Thus Mexico, while admitting a general obligation to pay compensation, under its municipal law, claimed that the time, amount and manner of such payment could be determined only in accordance with her own laws. It further argued that a distinction should be drawn between the rules governing large-scale expropriation, i.e. nationalisation, and expropriation of isolated items of property.

The dispute between Mexico and the United States over the oil nationalisation was settled by agreement between the two governments in 1942, after abundant diplomatic exchange as indicated above. Since British shareholders had a majority interest in the expropriated oil companies, the settlement of claims became much more difficult. However, after prolonged negotiations, settlements were made in 1947.[48]

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45 G. H. Hackworth, *Digest of International Law*, Vol. 3, Government Printing Office, Washington D.C. (1942) at 655-561.

46 Ibid.

47 Ibid.

48 Wortley, op. cit., at 66

3. Post World War II Nationalisation Measures

Having discussed expropriation and nationalisation measures carried out in the inter-war period, this sub-section will deal with those measures which took place after World War II. In this period vast nationalisations occurred in a wide variety of geographical, political and ideological regions throughout the world, even in Western Europe (for example, France and the United Kingdom). The wave of nationalisation spread far from its centre in Europe, to reach a number of other countries, such as Peru, Iran, Egypt, Chile, and Indonesia. While many of the nationalisation measures prior to World War II were aimed primarily at foreigners, post-war measures usually affected nationals and foreigners alike.[49] In the following sections, therefore, we shall consider:

- nationalisations in the European countries, including Eastern and Western Europe;

- Third World countries' nationalisations;

- nationalisations in Latin American countries; and

- OPEC countries' take-overs.

3.1 East European Nationalisations

After World War II several East European countries enacted nationalisation laws affecting both nationals and foreigners, and permitting the taking of mines, branches of industry, transportation and communication facilities, commercial enterprises, banks and insurance companies as well as other properties. While these measures were motivated by political, economic and social reasons,[50] they "do not in principle reject either private property, the right of inheritance or private enterprise."[51] Similarly, lump-sum compensation agreements were concluded between East European countries and their creditors countries which showed several features which are worthy of mention. Firstly, in all cases,

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49 Doman, op. cit., at 1140.

50 See, e.g., Friedman. op. cit., at 30-31, and White, op. cit., at 18-31.

51 Katzarov, op. cit., at 53.

compensation was paid for the property or undertakings nationalised. An exception was made in the cases of persons who had collaborated with the enemy. Secondly, the compensation did not cover, as a rule, the total value of the property or undertakings and sometimes was less than half the estimated value. Thirdly, with few exceptions, payments were normally made in the form of public bonds which were redeemable on different days. Fourthly, none of the enactments made distinctions on the basis of the nationality of the persons affected and some even provided for preferential treatment of aliens affected by the nationalisation measures.

3.1.1 Czechoslovakia

In Czechoslovakia the nationalisation of economic life followed two steps. The first step took place in 1945, when the National Front Government was in power. The Nationalisation Law of October 24, 1945 went into effect on the 27th of October, 1945. By the law, "the Czechoslovak State acquired ownership of the nationalised enterprises including all of their property, assets and rights."[52] Among these enterprises were the mines, banks, the insurance companies, and certain industrial enterprises. 'National' enterprises were established out of the nationalised enterprises. The national enterprises succeeded to the liabilities of the nationalised enterprises. The new national enterprises had the status of an independent legal person. For instance, they were subject to the provisions of commercial law, tax laws, and were registered in the register of firms kept by the District Court of appropriate jurisdictions. Although the surplus earnings of the national enterprises were handed over to the State, it was not responsible for their debts.[53]

Compensation was provided for nationalised property, "except in the case of property owned by German or Hungarian, public or private corporations or persons of German or Hungarian nationality, and persons who were engaged in

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[52] A. R. Rado, "Czechoslovak Nationalization Decrees: Some International Aspects", 41 A.J.I.L. (1947) 795. See also Doman, op. cit., at 1143-1146; Friedman, op. cit., at 39-42, and Katzarov, op. cit., at 56-57.

[53] Ibid., at 796.

certain activities against the Czechoslovak State."[54] The amount of compensation was based on "the official prices prevailing on October 27, 1945, after deducting all liabilities."[55] In cases where there were no official prices, the quantum of compensation was calculated on the basis of an official valuation by the Government. The Nationalisation Law listed three possible methods of payment of compensation: "(a) securities, (b) cash or (c) in other value."[56] For the purposes of compensation payments, a 'Nationalised Economy Fund', an independent legal person, was established in Prague. Interestingly, compensation claims in the case of conflict were decided by administrative and not by judicial tribunals.[57]

The second step occurred when the Communist Government took power in 1948. There "the 1945 nationalization decrees were amended [with retroactive effect] and some sectors of the economic life not covered by the previous law were subjected to nationalisation."[58]

As to compensation claims, settlements were made with Belgium, France, Switzerland and the United States. A lump-sum agreement was also concluded by Czechoslovakia with the United Kingdom.[59]

3.1.2 Poland

The Polish nationalisations were effected by a Law of January 3, 1946 which nationalised the principal sectors of the economy. These measures were the result not only of the *de facto* situation which existed immediately after World War II in all East European countries, but also of two other factors.[60] Firstly, the State took an appreciable part in economic life even before World War II, through "State owned or consisted of undertakings in which the State had share." Secondly, "the extent of foreign investments in Poland which seemed to

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54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid.
58 Doman, op. cit., at 1145.
59 Wortley, op. cit., at 68.
60 Friedman, op. cit., at 32. See also Doman, op. cit., at 1146-1149, and Katzarov, op. cit., at 57-58.

render illusory a political sovereignty unaccompanied by economic independence." Poland nationalised industry, banking, mines, transport, insurance, and commercial enterprises.

The nationalisation law divided nationalisation into two broad categories, one of which involved the payment of compensation, and the other did not. The absence of compensation depended both on the identity of the owner, and on the nature of the subject matter. "No compensation was payable in respect of the nationalisation of industrial, mining, banking, commercial, transport or insurance undertakings formerly belonging to Germany or the Free City of Danzig, or to persons who entered the service of the enemy."[61]

Article 7 of the Nationalisation Law laid down the compensation procedure for those cases to which it applied. As in the case of Czechoslovakia, under the Polish Law compensation was payable; (a) in securities (bonds), (b) in cash or (c) in other values. In Polish Nationalisation Law, there was a provision, not found in the laws of most of the other Eastern European States, which provided for "a special commission to determine the amount of compensation."[62] In the determination of compensation, the following were taken into account:

> (1) general decrease in value of the national wealth;
>
> (2) net value of the assets of the undertaking on the day of its transfer to the State;
>
> (3) decrease in value of the undertaking as a result of war losses and losses suffered in connection with the war and occupation in the period between 1 September 1939, and the time of transfer to the State;
>
> (4) the amount of investments made after 1 September 1939;
>
> (5) special factors affecting the value of the undertaking (duration of concessions, licences, etc.).[63]

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61 Katzarov, op. cit., at 58.
62 Doman, at 1147.
63 Ibid., at 1148.

Separate Mixed Commissions, both with the United Kingdom and the United States, were set up to fix the amount of compensation due. "The presence of Polish gold and other assets in the United Kingdom and the United States may have assisted the negotiations for compensation."[64] Lump-sum agreements were also concluded with Belgium, France, Switzerland and the United Kingdom.

3.1.3 Former Yugoslavia

The interference with private property or enterprise followed two steps in the former Yugoslavia. The first step took place when a large number of industrial enterprises were placed under State control, or, on the basis of the National Council decree directed against collaboration with the enemy issued on November 24, 1944, were expropriated by various court decisions. These measures also affected foreign property or property of persons who fled the country during or after the war.[65]

In the second step, the Nationalisation Law of December 5, 1946 was introduced, which nationalised all the essential undertakings of the whole country.

Provisions were made for the payment of compensation (Article 8 of the Law of December 5, 1946), except where the property nationalised was used for humanitarian, social, cultural or similar purposes (Article 14).[66] Compensation was paid to the owners of nationalised undertakings for the nationalised property "on the basis of its net value on the day of nationalisation."[67] Under Articles 10 and 11 of the Nationalisation Law, "payment was to be paid in State bonds and, in certain cases, in cash."[68]

A lump-sum settlement with the United Kingdom was reached, and similar settlements were also made with Switzerland and the United States.[69] In the case

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64 Wortley, at 67.
65 Doman, at 1149.
66 Katzarov, op. cit., at 59.
67 Doman, op. cit., at 1150.
68 Friedman, op. cit., at 44.
69 Wortley, op. cit., at 68.

of the latter, the question of compensation involved so much disagreement that "relations between the two countries were put to a severe test."[70] The United States began to block former Yugoslav assets in the United States which had been transferred to the Federal Reserve Bank during the German occupation. Eventually, an agreement between the two Governments was concluded on July 19, 1948.

3.1.4 Hungary, Rumania and Bulgaria

After World War II *Hungary* adopted nationalisation measures and carried out an agrarian reform.[71] By the Decree of March 15, 1945, the State distributed large estates among landless and small landowners. The decree provided for compensation, except in the cases of traitors, the heads of the Fascist parties, war criminals, and Germans deprived of Hungarian nationality. The nationalisation of key economic sectors was carried out as from 1946, when the principal heavy industries were placed under State control. A year later, the Hungarian National Bank and other large credit establishments were nationalised. Various industrial undertakings were also effected by a Law of May 8, 1948. The outstanding feature of the Hungarian nationalisation law was its favourable treatment of foreigners, which, in Doman's view, was exceptional in the history of expropriatory legislation.[72]

In *Rumania* nationalisation was introduced in 1946. However, the main nationalisation measures were carried out when Rumania adopted a new Constitution in 1948. Under the new Constitution, the natural resources of the soil and the sub-soil were vested in the State. These principles were "applied under the Bill of 'Nationalization of Industrial, Banking, Insurance, Mining and Transport Enterprises' of June 11, 1948."[73] In principle, nationalisation was effected subject to compensation, but no compensation was payable (a) to those

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70 Friedman, op. cit., at 45.
71 Ibid., at 47.
72 Doman, op. cit., at 1153.
73 Ibid., at 1154-1155.

enriched in an unlawful manner; and (b) to those who left the country unlawfully.[74]

Similar measures were adopted by *Bulgaria*. A Law of March 6, 1946, ordered the confiscation of property acquired illegally or through speculation, i.e. "by means of an activity which had disproportionality increased the fortune of the person exercising it at a time of difficulty for the State."[75] However, the most important nationalisation was effected by the Law of 24th December, 1947, which nationalised private industrial and mining enterprises. This Law specifically referred to the power conferred on the State by Article 10 of the new Constitution, which became effective on December 6, 1947, to nationalise certain branches of industry.[76] The whole banking system was also nationalised. The owners of nationalised enterprises were given compensation "in the form of interest-bearing State bonds." No compensation was granted to those who served or helped the enemies of the Bulgarian regime.[77]

Likewise, these countries were under treaty obligations: the Peace Treaties concluded with the defeated Powers, to restore to the United Nations and United Nations' nationals property they owned before World War II.[78]

Commenting on Bulgarian nationalisation measures, Doman maintains that the measures were "more unfavorable to foreign property owners than any of the other decrees discussed above." Equally[At the same time], he observes that foreign property rights were less substantial in Bulgaria than in any of the other East European countries.[79]

3.2 Nationalisations in Western Europe

As indicated above, after World War II not only the countries of Eastern Europe adopted laws nationalising the major portions of industry; Western

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74 Katzarov, op. cit., at 64.
75 Friedman, op. cit., at 46.
76 Katzarov, op. cit., at 60.
77 Doman, op. cit., at 1157.
78 Ibid., at 1140.
79 Ibid., at 1158.

European countries also resorted to nationalisation. The measures of nationalisation in the latter countries were much milder than those of Eastern European countries, and since few of them directly affected aliens, they led to few problems of international law. Nonetheless, their significance should not be underestimated. In the following section, nationalisations carried out in France and the United Kingdom will be examined in turn.

3.2.1 France

France experienced three waves of nationalisations.[80] The first one occurred before World War II, when two sectors of the French economy, namely the war-related industries and the rail-roads, were nationalised. These measures were effected under the Law of 16th August, 1936. It was stipulated that compensation must be fixed by mutual agreement or, in the absence of such an agreement, by an arbitrator.[81]

The second wave took place immediately after World War II, and was of greater importance.[82] First a few industrial undertakings, such as the Renault motor company, were confiscated because their owners were accused of collaboration with the Germans. In 1945, all private airlines were merged in the State-owned Air France. Moreover, four other large sectors were nationalised, they include: (1) the *Banque de France* and the four large deposit banks; (2) the gas and electricity industries; (3) the coal industry; and two-thirds of the leading insurance companies.

The owners of nationalised undertakings were given compensation in the form of interest-bearing State securities or bonds. The amount of compensation was based on "market quotations of shares in designated periods during 1944 and 1945 or on valuations made by special committees based on the market value of the assets of the companies."[83] For the purpose of paying compensation "a

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80 D. Borde and W. Eggleston, "The French Nationalizations", 68 A.B.A.J. (1982) 422.

81 Friedman, op. cit., at 57.

82 See generally Doman, op. cit., at 1141-1143; Friedman, op. cit., at 58-63; Wortley, op. cit., at 118-120, and Katzarov, op. cit., at 42-45.

83 Doman, op. cit., at 1141.

distinction was made between French nationals and foreigners, the latter being more favourably treated than the former."[84] In Friedman's view, this policy was based on such non-legal considerations as: (a) foreign shareholders in France were not extensive; and (b) France was anxious to maintain the right of the far more numerous French shareholders affected by the measures of nationalisation which took place in Eastern Europe.[85] Thus, there were no significant international agreements concluded as a result of the French nationalisations.

The last wave of nationalisations was carried out in 1982, after President Mitterrand took power in 1981. The Nationalisation Law was promulgated on February 11, 1982, and it embraced four titles.[86] Under title I, all of the shares of five important companies were transferred to the State. Title II of the law required the nationalisation of all banks in France which had deposits equal to or more than one billion francs, except industrial or real estate banks, and foreign-controlled banks. Title III of the law nationalised "two major banking and investment groups." The last title of the Nationalisation Law related to: (1) the status of employees of the nationalised concerns; (2) the tax treatment of the shares nationalised; and (3) transactions in the bonds issued in exchange for shares.[87]

In the Mitterrand nationalisations, as in the preceding French nationalisations, provision was made for compensation. The shareholders of the nationalised enterprises were granted compensation in the form of interest-bearing State bonds issued by the National Industrial Fund. In order to assess the value of each share nationalised, the Nationalisation Law stipulated a tripartite method of determining the total value of all shares of any nationalised industry.[88]

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84 Friedman, op. cit., at 61-62.
85 Ibid., at 62. See also Doman, op. cit., at 1144.
86 Borde and Eggleston, op. cit., at 423.
87 Ibid., at 424.
88 Ibid., at 426.

3.2.2 The United Kingdom

After World War II, the United Kingdom, like France, sought a solution to the grave problems of reconstructing certain sectors of her economy.[89] Following the 1945 General Election, Nationalisation was introduced by the new Labour Government, implementing an essential part of the party's manifesto.[90]

Thus, various measures of nationalisation were adopted.[91] By the Civil Aviation, and the Cables and Wireless Acts, 1946, those activities connected with communications between various parts of the country were nationalised. The Bank of England was effected, in order to strength State control over the nation's finances. The nationalisation measures also affected various "sectors of the national economy in which antiquated methods of production and the disorder of individual activity threatened to compromise the work of reconstruction."[92] They included: the coal industry, by the Coal Industry Nationalisation Act, 1946, enterprises engaged in the production and distribution of electricity, by the Electricity Act, 1947, and rail communications, the docks, inland waterways, lighterage, by the Transport Act, 1947.

Throughout the whole scheme of nationalisation in Britain, compensation was the constant concomitant of the measures, and it "was sometimes calculated on a generous scale."[93] In Scammell's view, however, "the reasons prompting the inclusion in the nationalising statutes of provisions for compensation were social and economic rather than legal."[94] He argues that "since ... there is no constitutional requirement that expropriation shall be attended by compensation."[95] The amount of compensation was based on "the average

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89 E. H. Scammell, "Nationalisation in Legal Perspective", 5 C.L.P. (1952) 30.

90 Note that even long before World War II, there were many examples of State interference with economic life. On the issue, see Katzarov, op. cit., at 46-47.

91 See C. M. Schmitthoff, "The Nationalization of Basic Industries in Great Britain", 16 L.& C.P. (1951) 557; Friedman, op. cit., at 63-65, and Katzarov, op. cit., at 47-52.

92 Friedman, op. cit., at 63-64.

93 Ibid., at 64. Note that in compensating the shareholders of the Bank of England, the government was generous. Ibid.

94 Scammell, op. cit., at 37.

95 Ibid., at 37-38.

quotation of the shares on the Stock Exchange for the first week of November, 1946, or, in the case of the nationalisation of electricity and transport, for six months preceding the General Election."[96] In the cases of the coal mines and telecommunications, an arbitration procedure was provided to fix the quantum of compensation.

The United Kingdom also adopted a measure of nationalisation when, in 1977, the Labour Government passed the Aircraft and Shipbuilding Industries Act.[97] Under the Act, 31 companies' shares passed into the ownership of two State-owned companies: British Aerospace and British Shipbuilders. Provision was made for compensation. It was stipulated that "securities quoted on the Stock Exchange were to be valued at their average price during a six-month period ending on 28 February 1974 ... whilst unquoted securities were to be valued, by agreement or arbitration, as if they had been quoted during the same reference period."[98] So-called 'Stockholders' Representatives' were appointed to represent the interests of the former shareholders. Their duty was to negotiate with the Government as to the value of the shares taken.

Eventually, all of the Representatives accepted the compensation offered by the Government, except in some cases in which the shareholders were dissatisfied with the measure of compensation provided under the Nationalisation Act. Consequently, proceedings were instituted by seven companies under the European Convention on Human Rights,[99] on the grounds of inadequate compensation. The European Court of Human Rights considered the dispute, under the label the '*Lithgow* case', and on 8 July 1986, rendered its decision in the British Government's favour. The decision is often cited for its statement regarding nationalisation, and particularly the standard of compensation.

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96 Friedman, op. cit., at 64.

97 M. Mendelson, "The United Kingdom Nationalization Cases and the European Convention on Human Rights", 57 B.Y.I.L. (1986) 35.

98 Ibid., at 34.

99 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on November 1950, Vol. 213, U.N.T.S., at 221.

It should be noted that the other countries of Western Europe did not adopt significant nationalisation measures which merit discussion. For instance, in 1945, the Netherlands temporarily nationalised the war-wrecked mining industries. Otherwise, she refrained from nationalisation on a large scale.[100]

3.3 Nationalisations in the Third World Countries

Although after World War II the most important nationalisation measures occurred in the Eastern and Western European countries, as indicated above, these were not the only examples which can be mentioned. Some of the developing countries for political, financial and nationalistic reasons also resorted to nationalisation. Among them may be cited Iran, Egypt and Indonesia. In the mid-twentieth century, in order to combat economic difficulties which arose after World War II as well as to satisfy nationalistic elements in the Iranian population, the Iranian Government in the early 1950s, nationalised its oil industry. In the late 1950's, as a link in President Nasser's attempt to stabilise his regime and maintain the independence of Egypt from the Western World, the Suez Canal was nationalised. In 1959, in the context of the struggle for liberation of West-Irian, Indonesia also took measures against Dutch interests. Thus, the following section will deal with nationalisations in these countries.

3.3.1 Iran

The history of Iran (then called Persia) was largely a history of Great Power competition. During the past two centuries Iran became the battleground in the political rivalry of the Great Powers, particularly Britain and Russia. The competition for concessions was intense, and by the end of the nineteenth century the number of concessions was so great that in practice all of the country's resources were in the hands of foreigners.[101] As Ford observes:

> The oil resources of Iran are closely connected with the Great Power struggle between Britain and Russia in Iran. The competition

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[100] Doman, op. cit., at 1142.

[101] For an excellent account of the political and economic history of Iran in the first half of the twentieth century, see A. W. Ford, *The Anglo-Iranian Oil Dispute of 1951-1952: A Study of the Role of Law in the Relations of States*, University of California Press, Los Angles (1954) at 1-40.

> between the two nations for concessions to exploit Iranian oil resources has continued for half a century.[102]

In 1901, William K. D'Arcy, an Australian financier, was granted an oil concession for a sixty-year term. Under the concession, D'Arcy agreed to establish one or more companies for oil exploitation. In 1909, the first exploitation company, namely the Anglo-Persian Oil Company was established. Thus, the D'Arcy interests were transferred to the new Anglo-Persian Oil Company (Anglo-Iranian Oil Company, when in 1935 the name of country changed from 'Persia' to 'Iran' - hereinafter 'the Company').[103]

Following controversies over royalties to be paid by the concessionaire company, in November 1932, the Persian Government notified the Company that the concession was annulled. The British Government reacted immediately, and her warships appeared in the Persian Gulf, as they were again to appear in 1951. Protests and requests for arbitration by the Company were not successful.[104] The British Government submitted the dispute to the Council of the League of Nations. The latter suspended proceedings when direct negotiations between the Persian Government and the Company were begun in February, 1933.[105] The negotiations led to the granting of a new concession to the Company on April 29, 1933, for a sixty-year period.

The new concession granted the Company "the exclusive right to extract and process petroleum in a clearly defined concession area and also certain other rights."[106] In Article 21 of the concession it was stipulated that it could only be annulled before the expiration date, i.e. 1993, under certain conditions, and that arbitration provided for any disputes between the parties (Article 22).[107]

In 1949, the Iranian Government demanded increased royalties from the Company. After some negotiation, a Supplementary Agreement was reached, but

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102 Ibid., at 14.
103 Ibid., at 15. The Company is today called 'British Petroleum'.
104 Ibid., at 14-20.
105 J. Frankel, "The Anglo-Iranian Dispute", 6 Y.B.W.A. (1952) 59.
106 W. W. Bishop, "The Anglo-Iranian Oil Company Case", 45 A.J.I.L. (1951) 749 at 750.
107 Ibid., at 751.

never ratified by the Majlis.[108] On March 15, 1951, the Majlis passed a 'Single Article' enunciating the principle of nationalisation of the Iranian oil industry, and it was approved by the Senate.[109] Moreover, the Single Article Law was implemented by the Iranian Oil Nationalization Law of May 1, 1951. Article 1 of the latter Law provided for a board of five Senators, five Deputies, and the Iranian Finance Minister, "under whose supervision immediate nationalization and dispossession of the Anglo-Iranian Oil Company was to be carried out."[110] It was also stipulated that "the entire revenue derived from oil and its products is indisputably due to the Persian nation."[111]

Provision was made for compensation. Under Article 2 of the Nationalization Law, "the Government was bound to examine the rightful claims of the Government as well as those of the Company", and to submit its proposals to the Iranian Parliament.[112]

In May, 1951, the Company, in pursuance of Article 22 of the 1933 concession, requested arbitration. The Iranian Finance Minister replied and rejected the Company's suggestions on the grounds that: (1) "the nationalization of industries is based on the right of the sovereignty of nations, and the British Government itself nationalised her basic industries"; (2) "the nationalization of the Iranian oil industry was not referable to arbitration"; and (3) "no international authority had competence to deal with the matter, because it was entirely and solely within the purview of the Iranian Government."[113] Attempts to reach an amicable settlement, even through a special representative of President Truman, between Iran and the United Kingdom were unsuccessful.[114]

On May 26, 1951, the British Government submitted the dispute to the International Court of Justice (hereinafter the 'ICJ'). Two days later, the Iranian

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108 Ford, op. cit., at 48-51. Note that the Iranian Parliament is called 'the Majlis'.
109 Ibid.
110 Ibid. For the full text of Iranian Nationalisation Law, see ibid., Appendix IV, at 268.
111 Ibid.
112 Ibid.
113 Ibid., at 58.
114 Bishop, op. cit., at 752.

Foreign Minister informed the Court that the Iranian Government did not recognise its competence in this matter.[115] In these situations, the British Government, by sending troops into the Persian Gulf and to the Shatt-al-Arab River was prepared to take military action; however, she did not take it.[116]

On June 22, 1951, the British Government applied again to the ICJ, this time for interim measures of protection, and the Court on July 5, 1951 issued an order.[117] Iran based its objection to the jurisdiction of the ICJ on the "legal incompetence of the complaint" and on "the fact that the exercise of sovereignty is not subject to complaint."[118] As a result, it refused to comply with the measures.

The ICJ considered the United Kingdom's application, under the name '*Anglo-Iranian Oil Company* case', and on July 22, 1951, it was dismissed on the ground of lack of jurisdiction.[119] The Court based its decision on "the interpretation of the declaration, ratified on September 19, 1932, by which Iran accepted the jurisdiction of the PCIJ according to Article 36 (2) of the PCIJ Statute."[120] The British Government argued that "the Court had jurisdiction in all disputes which arose after the ratification of the Iranian declaration but which related to the application of treaties in force at any time."[121] The Iranian Government took the view that "the treaties on which disputes should be based were limited to those signed after September 19, 1932."[122] However, the ICJ concluded that no treaty or convention between the two countries resulted from these proceedings.[123] It held that "it had no jurisdiction to consider the

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115 Ford, op. cit., at 75.

116 Two reasons have been advanced for the avoidance of military action by the British: (1) the United States probably opposed British military action, since the former State wished to avoid repercussions likely to affect its own extensive oil interests in the Middle East; and (2) British intervention would bring about Russian occupation of North Iran. Frankel, op. cit., at 66-67.

117 Ibid., at 67. For the full text of the 'interim measures of protection', see 45 A.J.I.L. (1951) at 793-794.

118 Ford, op. cit., at 78.

119 N. Wühler, "Anglo-Iranian Oil Company Case", Vol. 2, Encycl. P.I.L., North Holland Publications, Amsterdam (1985) 15.

120 Ibid., at 16.

121 Ibid.

122 Ibid.

123 Ford, op. cit., at 175.

application of the United Kingdom of May 26, 1951, and indicated that its order of July 5, 1951, indicating interim measures of protection, consequently ceased to be operative."[124] Also, the British Government called upon the UN Security Council to intervene in the Anglo-Iranian dispute, but it was quite futile.[125]

By 1953, a financial crisis caused by British blockades and the severance of diplomatic relations led to the collapse of the Mossadegh government. Thus, the dispute between Iran and the Anglo-Iranian Company was not ended until political changes occurred in the country. Eventually, the dispute was resolved in 1954 by an agreement establishing an international consortium to market the oil and operate the industry as agents of the Iranian Government and the new National Iranian Oil Company. The second part of the agreement was related to the question of compensation.[126]

Besides the measure of nationalisation adopted in the middle of this century, Iran carried out more nationalisations after the Islamic Revolution of 1979.[127] The new Government was anxious to reduce foreign influence in Iran, and wanted to obtain complete control over the Iranian vital industries, including banks, insurance, and oil and gas. By the Nationalisation Laws of 7 June, and of 25 June, 1979 the banking and insurance industries were nationalised, respectively.

As indicated above, the oil industry was nationalised long before the Revolution, i.e. in 1951, and due to political changes in Iran, in 1954 an agreement was reached with an international oil consortium. However, the new Government of Iran after the Revolution regarded the 1954 agreement, which replaced the concession granted to the Anglo-Iranian Company in 1933, in violation of the 1951 nationalisation of the oil industry in Iran. As Piran observes:

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[124] Ibid., at 176.

[125] Franklin, op. cit., at 70.

[126] A. Farmanfarma, "The Oil Agreement Between Iran and the International Oil Consortium: the Law Controlling", 34 Tex.L.R. (1955) 259.

[127] For a general survey of Iran's post-revolution era nationalisation measures, see Piran, op. cit., at 145-148.

> The new Government regarded the 1954 agreement as the American backed coup d'etat's reward for the Western oil companies and a mockery to the 1951 nationalisation of the oil industry in Iran.[128]

Thus, under a Law of January 8, 1980, a special commission was established. The commission's particular function was to consider all oil agreements concluded by the previous regime and to nullify those found as contrary to the Nationalisation Law of 1951. This amounted to the nullification of numerous oil agreements with foreign companies, including the 1954 agreement with an international oil consortium.

The Iranian post-revolution era nationalisation measures mostly affected American nationals. The latter brought their claims before the tribunal, viz., the Iran-United States Claims Tribunal, which was established for this purpose. The awards of the Tribunal on expropriation and the relevant issues constitute a rich body of material in this branch of international law, and reference will be made to them in this thesis.

3.3.2 Egypt

By a Law of July 26, 1956, the Government of Egypt nationalised the Universal Suez Maritime Canal Company.[129] Under the Law, all rights and obligations of the company were transferred to the State, and:

> All organisations and committees now operating the company are dissolved. Shareholders and holders of constituent shares shall be compensated in accordance to the value of the shares on the Paris Stock Market on the day preceding the enforcement of this law. Payment of compensation shall take place immediately the State receives all the assets and property of the nationalised company.[130]

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[128] H. Piran, "Indirect Expropriation in the Case Law of the Iran-United States Claims Tribunal", F.Y.I.L. (1995) 140 at 152.

[129] See generally R. Delson, "Nationalization of the Suez Canal Company: Issues of Public and Private International law," 57 Col.L.R. (1957), 754; T. T. F. Huang, "Some International and Legal Effects of the Suez Canal Question", 51 A.J.I.L. (1957) 277, and Katzarov, op. cit., at 68.

[130] Article 1 of the Nationalisation Law. For the full text of the law, see *White Paper on the Nationalisation of the Suez Maritime Canal Company*, Government Press, Cairo (1959).

In order to ensure passage through the Suez Canal, Article 2 of the Nationalisation Law provided for the establishment of an independent body with separate legal personality but responsible to the Ministry of Commerce. Moreover, it was also stipulated that Canal employees were to continue in their posts, resignation was not allowed without the permission of the independent body.[131]

The motives of the nationalisation of the Suez Canal were "financial - to obtain resources for the Aswan High Dam project, and political; with the desire to eliminate foreign capital and gain control of the operation of the Canal playing a subsidiary role."[132] On August 2, 1956, the Governments of France, the United Kingdom and the United States made a statement to foreign governments using the Canal, of which Paragraph 2 reads:

> They [the three Governments] do not question the right of Egypt to enjoy and exercise all the powers of a fully sovereign and independent nation, including the generally recognised right, under appropriate conditions, to nationalise assets, not imposed with an international interest, which are subject to its political authority.[133]

Similarly, the nationalisation of the Suez Canal resulted in a conflict in 1956, in which Britain, France and Israel were involved.[134] The British were willing to respond with force to the measure of nationalisation. To a British writer, they had numerous reasons for doing so, including the great importance of Canal for the passage of their vessels, and the fact that President Gamal Abdel Nasser appeared to threaten what remained of the British Empire. Due to Nasser's support of the Algerian rebels, the French wished to overthrow his regime. In addition, America took the position "that the Canal was of an international nature and its control not be vested in one nation only", however, it opposed the use of force.[135] On 16 August 1956, the eighteen nations which used

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131 Ibid., Article 4.
132 White, op. cit., at 26.
133 Quoted in ibid., at 36.
134 K. Scott, "Commentary on Suez: Forty Years on", J.A.C.L. Vol. 1, No. 2 (1996) 205.
135 Ibid., at 207.

the canal most heavily met in London, where they held a maritime conference "with the aim of negotiating free passage through the Canal."[136] However, it was ineffective.

In September 1956, the dispute was referred to the Security Council of the United Nations. This body developed the so-called Six Principles, but they were vetoed by Russia.

A month later, Britain, France and Israel concluded a secret agreement in which they agreed to capture the Canal by force. Israel put the first phase of this agreement into effect on 29 October, when it attacked Egypt. For the second time, the conflict was raised in the Security Council. This time the resulting Security Council resolution was vetoed by Britain and France. Following an agreement of November 2, between the United States and Russia, the matter was submitted to the General Assembly of the United Nations. The latter adopted a resolution calling for a cease-fire, and Britain and France agreed to it.[137]

Eventually, "by a subsequent negotiated Heads of Agreement on April 29, 1958, the United Arab Republic agreed to relinquish all claims to all Company assets located abroad and to pay ... to the foreign shareholders of the Suez Canal Company."[138]

3.3.3 Indonesia

Prior to World War II the Kingdom of the Netherlands possessed vast colonies in South East Asia, then known as the Netherlands Indies, and now referred to as Indonesia. They comprised many islands, including Sumatra.[139] In West Sumatra, the independence movement, and consequently the intervention of the Indonesian Government, in order to restore order, led to the taking over of

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136 Ibid.
137 Ibid., at 211.
138 Dawson and Weston, op. cit., at 748.
139 A. Sastroamidjojo and R. Delson, "The Status of the Republic of Indonesia in International Law", 49 Col.L.R. (1949) 344.

Dutch enterprises.[140] An administrative body was established to carry out this government control. On December 27, 1958, the Nationalization of Dutch Enterprises Act was passed by the State and it was promulgated on December 31.[141] Under Article 1 of the Act, Dutch-owned enterprises in Indonesia were nationalised, and declared as full and free property of the State. Provision was made for compensation. In Article 2 it was stipulated that compensation "be determined by the committee whose members are appointed by the Government." Moreover, the amount, mode and time of payment "will be further regulated in a separate Act."[142]

On February 28, 1959, the Dutch Government made protest on the following grounds:

> (1) ... the measures are not based on the general interest ... but have been taken for the purpose of exerting pressure in a political dispute;
>
> (2) the measures are only directed against Dutch-owned enterprises and are therefore discriminatory ... ; and
>
> (3) the measures are further of a confiscatory nature, since there is no question of any prompt payment of an adequate and effective compensation.[143]

It should be noted that the validity of the Indonesian Nationalisation measures was challenged before domestic courts. Two Dutch-owned enterprises, whose tobacco plantations in Indonesia were nationalised, claimed title to the tobacco harvest of 1958, which was shipped to Bremen, Germany. Both German courts, Bremen District and Appeals Courts, took the position that "Indonesian nationalization measures were to be recognized abroad."[144] In similar proceedings, the District and Appellate Courts of Amsterdam, "though refrained

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[140] See generally Lord McNair, "The Seizure of Property and Enterprises in Indonesia", 6 N.I.L.R. (1959) 218; M. Domke, "Indonesian Nationalization Measures before Foreign Courts", 54 A.J.I.L. (1960) 305, and Katzarov, op. cit., at 68-69.

[141] McNair, op. cit., at 220.

[142] Ibid.

[143] For the full texts of exchange note between the two Governments, see. 54 A.J.I.L. (1960) at 484-490.

[144] Domke, op. cit., at 307.

from determining the validity of the acts of a foreign state", took a contrary position.[145] The rulings of German and Dutch courts on the issue were the subject of a debate in the pages of the *American Journal of International Law*.[146] Reference to the debate will be made in due course.

3.4 Nationalisations in Latin America

As alluded to earlier, the massive penetration of the Mexican economy by American, British and other foreign investors before the 1910 Revolution culminated in a strong nationalist reaction which eventually entailed agrarian reform in 1937 and nationalisation of petroleum in 1938. Other Latin American countries which sought economic independence, notably Cuba, Chile, Peru and Bolivia, also adopted the measures of nationalisation.

It is worth noting that besides ideological, political and financial causes, there are numerous other reasons why Latin American countries resorted to expropriate foreign properties.[147] Firstly, these countries may have been concerned about the effect which foreign businesses had upon their national culture. Secondly, they felt that foreign-controlled enterprises presented unfair competition to local business concerns. Thirdly, the leaders of these countries may have believed, along with some Roman Catholic bishops, that international capitalism was one of the factors which contributed to their economic backwardness. Finally, many thinkers in the region believed that multinational corporations decapitalise the host country through the balance of international payments. In 1969 at an official ceremony at the White House, which Latin American ambassadors attended, the president of the Special Latin American Coordinating Commission remarked:

> Private foreign investments have meant, and mean today for Latin America that the amounts that leave our Continent are many times higher than those that are invested in it. Our potential capital is

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[145] Ibid., at 308.

[146] On the issue, see Domke, op. cit. (note 140), and H. W. Baade, "Indonesian Nationalization Measures before Foreign Courts - A Reply", 54 A.J.I.L. (1960) 801.

[147] Baklanoff, op. cit., at 6.

> diminishing while the profits of the invested capital grow and multiply at enormous rate, not in our countries, but abroad.[148]

In Cuba and Chile a fundamental change in ideology and internal power formed new policies towards foreign-controlled companies that resulted in the expropriation of foreign properties, particularly American investments, on a large scale. Thus, during 1959 and 1960 the Cuban Government of Fidel Castro nationalised US corporate and individually-owned property. Similarly, in 1970 the nationalisation of the US-copper mining enterprises in Chile, under the Allende administration, were effected.

Likewise, in 1968 Peru and Bolivia, within about a year of each other, took action against Standard Oil's Peruvian subsidiary as well as the International Petroleum Company, and the Bolivian Gulf Oil Company by nationalising the companies' properties, respectively. It should be noted that among Peruvian and Bolivian nationalisation measures, the expropriation of the International Petroleum Company will be considered. Since: (1) its controversy in Peru was one of much greater substance and complexity than that of the Gulf Oil Company in Bolivia; (2) the Bolivian nationalisation measure was characterised as a simple political manoeuvre, and there was no disagreement over the compensation question with the Bolivian Government.

Therefore, in addition to Mexican nationalisation measures considered earlier in this chapter, the following section will deal with the measures of nationalisation in three more Latin American countries: Cuba, Chile and Peru. Venezuelan nationalisation measures will be examined later under the heading of the OPEC members take-overs.

3.4.1 Cuba

After World War II Cuba's investment climate was one of the most favourable among the 20 nations of Latin America. This was because the Cuban Constitution of 1940 guaranteed the protection of property rights, and these rights

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[148] Ibid.

were applied equally to Cubans and foreigners. The United States experienced the highest level of investments in Cuba. [149]

When the Marxist regime of Fidel Castro came to power in Cuba in 1959, after the overthrow of the Batista regime, it started to nationalise the properties of US and other foreign nationals on the island.[150] The process began with the expropriation of agricultural and cattle farms under the Agrarian Reform Law of June 3, 1959. Nationalisation reached its peak with the largest of the expropriations in the second half of 1960. Therefore, on July 6, 1960, Law No. 851, which was entitled 'the Nationalisation Law', ordered the taking of US nationals' property in Cuba. In Article 1 of the Law it was stipulated that:

> The President of the Republic and the Prime Minister are authorized to order jointly by means of resolutions, whenever they may deem it convenient in defence of national interest, the nationalization through expropriation of the properties or concerns belonging to natural or juridical persons nationals of the United States of America or the concerns in which said persons have a majority interest or participation even through they be organized under the laws of Cuba.[151]

Thus, the Nationalisation Law was carried out through three resolutions, which were issued by the Cuban President and Prime Minister.[152] These resolutions were aimed primarily at the nationalisation of specific American-owned property, although other foreign nationals' properties were also taken. By Resolution No. 1 of August 6, 1960, 26 companies, mainly in the fields of public interest, oil, and sugar were nationalised. Three American-owned banks were effected by Resolution No. 2 of September 17, 1960. Finally, Resolution No. 3 of October 24, 1960 ordered the nationalisation of 166 further businesses owned in whole or in part by the United States nationals.

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[149] Ibid., at 113.

[150] See generally Baklanoff, op. cit., at 12-30; M. M. Whiteman, *Digest of International Law*, Vol. 8, Department of State Publications, Washington D.C. (1967) at 1041-1047, and M. F. Travieso-Diaz, "Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims against Cuba", P.U.J.I.E.L. (1996), Vol. 17 (No. 2) 659.

[151] Quoted by M. M. Whiteman, *Digest of International Law*, Vol. 8, Department of State Publications, Washington D.C. (1967) at 1042.

[152] Ibid., at 1043-1044.

In addition, the process of nationalisation continued through 1963, when the last US corporations that were still in private hands were taken. It should be noted that in a parallel process, the properties of Cuban nationals were also expropriated during 1959-1968.[153] The Nationalisation Law authorised the State to provide compensation to the dispossessed owners. Moreover, it provided for the provision of compensation in thirty-year bonds with 2 percent interest.[154] However, in almost all cases, no compensation was paid.[155]

Following the nationalisation of most American-owned property in Cuba in July 1960, the US Government cancelled "Cuba's huge sugar contract with the US. For decades, this contract had been Cuba's leading income source." When Cuba failed to pay compensation, according to America's estimation corresponding to $1.8 billion, "Cuban-American relations plummeted to rock bottom." Nearly four decades after the nationalisation measures, a strictly enforced economic blockade and embargo against Cuba, which began in 1961 under the Kennedy administration, still continues.[156]

Besides those measures indicated above, on March 12, 1996, the US Congress passed a law, entitled 'Cuban Liberty and Democratic Solidarity Act' (popularly known as the Helms-Burton Bill).[157] The Act provides that "any individual or company (whether British ... or of any other nationality) doing business on, or through property nationalised by the Castro government is potentially subject, as a so-called 'trafficker in expropriated property', to a range of stiff US legal sanctions."[158]

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153 Travieso-Diaz, op. cit., at 661.

154 Baklanoff, op. cit., at 134.

155 Note that in his recent article, Story concludes that:
"A detailed examination of how US property was acquired and protected in pre-1959 Cuba suggests that, on equitable and legal grounds, 'appropriate' level of compensation is no compensation." A. Story, "Property in International Law: Need Cuba Compensate US Titleholders for Nationalising their Property?", J.Pol.Phil. (1998), Vol. 6 (No. 3), 306 at 333.

156 Ibid., at 308.

157 For the full text of the Act, see 35 I.L.M. (1996) 357.

158 Story, op. cit., at 309.

Following the passage of the Helms-Burton Bill many countries, such as the European Union (hereinafter the 'EU'), Canada, Mexico and Russia made strong protests. For example, the EU submitted two critical demarches to the US Department of State in this regard. In these demarches the Vice-President of the Commission expressed the EU's concerns, namely: its extraterritorial reach; its impact on trade interests in the EU; the legal chaos that will result from expanding the United States' jurisdiction over the expropriation claims of American nationals and its incompatibility with the World Trade Organisation.[159] Moreover, "the European Union announced that it will ask the WTO to issue a ruling on Helms-Burton. Washington has stated it will disregard any unfavourable WTO rulings."[160]

To the present author's best knowledge, on April 12, 1997, the European Commission and the United States reached an agreement in principle aimed at resolving the dispute over the Helms-Burton Act.[161]

As indicated above, although the bulk of the nationalisations involved American-owned properties, the Cuban Government also nationalised the property of nationals from other countries. Thus, settlement agreements were made by Cuba with Canada, France, Spain and Switzerland. "Claims have been settled at a fraction of the assessed value of the expropriated assets."[162]

3.4.2 Chile

In the nineteenth century, copper was the most important commodity in Chile, and to a large extent her economy depended upon the export of this single primary item. The copper industry remained in Chilean hands until the last years of the nineteenth century, and foreign economic control was limited to marketing. Since the beginning of this century to the late 1960s, two US-owned companies,

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159 I.L.M. (1996) at 357-397.
160 Story, op. cit., at 309.
161 The Financial Times, April 12, 1997.
162 Travieso-Diaz, op. cit., at 664.

the Anaconda Company and the Kennecott Copper Corporation, dominated Chile's copper mining industry.[163]

The experience of Anaconda and Kennecott in Chile may be divided into two periods. The first period extends from the beginning of this century to the late 1960s, and the second period under examination is that of Allende's term in power. This study will concern the second period, the time of the nationalisation of the US copper mining enterprises under the Allende administration. Nonetheless, the outstanding features of the first period are:[164] (1) the passage of the 'New Deal' Law in May 1955, which eliminated the discriminatory exchange rate on the US-owned companies, returned control over sales to them, and allowed them to receive the full sales price on copper produced; (2) 'Chileanization' or partnership policy in the mid-1960s, whereby the Chilean Government took its first step towards recovering control by acquiring majority holdings in the mining companies; (3) the conclusion of an investment guarantee treaty between Chile and the United States, under which the US Government insured a major share of the new investments of the US enterprises against expropriation; and (4) the conclusion of two 20-year tax stabilisation agreements with the US copper companies in 1955 and 1967.

Following the Chilean presidential election of 1970, the late President Salvador Allende took power for a six-year term. On December 22, 1970, Allende submitted to the Chilean Congress a "Constitutional Amendment Concerning Natural Resources and Their Nationalization."[165] The purpose of the amendment was to alter Article 10 of the Constitution, which concerned the rights of property ownership. As originally proposed, the amendment would establish State ownership over all mineral resources, nationalise the large copper companies and provide for compensation. However, it would lay down restrictive conditions for assessing compensation. Moreover, the compensation

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[163] See generally G. M. Ingram, *Expropriation of US Property in South America - Nationalization of Oil and Copper Companies in Peru, Bolivia, and Chile,* Praeger, New York (1974) at 211-321, and Baklanoff, op. cit., at 63-106.

[164] Baklanoff, op. cit., at 72-83.

[165] The full text of the Chilean Constitutional Amendment, *reprinted in* 10 I.L.M. (1971) 1067.

would be reduced by the amount of excess profits earned by the companies since 1955, with payment to be made in 30-year bonds at an interest rate of 3 percent annually. Appeal could be made to a five-man Special Copper Tribunal set up for this purpose.[166]

On 11 July 1971, the amendment bill was ratified by the Congress, and five days later, following the President's signature, the bill became law. Decree No. 92 of the Ministry of Mines establishes the rationale for the 'excess profits' deduction. Under the Decree, the Head of State was authorised to make a series of deductions from the value of compensation, including 'excess profits' obtained by the foreign companies. It stipulated, in particular, that in making 'excess profits' reduction from the value of compensation due to the foreign companies, the President should take into consideration "the spiritual and the historical-political inspiration" of the Constitutional Amendment.[167]

Thus, the US copper mines were assessed by the Chilean comptroller general as of the end of 1970 at $664 million. Further, according to the President's calculations, the amount of 'excess profits' that would be deducted from compensation to be paid to the companies was at $774 million.[168] To Francioni, Allende's assumption in tendering compensation in a reduced form was that:

> The foreign investors had been doing business in Chile under particularly privileged conditions provided by previous governments which allowed a considerably higher rate of profit when compared with the average rate of return enjoyed by the same or similar companies in other parts of the world.[169]

The deduction of 'excess profits' became the centre of a dispute between the Chilean Government and the US companies. The latter brought actions in the Special Copper Tribunal seeking compensation for properties taken by Chile. However, in August 1972, the Special Tribunal denied the petitions and declared

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166 Ibid., at 1069.
167 Baklanoff, op. cit., at 90.
168 Ibid., at 90-91.
169 Francioni, op. cit., at 279-280.

that it was incompetent to question the amount of excess profits fixed in a discretionary manner by the Head of State.[170]

As in the case of Indonesian nationalisation measures, the validity of the Chilean nationalisation was challenged before domestic courts.[171] When compensation provisions were applied to Kennecott's single Chilean subsidiary, the Braden Copper Company, it was not only refused any compensation but was held to owe the Chilean Government a sum of money. The Company brought actions in the courts of Paris and Hamburg to obtain recognition of its rights over Chilean copper imported by French and German companies. The decision of the French court upon the validity under international law of the Chilean nationalisation was not altogether clear-cut. However, the German court not only explicitly refused to rule on the issue under international law, but even under German law it found that the German defendant had a processing contract relationship with the copper delivered to it, not as ownership relationship. Thus, it held that since there was no significant contacts with the forum, it could not refuse to apply the Chilean nationalisation law.

The compensation dispute between Chile and the American companies was not resolved until political changes occurred in Chile. After the overthrow of the Allende Government on 11 September 1973, Agreements of July 24 and October 24, 1974 were reached with the US companies. Thus ending all pending legal proceedings.[172] To some, the overthrow of Allende's constitutional Government:

> Does not in any way affect the validity of this thesis ['excess profits' reduction], despite the strong probability that the new political policy of the new regime will favour more generous compensation for the nationalised American interests."[173]

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[170] Baklanoff, op. cit., at 114.

[171] See F. O. Vicuña, "Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile", 67 A.J.I.L. (1973) 711; I. Seidl-Hohenveldern, "Chilean Copper Nationalization Cases before German Courts", 69 A.J.I.L. (1975) 110, and P. Weil and P. Rambaud, "Chilean Copper Nationalization, Review by Courts of Third State", Vol. 8, Encycl. P.I.L., 76-78.

[172] Weil and Rambaud, op. cit., at 78.

[173] Francioni, op. cit., at 280.

3.4.3 Peru

Furnish observes that those who wish to understand Peru's programme of expropriation without compensation should take the history and laws of that country into consideration.[174] In the nineteenth century the majority of foreign investment in Peru was European, but toward the end of the century the United States replaced its European competitors as the most important foreign influence on both political and economic issues. In the 1920s under Peru's liberal investment laws, American investors were actually able to take over whole sectors of the economy. By 1926 among the three largest American companies, the International Petroleum Company (hereinafter IPC) "accounted for 70 percent of the petroleum production and 90 percent of the petroleum exports of Peru." Thus, the United States succeeded not only in dominating sections of the Peruvian economy but also in exercising influence in its Government. Moreover, by 1960 IPC controlled 98 percent of the petroleum industry.[175]

For the creation and growth of anti-US sentiments in Peru in the early 1930s, which resulted finally in the expropriation of IPC in 1968, several reasons have been mentioned: (1) most of the population of Peru became aware of the American dominance over key sectors of the economy; (2) the possibility of alternative sources of control; (3) the close co-operation between both the US Government and the business community with the various oppressive regimes during the first half of the twentieth century; and (4) the dependence of the Peruvian economy on the US economy during World War II, by exports of raw materials to America and the severe decline in export earnings after the war and its effects on the Peruvian economy.[176]

It is interesting to note that in Peruvian law, like that of most Latin American countries, there is a rule which stipulates that "all mineral wealth

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[174] D. B. Furnish, "Petroleum Expropriation in Peru and Bolivia", in R. B. Lillich (ed.), *The Valuation of Nationalized Property in International Law*, Vol. II, University Press of Virginia, Charlottesville (1973) 55 at 57-58.

[175] Ingram, op. cit., at 19-29.

[176] Ibid., at 30-32.

belongs to the State and may be exploited only under concession agreement." In fact, the core of the controversy between the Peruvian Government and IPC was over the ownership of the La Brea y Parinas oil fields, where the company operated; IPC claimed special rights of private ownership in the sub-soil resources.[177]

In 1963 President Fernando Belaunde Terry took office. He vowed to bring the IPC controversy to a close within ninety days. After five years heated negotiations, on August 12, 1968, an agreement was reached with the company. Since the agreement was unfair to Peru, it rapidly became the target of strong criticism.[178]

On October 3, 1968, a military junta headed by Juan Velasco Alvarado took control of the Government. On October 9, designated a Day of National Dignity, the new Government decreed the nationalisation of the La Brea y Parinas oilfields and of the Talara refinery complex, and ordered the military to take over IPC's properties. In his speech to the nation, President Velasco stated:

> For more than 50 years, like a painful wound, the problem of La Brea y Parinas has been a chapter of ignominy and of shame for our Republic, representing an insult to the dignity, honour and sovereignty of the nation.[179]

The nationalisation decree explained that the oil fields were taken over because they belonged to the State, and that the Talara refinery was taken over because of debts owed by IPC. On February 6, 1969, the company was directed to pay to the State the sum of $690,524,283 as restitution for illegal exploitation since 1924, the year it took possession of the disputed field. As a result of the claim for restitution, IPC received no monetary compensation for its nationalised properties. Interestingly, the Peruvian Government recognised its duty to pay

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[177] Furnish, op. cit., at 62. Note that this rule originated from the colonisation of the Southern American countries by Spain in the 1250s, when the Spanish brought with them their laws and customs. Ingram, op. cit., at 34.

[178] Ingram, op. cit., at 44-59.

[179] Ibid., at 60.

compensation for IPC's properties which were nationalised, "but charged such compensation off against its own claim for restitution."[180]

Therefore, IPC made juridical and administrative appeals against the Peruvian military regime. In the Peruvian courts, the company based its arguments on: (1) the agreement dated August 12, 1968, which required the complete and definite solution of the matters pending in the La Brea y Parinas controversy; and (2) since the Peruvian Government's action was taken by executive decree rather than through the courts, it was unconstitutional. Likewise, in an administrative appeal to the Ministry of Energy and Mines, it petitioned for the reconsideration of the declared debt of $690 million to the State.[181] However, the courts, including the Superior Court of Lima, held that "the laws of the military junta prevailed over the Constitution", thereby "leaving IPC with no legal recourse to protest the debt."[182]

In 1969, when the controversy reached its peak, the US Government became an active participant on behalf of the company. America declared that it recognised Peru's right to expropriate foreign property, provided that Peru met the obligation to offer prompt, adequate and effective compensation. Moreover, the US Government retained the right to extend diplomatic protection to its nationals.[183] The Peruvian Government's position may be summarised as follows: (1) the company was a Canadian and not a US national; (2) the controversy over IPC was an internal matter and would be settled in Peruvian courts; and (3) under Article 17 of the 1933 Peruvian Constitution, in a State contract with foreigners, the latter cannot seek diplomatic protection (referred to as the Calvo Doctrine, which will be considered in due course).[184]

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180 Furnish, op. cit., at 63.
181 Ibid., at 64-65.
182 Ingram, op. cit., at 63.
183 Ibid., at 64.
184 Ibid.

In late 1968 the US Government threatened the implementation of the Hickenlooper Amendment [185] if Peru did not compensate or undertake negotiations to produce compensation for the nationalisation of IPC. However, in practice, the Nixon administration refrained from the application of the Hickenlooper Amendment against Peru. In the passage of time, the US press and Government attention with regard to the IPC controversy declined, but "such was not the case, in Peru, where resentment against IPC remained high." Thus, the company was given time to pay the debt. However, since the value of IPC's assets were far less than the debt, IPC did not comply with the order of the Peruvian Government. As a result, the Government intervened in the remainder of IPC's operations. "By the middle of 1969 the issue was no longer compensation for the IPC's expropriated assets but its debts of $690 million; and, when the company failed to pay the sum, Peruvian law provided that its property be expropriated." While the United States' defence of IPC damaged its relations with other Latin American countries and threatened the security of American investments in the region, Peru received considerable verbal support from her neighbours. In these circumstances, even if the US Government had invoked the Hickenlooper Amendment, the effect on Peru would not have been great. As far as Peruvians were concerned, all the steps which were taken against IPC's assets were legal.[186] As Ingram observes:

> It might be possible to find a few who would admit that the basis of the $690 million debt was shaky and that perhaps certain of the decrees of the military regime and its intimidation of the courts had deprived IPC of due process of law, but none who would fault such occurrences in light of foreign pressure that IPC had brought to bear on Peru in obtaining the Arbitral Award of 1922 and *in light of the profits the company had reaped through half a century of*

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[185] Among "several [American] Congressional measures aimed at either punishing or preventing discriminatory action against U.S. business interests - including amendments affecting foreign aid, the sugar quota, and military assistance", the Hickenlooper Amendment was the first measure to the 1962 foreign aid act, "that came to symbolize all such measures and became a critical issue in US-Latin American relations in the late 1960s." Ibid., at 368-369

[186] Ibid., at 64-68.

monopolizing the petroleum industry and draining the economy of Peru (emphasis added).[187]

3.5 OPEC Countries Take-overs

Following the Baghdad Conference on September 14, 1960, the Organisation of Petroleum Exporting Countries (hereinafter 'OPEC') was established. Originally it comprised only five members: Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. Other countries, such as Abu Dhabi, Algeria, Ecuador, Gabon,[188] Indonesia, Libya, Nigeria and Qatar joined later. The organisation's "principal aim was to be the unification of petroleum policies ... and the determination of the best means for safeguarding the interests of Member Countries individually and collectively."[189]

At the time of the establishment of OPEC the oil industry of its member countries was in the control of foreign companies. During the first decade of the organisation's existence, the main preoccupation of its member States was to increase tax revenues from foreign oil companies which operated on their territories under a concessionary system. However, "with the increasing political strength of member countries, and of Third World countries in general during the 1960s, the concern for taxation gave way towards the end of the decade to demands for equity participation in the concessions."[190]

To this end, in its Sixteenth Conference held in Vienna in June 1968, the organisation adopted a resolution, titled the 'declaratory statement of petroleum policy in member countries'.[191] In the preamble of the resolution it was stipulated that "hydrocarbon resources in Member Countries are one of the principal sources of their revenues and foreign exchange", and that these

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[187] Ibid., at 68.

[188] Gabon was first accepted as an associate member, viz., with no voting rights. However, with its admission as a full member later, the organisation now acquired 13 full member States. See I. F. I. Shihata, "Organization of Petroleum Exporting Countries", Vol. 5, Encycl. P.I.L., at 224-228.

[189] Ibid., at 225.

[190] Ibid.

[191] Resolution 90 (XVI), was adopted on 24 and 25 June, 1968, *reprinted in* 7 I.L.M. (1968) 1183.

resources "are limited and exhaustible". Referring to the General Assembly of the United Nations Resolution 2158 of November 25, 1966, it further provided that the State's right over its natural resources is inalienable and permanent. The resolution also recommended numerous principles to be pursued by the member countries. Among these recommendations may be recalled:

> 1. Member Governments shall endeavour ... to explore for and develop their hydrocarbon resources directly ... ;
>
> 2. However, when a Member Government is not capable of developing its hydrocarbon resources directly, it may enter into contracts of various types ... Under such an arrangement, the Government shall seek to retain the greatest measure possible of participation in and control over all aspects of operations;
>
> 3. In any event, the terms and conditions of such contracts shall be open to revision at predetermined intervals, as justified by changing circumstances. Such changing circumstances should call for the revision of existing concession agreements.

The member countries tried to render operational the principles contained in the resolution. For doing so, some of them, like Iran, with its oil industry already nationalised, attempted to modify their contracts with foreign oil companies. Others, such as Iraq, Libya and Venezuela, resorted to nationalisation of their oil industries.[192] Therefore, the examination of such measures in these three countries will be our next task.

3.5.1 Iraq

Iraq was a part of the territory of the Ottoman Empire until the signing of the Lausanne Treaty on July 24, 1923. Britain then, under the League of Nations' mandatory system, accepted a mandate over Iraq. Eventually, it gained independence at the end of World War II. Britain and Germany were the first countries which attempted to obtain concessions from Turkey in relation to Iraq. Early in the 1910s, there were four groups: the German-Deutsche Bank; British-

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[192] It has been suggested that OPEC recommendations could not be regarded as the sole reason for such measures. See Piran, op. cit., at. 55.

D'Arcy (the Anglo-Persian Oil Company); Dutch-Anglo Saxon Oil Company; and American-Chester group, all of which sought concessions in the oil fields of Mesopotamia. The first three groups determined to unite themselves and to keep the Americans out.[193]

In 1912 a British joint stock company, the Turkish Petroleum Company (hereinafter 'TPC'), was formed by a British subject, "for the purpose of acquiring all claims to the Mesopotamian oil fields, as well as prospecting for oil in other parts of the Ottoman Empire." Two years later, after some negotiations between these groups (with the exception of the Americans), an agreement (referred to as the Foreign Office Agreement) was reached. The agreement united all the European interests in the Mesopotamian oil concessions, and conferred upon the British absolute control. It should be noted that in 1909 an American subject, Admiral Chester, was granted a concession for mineral rights, including oil, but it was never ratified by the Turkish Parliament. Consequently, the US State Department began to question the legality of TPC concession. In 1923 the American companies finally opened direct negotiations with the partners of TPC. In fact, this was in a sense a recognition of TPC by the US Government and companies. In these negotiations, "the question of self-denial clause, in which the participating companies obligated themselves not to seek oil concessions in the territories of the Ottoman Empire except through TPC" was one of the dominant difficulties. In the meantime, in 1925 TPC was granted a concession for seventy-five years by the Iraq Government. Eventually, in 1927 the US State Department announced that it would not object to the self-denial formula.[194]

Moreover, "on July 31, 1928 all the participants [including the American group] in TPC signed the Group agreement which limited the activities of each participant in the specified area, which was marked out on a map attached to the Agreement by a red line" (known as the 'red line agreement'). Subsequently,

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[193] B. Shwadran, *The Middle East, Oil and the Great Powers* (3d ed.), Israel Universities Press, Jerusalem (1973) at 195.
[194] Ibid., at 196-209.

TPC's name was changed to the Iraq Petroleum Company (hereinafter 'IPC'). On March 24, 1931, the Red Line Agreement was revised and "the new concession gave the Company [IPC] the sole right to exploit all lands situated to the east of the Tigris River" and it further provided that "royalties to be paid to Iraq were four shillings (gold) per metric ton." Under the agreement, IPC enjoyed tax exemption, subject of course to the production.[195]

It is worthy of note that the relations between IPC and the Iraq Government were best when the country was closely guided by the British. However, the dispute began when the Iraq Government asked IPC for an increase in royalties from four to six shillings (gold) per metric ton in 1948. Prolonged negotiations were undertaken, but no agreement was reached. In the meantime, two important events occurred in the neighbouring countries of Iraq: (1) as indicated above, in 1951 the Anglo-Iranian Oil Company was nationalised; and (2) in the same year Saudi Arabia concluded an agreement with Aramco, the Arabian American Oil Company, with a 50-50 royalties formula. Then the Iraqis, who were dissatisfied with the existing royalties, insisted on increasing royalty payments to levels similar to those received by neighbouring countries. Finally, on February 3, 1952, a new agreement was signed between the Government of Iraq and the Company, and two weeks later it was approved by the Iraq Parliament. Thus, the Iraqis were able to insert a fifty-fifty profit basis clause in the new agreement.[196]

Likewise, Iraq sought higher royalties, a higher percentage of the taxes, a reduction of the concession areas, and a higher participation in management. Therefore, from the late 1950s to the early 1970s the relations between the Company and the Government of Iraq became worse, which resulted in the nationalisation of IPC in 1972. After the revolution of 1958, led by Abd al-Karim Qasim, "the Ports Authority ruled IPC was not entitled to specific exemption from the regular port dues and proposed to raise the duties to the level imposed on other exports." In return, IPC threatened to reduce production. The

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[195] Ibid., at 237-238.
[196] Ibid., at 245-257.

revolutionary leader, Qasim, warned the Company that if it reduced production he would take appropriate measures. IPC felt that due to some considerations, such as the drop in the price of oil in the international market, the Iraqis would refrain from taking severe action. The Iraqis believed that "the threat of nationalization, for which there was a strong sentiment among the Iraqi nationalists, the reduced influence of the Western nations in the Middle East and the consequent readiness of Russia to assist in oil and other economic problems would induce IPC to submit to their demands."[197]

On December 11, 1961, Law No. 80 was promulgated by the Iraq Government which contained seven articles and "defined all areas allocated to each of the petroleum companies operating in Iraq." The law also "ordered the companies to submit all geophysical and geological information on the territory covered by the concessions, as well as other engineering data." IPC objected to the law and called for arbitration under the provisions in its agreements. The Company "named a former president of the ICJ as its nominee, and asked Iraq to appoint its arbitrator." After the passage of the 1961 law, the company continued discussions with the Iraq Government for a possible modification of the law, and the major disputed issues between them, such as marketing allowances and royalty expensing.[198]

The negotiations between OPEC member States and the Middle East concessionaire companies led to the Tehran agreement of February 14, 1971, "which gave Iraq an increase of about 7 cents a barrel for oil produced in the southern fields and increase of 5% in the profits share." Moreover, in line with OPEC recommendations, Iraq requested from the Company: (1) more participation in IPC's management; (2) increase in annual production, and in the number of seats on the boards of directors for Iraqis; and (3) the removal of IPC's headquarters from London to Baghdad. For its part, IPC asked arbitration for Iraq's expropriation of its concession areas. The Government of Iraq "countered

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[197] Ibid., at 272-273.
[198] Ibid., at 276.

by demanding retroactive royalty payment increases." It warned the Company either to meet its demands or face legislation.[199]

During 1971 and early 1972, production in the northern fields dropped. In IPC's view, it resulted from some economic reasons, but the Government considered that IPC's real intention was to force Iraq to return the oil field in question. In these circumstances, on June 1, 1972, the President of Iraq, Ahmad Hassan al-Bakr, announced the decision of the Revolutionary Command Council to nationalise the Iraq Petroleum Company.[200]

On June 9, 1972, at an extraordinary conference in Beirut, OPEC adopted a resolution "supporting Iraq's action and asked members not to allow companies to make up the loss in Iraqi output by increasing production."[201]

The IPC controversy was solved through mediation. On February 28, 1973, the President of Iraq announced that the efforts of mediators, such as the Secretary-General of OPEC, resulted in a settlement. Under the settlement, "IPC was to pay Iraq £141 million for past debts and was to receive $15 million tons of crude oil as compensation for nationalization of its concession."[202]

3.5.2 Libya

Libya was formally recognised as an independent sovereign State by the United Nations in 1949, and effectively became so in 1952.[203] At the time of its independence, Libya was a very poor country with almost no known natural resources. Besides having only small areas of cultivable land, over 90% of the country is desert, and hence there was little hope for much improvement. During 1951-1976, however, Libya experienced remarkable economic growth as a result of the discovery, exploitation and exportation of petroleum, and by 1969 it became the fourth largest petroleum exporter in the world.[204]

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199 Ibid., at 278.
200 Ibid., at 279.
201 Ibid.
202 Ibid., at 295-296.
203 62 I.L.R. Lauterpacht (ed.), Grotius Publications Ltd., Cambridge (1982) 151.
204 R. B. von Mehren and P. N. Kourides, "International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases", 75 A.J.I.L. (1981) 476 at 477.

In order to improve its economic conditions, to encourage foreign capital investment, and to insure the exploitation and protection of its natural resources, Libya passed the 1955 Petroleum Law. In Article 1, it was stipulated that:

> (1) All petroleum in Libya in its natural state, in strata, is the property of the Libyan State;
>
> (2) No person shall explore or prospect for, mine or produce petroleum, unless authorized by a permit or concession issued under this Law.[205]

The Petroleum Law experienced two major amendments in 1961 and 1971, and both of them recognised the principle that the rights of the concessionaire could not be unilaterally changed without its consent.[206] Moreover, "within the framework of the Petroleum Law, approximately 133 concessions were granted to American, British, German, Italian and French corporations prior to 1971."[207] In 1968 the Royal Government of Libya, under the administration of King Idriss I, was overthrown by a revolutionary regime which declared that it would honour the concessions given by its predecessor.[208]

In effect, Libya was the first OPEC member country to attempt to enforce the decisions of the eighteenth OPEC meeting of 1968, "including the establishment of a very elaborate set of controls to be applied by member countries to the operations of the multinational oil companies."[209] From late 1971 to 1974, accordingly, the Libyan Government gradually nationalised all of the interests and properties of American and British companies. The controversies over the Libyan nationalisation measures resulted finally in the issuance of three well-known arbitral awards, namely *BP*, *Texaco* and *Liamco*. In these awards, the arbitrators discussed some important issues of international

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205 20 I.L.M. (1981) 1 at 9 (62 I.L.R. 140 at 151).
206 Mehren and Kourides, op. cit., at 480.
207 20 I.L.M. (1981) at 14 (62 I.L.R. at 156).
208 C. Greenwood, "State Contracts in International Law - the Libyan Oil Arbitrations", 53 B.Y.I.L. (1982) 27 at 29.
209 G. Coronel, *The Nationalization of the Venezuelan Oil Industry*, LexingtonBooks, D.C. Health and Company, Lexington (1983) at 35.

law, such as the notion of permanent sovereignty over natural resources, and the law of contracts between States and foreigners, natural or legal persons. Reference to these awards will be made in this thesis on appropriate occasions. Thus, a brief examination of the measures taken by the Libyan Government is necessary.

In 1957 Mr. Nelson Bunker Hunt, a United States national, was granted a single concession (Concession 65) to research for and extract oil within a designated area, by the Royal Government of Libya. In 1960 Mr. Hunt assigned to BP Exploration Company (Libya) Limited, a subsidiary of British Petroleum Company Limited, (hereinafter 'BP') "an undivided one half interest and title in and to the Concession." BP then acted as an operator on behalf of Mr. Hunt and itself.[210] Moreover, between 1955 and 1968 the Texaco Overseas Petroleum Company (hereinafter 'Texaco') and the California Asiatic Oil Company (hereinafter 'Calasiatic'), both American companies, obtained fourteen oil concessions from the Royal Government.[211] Similarly, in 1955 the Libyan American Oil Company, the subsidiary of Texas Gulf, (hereinafter 'Liamco') was granted seven concessions, but voluntarily surrendered two, and relinquished two more concessions to the Libyan Ministry of Petroleum prior to the decree of nationalisation.[212]

On December 7, 1971, the Libyan Government announced Decree No. 115 nationalising all the interests and properties of BP in the Hunt/BP concession. Following the BP nationalisation, Mr. Bunker Hunt was asked by the Libyan Government to operate the entire concession, but problems developed. Eventually, on June 11, 1973, the Libyan Government nationalised all of Hunt's interests and property in the Hunt/BP concession.[213]

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210 53 I.L.R. at 319-324.
211 Ibid., at. 393-398.
212 62 ibid., at 156.
213 Mehren and Kourides, op. cit., at 483-484.

Here, as in the case of Iraq, OPEC passed a resolution which supported the actions of the Libyan Government. The resolution [214] after considering the point that a principal aim of the organisation is to protect the interests of member countries individually and collectively, provided that:

> 1. To express its full support to the decision taken by the Libyan Government in fulfilment of its sovereign right to control its natural resources; and
>
> 2. That in case certain oil companies take individual or collective actions to hinder the implementation of the decision taken by the Libyan Government in the fulfilment of its sovereign right, the Conference shall take the appropriate measures which it deems necessary.

It is significant to note that in early 1973, Libya sought direct participation, ranging from 51 to 100 percent, in the oil concessions, and thus demanded from Texaco and Liamco a higher participation. The Companies responded "with a variety of proposals and counterproposals, all of which were rejected by Libya." In these circumstances, on September 1, 1973, Libya promulgated Decree No. 66, nationalising 51 percent of the interests and properties of Texaco, Calasiatic and Liamco. Likewise, the remaining property of the Companies was effected by Decree Nos. 10 and 11 of February 11, 1974.[215] The Nationalisation Decree provided for compensation, however, the assessment of compensation was left to be determined by a Libyan Committee.[216]

As indicated above, since there were no friendly settlements made between the Libyan Government and the Companies, the latter commenced arbitration proceedings. Despite the failure of Libya to appear in the proceedings, the awards were rendered in the *BP*, *Texaco* and *Liamco* cases. However, none of these awards were executed, and after the arbitration proceedings, the Companies

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[214] Resolution 159 (XXXV), was adopted on September 16, 1973, *reprinted in* 13 I.L.M. (1974) at 221-222.

[215] Mehren and Kourides, op. cit., at 485.

[216] Greenwood, op. cit., at 29-30. See also R. Dolzer, "Libya - Oil Companies Arbitration", Vol. 2, Encycl. P.I.L., 168.

reached agreements with the Libyan Government, resolving their disputes. Put differently, the Companies were compensated out of arbitration. Agreements of November 24, 1974, September 25, 1977 and of March 1981 were concluded by Libya with BP, Texaco/Calasiatic, and Liamco respectively.[217]

3.5.3 Venezuela

As indicated above, in the law of almost all of the Latin American countries there is a concept in which the ownership of mineral deposits belongs to the State, and historically it originates from Spanish law. In the case of Venezuela, since the 1870s the concept has been firmly established in Venezuelan law and the State therefore holds the rights to all sub-soil deposits, including hydrocarbon resources.[218]

During the nineteenth century, coffee was the single primary commodity in Venezuela and it formed 75 percent of all its exports. Due to the low price of coffee in the world market, it was a bankrupt and extremely dependent country, until oil came to its rescue.

In the 1910s, numerous concessions to search for and extract petroleum within the different states and areas of Venezuela were granted to foreign companies. Among the concessionaires the most fortunate were the bigger multinational corporations, such as Exxon, Gulf, Mobil, Shell, and Texaco.

In 1920 during Gomez's office, the first hydrocarbons law was introduced and Venezuela possessed the most liberal petroleum policy in Latin America. Thus, "to attract foreign investments, exploration and exploitation, tariffs were very low and the same applied to royalties ... Import duties for petroleum equipment were waived."[219] At that time coffee was still the main export from Venezuela, but oil rapidly became more dominant in its economy. Two general points are here worthy of mention: (1) as in the case of Iraq, there was political instability in Venezuela, and the country witnessed several coups; and (2) like

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217 Mehren and Kourides, op. cit., at 545-546.
218 Coronel, op. cit., at 3-4.
219 Ibid., at 8-9.

Peru, both foreign enterprises and the US Government had a close relationship with the dictatorial governments in Venezuela, and this caused deep popular resentment against foreign companies.

In 1938 the Lopez Contreras Government passed a new hydrocarbons law. The law "gave to the government explicit authority to create national oil companies." It "reduced the tax relief on imports", and "increased exploration and exploitation taxes." By 1938 Venezuela was no longer dependent on coffee, but on oil. In 1943 a further hydrocarbons law was enacted. The new law extended for forty more years (1983) the terms of the old concessions "but subject to new conditions more favourable to the government." It increased taxes, reinforced the principle of reversion of assets, and also introduced a fifty-fifty profit basis clause between the Government and the oil industry. The law remained basically unchanged until 1975, the year of nationalisation, with only two partial amendments being made in 1955 and 1967.[220]

In 1950 Perez Jimenez took power in a coup, and Venezuela then started to receive massive US military aid. "Diplomatically, militarily, and economically, Venezuela remained firmly within the sphere of influence of the United States." On the one hand, due to "the favourable climate for foreign capital, foreign investments in Venezuela more than doubled during the 1950s" and on the other, Venezuela with seven million population had became the sixth best market in the world for US traders. The Ministry of Mines and Hydrocarbons was established to handle all matters concerning the exploitation of hydrocarbons and minerals.[221]

In 1954 the United States adopted a new oil imports policy, in which mandatory oil-import quotas were imposed on Venezuela. Its impact on the Venezuelan oil industry was severe. "The Venezuelan Government was especially worried about Mexico and Canada receiving preferential treatment over Venezuelan oil, since they felt that Venezuela had also special treatment

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220 Ibid., at 13-20.
221 Ibid., at 24-25.

earned for many years' service as a reliable supplier to the United States." Eventually, Venezuela obtained some minor increases in the quotas, but it never received the desired preferential treatment. In 1960 the Venezuelan Oil Corporation, a fully State-owned oil company, was established "as an appendix of the Ministry of Mines and Hydrocarbons to serve as an instrument of national oil policy."[222]

As alluded to earlier, Libya was the first OPEC member country to start enforcing the recommendations of OPEC towards controlling the operations of the multinational oil companies. Coronel observes that "there is little doubt that the Libyan initiatives regarding increasing controls over the operations led the Venezuelan government to issue" decree 832 of December 1971, in which it took a further step "in the systematic administrative take-over of its oil industry."[223] Moreover, in December 1970 the twenty-first meeting of OPEC was held in Caracas, and resolved some problems.

In August 1971 a law nationalising the gas industry was passed. Its main effect was that it reinforced the deeply nationalistic feelings existing in the country. Of much more importance was the passing of the law of reversion in July 1971. Under the reversion law, "all the assets, plant, equipment belonging to the concessionaires within or outside the concession areas would revert to the nation without compensation upon the expiration of the concession." Following the passage of this law, the foreign companies operating in Venezuela, such as Exxon, Shell, Texas, Mobil, Gulf and Sinclair brought actions before the Venezuelan Supreme Court for the nullification of the law, on the grounds that some of its provisions "violated their constitutional rights and were of a confiscatory nature." Similarly, they argued that "the law seemed to change the rules of the game, since the assets located outside the concession areas such as headquarters buildings would probably never have been built if it had been known that they would be taken over by the State." The Government defended

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222 Ibid., at 25-29.
223 Ibid., at 35.

its action upon the basis that "all assets built or acquired by the companies, directly related to the operation of the concessions, should be subject to reversion regardless of where they were located."[224]

The passage of the reversion law and decree 832 coincided with a notable reduction in the Venezuelan oil output. Several congressmen accused the foreign companies of retaliation. In February 1972, President Caldera in his speech to oil workers stated that "the production cuts were artificially provoked", and that "world oil demand increases every day, but Venezuelan oil output decreased last year." For many years the Ministry of Mines and Hydrocarbons remained the passive recipient of certain financial benefits in the form of royalties and taxes, but by 1972 the situation had changed significantly. The new tools, namely the law of reversion, decree 832, the natural gas law, and the authorisation to fix the fiscal export prices, granted Government almost total control of the oil industry. In short, the strategic decisions were no longer fully in the hands of the oil companies.[225]

In May 1974, under the supervision of President Perez, the Nationalisation Commission was established. Its "task force was in charge of analyzing the mechanisms required to allow the National Executive to take over the assets of the oil industry before the normal reversion year of 1983." In the meantime, President Nixon sent a representative, who declared the United States' policy on the nationalisation of American interests abroad. The US stance was that it "respected the sovereignty of countries to dictate their own laws." Following this position, an American company, Exxon, announced that it "would abide by the decision of the Venezuelan Government and that it "trusted the government to be fair and equitable."[226]

In early 1975 there were four different drafts of a nationalisation bill: two in Congress, namely the draft bills submitted by the two main Venezuelan political parties; the third one presented to President Perez by the Nationalisation

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224 Ibid., at 38-39.
225 Ibid., at 39-41.
226 Ibid., at 53-55.

Commission; and the last bill prepared by the National Executive. Among them, the draft of the National Executive finally went into effect. It was a document similar to, but not identical with, the draft presented by the Nationalisation Commission.

Finally, on August 29, 1975, President Perez proclaimed to the nation the entry into force of the Nationalisation Law. In Coronel's view,[227] comparatively, the nationalisation of the Venezuelan oil industry was unique. He has advanced two reasons to explain this: (1) the model was the result of many minds coming together during the national debate of 1974-1975; and (2) the experience which the Government had obtained when it nationalised the iron industry in 1974; the conclusion of technical assistance and marketing contracts with the former concessionaires after the nationalisation. Likewise, the main characteristic of the oil nationalisation model was "the national industry's relationship with the former concessionaires, which depended on negotiations leading to a settlement, compensation based on net book value and payment in bonds, technical assistance agreements, commercial agreements, and establishment of a guaranty fund." Put in technical terms, the case of Venezuela freeing its oil industry from foreign hands was partly accomplished by negotiation, and partly through nationalisation.[228]

Several factors enabled quick agreement with the oil companies. Firstly, the circumstances were ripe for nationalisation; since almost all the personnel of the Venezuelan oil industry were Venezuelans, there was considerable support for nationalisation. Secondly, following OPEC recommendations, member countries, as indicated above, had started a series of nationalisations.[229]

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[227] Ibid., at 82-83.

[228] The negotiated nature of the take-over of the oil industry was stipulated by Articles 12 and 13 of the Nationalisation Law. Article 12 in part reads:
Within 45 ... days following the promulgation of this law, the National Executive ... will present to the concessionaires a formal offer of compensation to be calculated pursuant to the provisions of article 15 of the present law." Article 13 concerned an expropriation mechanism in a case when an agreement with the concessionaires was not reached.

[229] Coronel, op. cit., at 72-73.

Article 15 of the Nationalisation Law concerned the issue of compensation. Under the article, "the amount of compensation of the expropriated assets cannot be higher than the net value covering properties, plants, and equipment." It further provided that "payment of compensation could be deferred for up to 10 years and could be made in bonds of the public debt, which would earn an interest no greater than 6 percent per annum."[230]

4. Conclusion

As is apparent from the above survey, the measures of expropriation were mostly carried out in the form of nationalisation (expropriation on a large-scale). Therefore, the following conclusions mainly concern the concept of nationalisation:

1. Nationalisation was employed as one means among many for the solution of economic and political problems in countries geographically dispersed and with widely differing political and ideological systems.

2. From the various reasons put forward to justify the nationalisation measures -including social, economic and political - it appears that the main cause of such interference "by the State into economic life is the aspiration towards the socialisation of the general conditions of life."[231] Moreover, the transfer to the State of the means of production and exchange, with a view to their utilisation in the public interest, "constitutes the real driving force of nationalisation in all countries."[232]

3. With a few exceptions, the nationalisation laws of the countries which have been examined recognised the right of dispossessed owners to receive compensation.

4. Prior to World War I the concept of nationalisation was not recognised. State interference with private property took the form of expropriation in the public interest, and was normally directed against isolated items of property.

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230 Ibid., at 85.
231 Katzarov, op. cit., at 74.
232 Ibid.

After World War I the notion of nationalisation appeared, but it was not recognised as a legal concept. At that time, private ownership was still regarded as an absolute and exclusive right, which could only be limited by expropriation in the classical type. As shown above, after World War II a wave of nationalisation occurred in many countries throughout the world. Consequently, the concept of nationalisation was incorporated in the constitutions of many countries, and eventually gained a distinct legal status.

5. The measures of nationalisation studied in this chapter may be classified into several systems, based on legal, regional and organisational similarities:

(a) The Russian system was based on the idea of complete and radical socialisation of economic life. Under the system, private ownership of land and means of production was abolished and "the whole economic system is based on socialist ownership of means of production, determined and directed by the State economic plan."[233]

(b) The Eastern European system was very similar to the Russian. According to this system, the nationalisation measures "being designed to allow new achievements without thereby destroying what was already in existence."[234] However, in these countries, unlike Russia, private property and private enterprise were not abolished, though they were restricted by laws.

(c) As indicated above, the nationalisation measures introduced by the Western European countries were much milder than the Eastern European ones. These measures do not aim at "modifying ... the traditional content of property, or imposing any appreciable restrictions on private enterprise."[235] However, the nationalisation effected in Western Europe entailed the transfer to the State of the means of production and exchange and their utilisation in *the public interest.*

(d) The Latin American system was based on "the concept of social function of property." This concept enabled the nations of the region to

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233 Ibid., at 77.
234 Ibid.
235 Ibid., at 78.

nationalise or expropriate the main industries. For these countries, "nationalisation represents not only a new attitude towards the internal social structure, but also the adoption of a new attitude towards foreign economic influence."[236]

(e) Since the developing countries, such as Iran, Indonesia and Egypt in resorting to the measures of nationalisation were pursuing the same goals as the Latin Americans, their system may be classified as belonging to group (d).

(f) The system adopted by OPEC member countries was based on freeing their oil industries from foreign hands. To this end, the member States tried to replace the concessionary system by 'participation' and finally 'ownership', a transition that was partly accomplished by negotiation and partly by nationalisation.

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[236] Ibid., at 76.

CHARTER TWO

EXPROPRIATION AND LEGAL PRINCIPLES

In the previous chapter we studied the development of concepts and procedures in expropriation. As we have seen, with a few exceptions, expropriations took place on a large-scale (so-called nationalisation), and were employed as one means among many for the solution of economic and political problems in countries from many parts of the globe, which differ widely in their political and ideological systems. In this chapter, the subject of expropriation will be considered from a legal point of view. In the first section of this chapter an attempt will be made to answer the question of whether, under international law, there is a single standard by which to measure the international responsibility of the State with regard to the treatment of aliens. This will be followed by the examination of the sovereign right of a State to expropriate foreign property. We shall study the limitations on such a right, which are laid down by customary or treaty law. The contractual devices for foreign investment protection will be considered. Finally, the principle of permanent sovereignty over natural resources and the activities of the UN General Assembly in this regard will be examined.

1. Traditional International Law: The Law of State Responsibility for Injuries to Aliens

The basic idea of the concept of State responsibility for injuries to aliens might be traced back to the teachings of the two most outstanding founding fathers of international law, Vitoria and Grotius.[1] However, a further step was

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[1] F. V. Garcia-Amador, *The Changing Law of International Claims*, Vol. 1, Oceana Publications, Inc., New York (1984) at 45. See also B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, University Press of Virginia, Charlottesville (1983) at 1-60.

taken by Vattel, when he declared that "whoever ill-treats a citizen injures the State, which must protect that citizen."[2] Thus, this approach, to be believed, led to the idea of 'protection of aliens abroad' (the so-called principle of diplomatic protection), and modern theories of State responsibility on the treatment of aliens.[3]

Traditional international law generally recognises that when a person resides in, or acquires property in, a foreign country, he is deemed to concede to the legislation of the host State for the protection of his person and property. The question which arises here is: does the emergence of the institution of State responsibility for injuries to aliens, and its collorary, the right of the home State to extend protection to its nationals abroad, mean that the status of aliens has ceased to fall within the exclusive jurisdiction of the host State? In short, does the status of aliens become governed, to some extent at least, by international law? In order to give a proper answer to the question, it is necessary to examine the two doctrines in this regard: the 'international minimum standard' and the 'national treatment standard'.

1.1 International Minimum Standard

The doctrine of international minimum standard is also called 'international standard of justice' or 'minimum standard of civilisation'. It was first formulated

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2 E. D. Vattel, "The Law of Nations", Classics of International Law (Trans. by C. Fenwick), Carnegie Institution, Washington D.C. (1916), Book II, Chapter IV, at 136.

3 Note that the law of State responsibility for injuries to aliens was the subject of severe criticisms and attacks by spokesmen from Latin American, Afro-Asian as well as former Communist countries. The Indian jurist Guha-Roy, for instance, observes that the law of responsibility of States for aliens is not a part of universal international law as "a custom [is] in no way binding on other States, unless it can be shown to have its roots in some general principles of law of a more or less universal character." S. N. Guha-Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?", 55 A.J.I.L. (1961) 863 at 872. Similarly, a commentator from Russia, Tunkin, maintains that the doctrine of State responsibility has no validity in contemporary international law, and contravenes the basic principles of international law, such as "principles of respect for State sovereignty, non-interference in internal affairs, equality of States ... good neighbourly fulfilment of international obligations." G. I. Tunkin, *Theory of International Law* (Trans. by W. E. Bulter), Harvard University Press, Massachusetts (1974) at 86. For a brief account on the issue, see F. W. Garcia-Amador, "The Proposed New International Economic Order: A New Approach to the Law Governing Nationalisation and Compensation", 12 Lawyer of the Americans (1980) at 1-10, and S. K. B. Asante, "International Law and Foreign Investment: A Reappraisal", 37 I.C.L.Q. (1988) 598 at 598-595.

in 1910 by the former US Secretary of State, Elihu Root.[4] However, its origin intertwined with the idea of diplomatic protection, and thus it may be traced back to the nineteenth century.[5] Under this doctrine, the host States are required by international law to observe an international minimum standard in the treatment of aliens and alien property.

This standard has been widely accepted in the past. As far as international jurisprudence is concerned, in the *Neer* case,[6] the US-Mexican Claims Commission stated that "the propriety of governmental acts should be put to the test of international standards."[7] The same Commission, in the *Hopkins* case,[8] took a similar position. It has also received support in legal writing.[9]

Despite its extensive support, the contents or definition of the standard are far from clear. In the *Neer* case, for instance, it was held that:

> The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.[10]

Therefore, international minimum standard has always suffered from a fundamental defect, namely its vagueness and imprecision. Jurists have also noticed this defect. Francioni, for example, comments:

> Apart from the serious dangers of maintaining in the present stage of evolution of international law a concept of 'civilized nation' - given its originally restrictive sense and the old connotations that makes it closely related to such ideas as colonialism and capitulation regimes -

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4 The standard was first formulated by the former US Secretary of State, Elihu Root in 1910. See, A. A. Akinsanya, *The Expropriation of Multinational Property in the Third World*, Praeger Publishers, New York (1980) at 40-42.

5 See generally D. F. Vagts, "Minimum Standard", Vol. 8, Encycl. P.I.L., at 382-385; Garcia-Amador (1984: 49-52); Brownlie, op. cit., at 527-528; O. E. Bring, "The Impact of Developing States on International Customary Law concerning Protection Foreign Property", 99 Scandinavian Studies in Law (1980) 99 at 103-104 and the American Law Institute's Restatement (Third) on Foreign Relations Law of the United States (1987), Vol. 2, Section 711, 184.

6 4 R.I.A.A. (1926) 60.

7 Ibid., at 61.

8 Ibid., at 47. See also the citations by Bring, op. cit., at 103 n. 10.

9 See the citations by Bring, op. cit., at 103 n. 9.

10 4 R.I.A.A. (1926) at 61-62.

> the doctrine of 'minimum standard' does, in fact, beg the question that it purports to answer.[11]

Guha-Roy made the following remarks:

> First, a national of one state, going to another in search of wealth or for any other purpose entirely at his own risk, may well be left to the consequences of his ventures ... For international law to concern itself with his protection in a state without that state's consent amounts to an infringement of that state's sovereignty. Secondly, a standard open only to aliens but denied to a state's own citizens inevitably widens the gulf between citizens and aliens and thus hampers, rather than helps, free intercourse among peoples of different states. Thirdly, the standard is *rather vague and indefinite*. Fourthly, the very introduction of an external yardstick for the internal machinery of justice is apt to be looked upon as an affront to the national system, whether or not it is below the international standard. Fifthly, a different standard of justice for aliens results in a twofold differentiation in a state where the internal standard is below the international standard. Its citizens as aliens in other states are entitled to a higher standard than their fellow citizens at home. Again, the citizens of other states as aliens in it are also entitled to a higher standard than its own citizens (emphasis added).[12]

Likewise, some argue that the doctrine never involved a definite content with a fixed standard, but rather a "process of decision",[13] "a process by which the question of whether a State was responsible under international law for an alien's injury could be weighed and resolved given the context and facts of a particular case."[14] Nonetheless, Garcia-Amador is of the opinion that the standard is not nowadays formulated:

> in a way so rigid as it is in the above-transcribed text. This change in the traditional position seems to be a response to the increasing criticisms coming from different directions, including from the Western sources themselves.[15]

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[11] F. Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity", 24 I.C.L.Q. (1975) 255 at 263.

[12] Guha-Roy, op. cit., at 889.

[13] M. S. McDougal *et al.*, "The Protection of Aliens from Discrimination and World Public Order: Responsibility of State conjoined with Human Rights", 70 A.J.I.L. (1976) 432 at 450.

[14] R. B. Lillich "Duties of States regarding the Civil Rights of Aliens", 161 Hague *Recueil* (1978-III) 329 at 350.

[15] Garcia-Amador (1984: 52).

Besides its vagueness and imprecision, the content of the international minimum standard in some areas, such as the expropriation of foreign property, is controversial. As will be shown in due course, the case for the survival of the traditional formula of 'prompt, adequate and effective' compensation has been virtually eroded.[16]

1.2 National Treatment Standard

The abusive exercise of diplomatic protection based on international minimum standard led to the enunciation of a number of doctrines in Latin America.[17] The most well-known one concerning the law of State responsibility for injuries to aliens is of the Calvo doctrine.[18] The Argentine jurist, Dr. Calvo, based his doctrine on two cardinal principles: (1) the 'non-intervention' principle, according to which a sovereign independent State, by reason of the principle of equality, enjoys the right to freedom from foreign interference in any form, whether by diplomacy or by force; and (2) the 'equality of treatment' principle, under which aliens could not claim any greater measure of protection than nationals.[19] Put differently, aliens were not entitled to any greater rights and privileges than those available to nationals. In Calvo's view, "the principle ... that foreigners merit more regard and privileges, more marked and extended than those accorded even to the nationals of the country where they reside ... is intrinsically contrary to the right of equality of nations."[20]

Although the principle of equality was not affirmed in the Hague Conference of 1930, on the 'Responsibility of States for Damages done in their

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[16] Other important elements of the traditional law of State responsibility are the concept of vested rights, particularly the requirements with respect to expropriation of foreign property, and the rules governing State contracts, such as *pacta sunt servanda* which will be examined in chapter 4 and in this chapter, respectively.

[17] Such as the Drago Doctrine, for instance, whose essence was that "force should not be used in collecting contractual debts owed foreigners." M. Sornarajah, *The pursuit of Nationalized Property,* Martinus Nijhoff, Dordrecht (1986) at 11.

[18] Garcia-Amador (1980: 2-5).

[19] See, e.g.:
- F. W. Garcia-Amador, "Calvo Doctrine, Calvo Clause", Vol. 8, Encycl. P.I.L., at 62-65; and
- Bring, op. cit., at 111-113.

[20] Garcia-Amador (1984: 53).

territories to the Persons and Properties of Foreigners', it was endorsed in the Seventh Latin American Conference held in Montevideo in 1933. Article 9 of the pertinent Convention reads, in part, as follows:

> Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.[21]

Similarly, national treatment, as a standard by which to measure the international responsibility of the State with regard to the treatment of aliens:

> Has support from many jurists both in Europe and Latin America prior to 1940, from a small number of arbitral awards, and from seventeen states at the Hague Codification Conference in 1930. At the latter twenty-one states opposed the principle, although some opponents had on occasions supported it in presenting claims to international tribunals.[22]

Among the international judicial precedents referred to in this quotation, the *Cadenhead* case[23] will be recalled. There, the President of the American and British Claims Arbitration Tribunal declared that "a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country."[24] The principle of equality was also invoked by the United States in the *Norwegian Shipowners' Claims*. In this case, Secretary of State Hughes made the following reservation to the action of the tribunal:

> Due process of law applied uniformly, and without discrimination to nationals and aliens alike and offering to all just terms of reparation or reimbursement *suffices to meet the requirements of international law* (emphasis added).[25]

However, the standard of national treatment has its own defects.[26] They include: (1) given the unilateral origin of the standard, in the absence of treaties,

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[21] Ibid., at 53. Latin American States enshrined the Calvo doctrine in their national constitutions as well as in contracts with foreign companies (the latter referred to as Calvo clause).

[22] Brownlie, op. cit., at 527 (footnotes omitted).

[23] Award dated May 1, 1914, cited in 8 A.J.I.L. (1914) 663.

[24] Ibid., at 664-665. See also the citations by Brownlie, op. cit., at 527, n. 27.

[25] Garcia-Amador (1984: 58).

[26] Ibid., at 66.

individual formulations of the principle are entirely dependent upon the State's discretion; (2) the standard does not exclude altogether the applicability of international law to the treatment of aliens; and (3) that nationals suffer equally from the absence of essential rights and remedies or from an improper State conduct cannot always constitute a valid excuse to evade international responsibility.

Thus, due to the respective shortcomings of the two standards, Garcia-Amador, Special Rapporteur of the ILC on the subject of State responsibility, in his second report attempted to resolve the difference between the two standards. Since Garcia-Amador's approach on the issue will be considered in chapter 4 of this thesis, it is sufficient here to note that, according to his perspective, aliens are entitled to enjoy the same rights and the same legal guarantees as nationals. The treatment of nationals, in its turn, is determined by human rights principles which are internationally recognised. However, the approach was not welcomed by the Commission.[27]

Additionally, some argue that the developments in the human rights sphere since 1945 and particularly in recent years have provided a new content for the international standard. Thus, human rights law may be considered "as establishing certain minimum standard of state behaviour with regard to civil and political rights."[28] These authors refer to instruments which, instead of referring to nationals and aliens, are concerned with individuals within a certain jurisdiction without discrimination.[29]

However, It has been recognised that certain sources of inequality between nationals and aliens are admissible.[30] Put in technical terms, the rights and obligations of nationals and aliens are not the same in all circumstances. Thus, these differences will be surveyed briefly in the following sub-section.

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27 See our discussion in chapter 4, at 276-278.

28 M. N. Shaw, *International Law* (4th ed.), Cambridge University Press (1997) at 571.

29 For instance, Article 2(1) of the International Covenant on Civil and Political Rights, adopted 1966, entered into force 1976. For the full texts of the Covenants, see I. Brownlie, *Basic Documents in International Law* (3rd ed.), Clarendon Press, Oxford (1991) 270.

30 Brownlie (1998: 526).

2. Legal Status of Aliens in General

Aliens, provided they entered the territory lawfully, are entitled to certain basic rights, including rights of contract, of acquisition of personal property or marriage, which are necessary to the enjoyment of ordinary private life.[31] Though the alien has access to the local courts, he may not have access to legal aid and may have to pay for costs.[32] Apart from these rights, "internal economic policies and aspects of foreign policy" of the State may sometimes result in the "restrictions on the economic activities of aliens."[33] Moreover, the preservation of national security, and the protection of public interest may require more restrictions upon aliens.[34] In some States, for instance, the holding or inheriting of immovable property by aliens is banned. In many States aliens are unable to acquire or register in their names specific types of moveable property, such as aircraft, ships, and the like. Further, aliens usually do not have political rights in the host state,[35] such as voting rights, or may be excluded from employment in certain professions (e.g. the diplomatic corps).[36]

The differences between nationals and aliens are also evident in the admission and expulsion of aliens. A State possesses unlimited discretion in admitting aliens into its territory. Though some publicists assert that there is a certain duty of States to admit aliens, State practice shows that States' discretionary power in this respect is for most purposes unqualified.[37] Thus, a State may refuse to admit aliens, or may accept them subject to certain conditions being fulfilled.[38] It has been stated that "In principle this is a matter of domestic jurisdiction: a state may choose not to admit aliens or may impose conditions on their admission."[39]

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31 S. Oda, The Individual in International Law", in M. Sørensen, *Manual of Public International Law*, Macmillan, London (1968) at 483.
32 Brownlie (1998: 527).
33 Ibid.
34 Oda, op. cit., at 483.
35 Brownlie (1998: 526).
36 Shaw, op. cit., at 572.
37 K. Doehring, "Aliens, Admission", Vol. 8, Encycl. P.I.L., at 9.
38 Oda, op. cit., at 481.
39 Brownlie (1998: 522).

Expulsion of aliens, like the right to refuse admission of aliens, is attributed to the sovereignty of a State, and the State also enjoys a wide discretionary power in this regard.[40] Whether the State in expelling aliens possesses the same discretion as it has in admitting them, is more open to doubt.[41] Though the grounds for expulsion of an alien may be determined by the expelling State with its own criteria, the right of expulsion must not be abused.[42] To some, expulsion "must be exercised in good faith and not for an ulterior motive."[43] Should the sole reason for expulsion, for instance, be to deprive the alien of his property or other rights, the action of the expelling State would be questionable.[44] For justification of the action, therefore, the State must give persuasive reasons.[45] International law requires that to expel an alien, there must be justifiable grounds to fear that public order is in danger.[46] It must be noted that special consideration is given to those aliens who have been resident for a long time.[47] They "have acquired prima facie the effective nationality of the host state", and their expulsion "is not a matter of discretion, since the issue of nationality places the right to expel in question."[48]

Besides the general rule of international law on expulsion, there are certain limitations on this right in both regional,[49] and international[50] human rights instruments.

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40 To Brownlie, "expulsion is also within the discretion of the state." Ibid., at 523.

41 Shaw, op. cit., at 572. See also Brownlie (1998: 523).

42 Oda, op. cit., at 482.

43 Brownlie (1998: 523).

44 H. Piran, *Nationalization of Foreign Property in International Law and Iran-United States Claims Tribunal* (unpublished PhD thesis, University of Liverpool, 1992) at 75.

45 Shaw, op. cit., at 572.

46 R. Arnold, "Aliens", Vol. 8, Encycl. P.I.L., at 8.

47 Oda, op. cit., at 482.

48 Brownlie (1998: 523).

49 The European Convention on Human Rights, for example, was signed in Rome on 4 November, 1950 (U.N.T.S., Vol. 213, at 221), and entered into force on 3 September, 1953. Nine protocols have been attached to the Convention adding to or amending the provisions of the Convention. It should be noted that Article 1 of Protocol 7 of the Convention has the same effect as Article 13 of the Covenant.

50 See, e.g., Article 13 of the International Covenant on Civil and Political Rights of 1966, op. cit. (note 29). It is assumed that the signatory States in exercising their discretion to expel aliens from their territory observe the provisions of this article, otherwise the expulsion might be considered wrongful.

It is interesting to note that among nearly 4,000 claims filed with the Iran-United States Claims Tribunal, some 1,500 were devoted to the alleged expulsion of American nationals by Iran during the Islamic Revolution of 1979. It was agreed[51] that the claims for less than $ 250, 000 should be presented by the two governments on behalf of their nationals. Since the claims of approximately 1,500 American nationals in principle were similar, the Tribunal did not consider all of them individually, instead it selected a few cases as sample cases and decided upon them.

From the analysis of the awards[52] of the Tribunal in those cases, the following rules may be emerged: (1) international law imposes certain restraints on the circumstances and the manner in which a State can expel aliens from its territory, and these limitations prohibit any arbitrary and discriminatory expulsions; (2) where the host State breaches its treaty obligation its responsibility for wrongful expulsion would be incurred; and (3) the burden of proof for wrongful expulsion falls upon the claimant alleging expulsion and the relevant rules would also apply where there is no special measure or direct action forcing the alien to leave the country (referred to as 'indirect expulsion'). In the latter case, the wrongful acts must be legally attributable to the expelling State.

Turning to the question which has been raised at the beginning of this chapter, that is whether, with the emergence of the institution of State responsibility for injuries to aliens the exclusive jurisdiction of the host State

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[51] Note that the Algiers Declarations (Accords) between the Governments of Iran and the United States which were signed on January 19, 1981, consisted of several agreements, including the General Declaration and the Claims Settlement Declaration. Under Article III(3) of the latter Declaration, the agreement on small claims was made. For the text of the Declarations, see: 1 Iran-United States Claims Tribunal Reports (hereinafter Iran-U.S. C.T.R.) (Grotius Publications, Cambridge); 75 A.J.I.L. (1981) 418, and 20 I.L.M. (1981) 224.

[52] The awards are as follows:

- Alfred L. W. Short and the Islamic Republic of Iran, Award No. 312-11135-3 (4 July 1987), *reprinted in* 16 Iran-U.S. C.T.R. 76.
- Jack Rankin and the Islamic Republic of Iran, Award No. 326-10913-2 (3 November 1987), *reprinted in* 17 Iran-U.S. C.T.R. 135.
- Kenneth P. Yeager and the Islamic Republic of Iran, Award No. 324-10199-1 (2 November 1987), *reprinted in* 17 Iran-U.S. C.T.R. 92. For a critical comment on these awards, see A. Ghassemi, "*Rules on Expulsion and their Application in the Iran-US Claims Tribunal*", (unpublished Master Dissertation, University of Brussels, 1989).

over aliens who reside in its territory would cease. The foregoing assessment indicates that, in the absence of treaties, while in some aspects the status of aliens is governed by international law, in others it continues to be governed by domestic law. Moreover, it would appear that there is no single standard regarding the treatment of aliens which enjoys universal support. Therefore, the international legal scene demands the formulation of new standards.

3. The Right of a State to Expropriate Foreign Property

Any interference by the State with private property, belonging either to aliens or to nationals, which is located within its jurisdiction is not prohibited by international law. That this embraces the right to expropriate cannot be doubted. The right of a State to nationalise is an attribute of its sovereignty. This right has been recognised in modern international law by way of various devices, including the relevant UN resolutions, legal writings, international decisions of courts and arbitral awards, as well as State practice.

Since UN resolutions on the subject under consideration and the relevant issues will be dealt with separately later in this chapter, it is sufficient here to note that between 1952-1974, the United Nations adopted numerous resolutions on the issue of permanent sovereignty over natural resources, the latest of which is Resolution 3281 (XXIX) of 12 December 1974. Besides the resolutions which squarely relate to the permanent sovereignty of a State over its natural resources, many of them contain explicit references to the right to nationalise foreign property.

Literature on the right to nationalise foreign property is abundant.[53] Juristic opinion is divided on the modalities of the exercise of the right to nationalise,

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[53] There is an extensive literature on the issue. See *inter alia*:
- S. Friedman, *Expropriation in International Law*, Stevens & Sons Ltd., London (1953);
- I. Foighel, *Nationalization: A study in the Protection of Alien Property in International Law*, Stevens & Sons Ltd, Copenhagen (1957);
- C. F. Amerasinghe, *State Responsibility for Injuries to Aliens*, Clarendon Press, Oxford (1967) at 121-169;
- M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press (1994) at 277-414, and the writer's other literature, op. cit. (note 17).
- G. White, *Nationalisation of Foreign Property*, Stevens & Sons Ltd., London (1961);

especially with regard to stabilisation clauses and standards of compensation. However, the right of a State to nationalise, in the words of White, is an attribute of its sovereignty in the sense of the supreme power which it possesses in relation to all persons and things within its jurisdiction.[54] Schrijver, like Garcia-Amador,[55] took a similar view, when he observed:

> The right to expropriate or nationalise foreign investment ... is inherent in the sovereignty of each State and was generally recognized long before the permanent-sovereignty resolutions were adopted.[56]

International jurisprudence does not really throw light on the issue. As far as the PCIJ is concerned, the *Chorzow Factory* case[57] is sometimes quoted as one of the first judgments which recognised a State's right to expropriate foreign property, "albeit under exceptional circumstances only."[58] So far the International Court of Justice (hereinafter the 'ICJ') has not dealt with a clear-cut

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- S. C. Jain, *Nationalization of Foreign Property - A Study in North-South Dialogue*, Deep & Deep Publications, New Delhi (1983);
- Akinsanya, op. cit. (note 4);
- W. D. Verwey and N. J. Schrijver, "The Taking of Foreign Property under International Law: A New Legal Perspective", 15 N.Y.I.L. (1984) 3;
- Brownlie (1998: 533-555);
- E. J. de Arechaga, "International Law in the Past Third of a Century", 159 Hague *Recueil* (1978-I) at 297-313 and the writer's other literature, "State Responsibility for Nationalization of Foreign Owned Property", 11 N.Y.U.J.I.L.P. (1978) 179;
- I. Seidl-Hohenveldern, *International Economic Law*, Martinus Nijhoff, Dordrecht (1992) 137-157 and the writer's article, "Aliens, Property", at 20-21; R. Arnold, "Aliens", 6-11, and R. Dolzer, "Expropriation, Nationalization", in Vol. 8, Encycl. P.I.L. (1985) at 214-217;
- F. W. Garcia-Amador, "Responsibility of State for Injuries Caused in its Territory to Persons or Property of Aliens", 2 Y.B.I.L.C. (1959) at 1-36;
- Z. A. Kronfol, *Protection of Foreign Investment - A study in International Law*, A. W. Sijthoff, Leiden (1972);
- A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal*, Martinus Nijhoff, Dordrecht (1994); and
- N. Schrijver, *Sovereignty over Natural Resources*, Cambridge University Press (1997) at 285-305 and 344-363.

[54] White, op. cit., at 35.

[55] Garcia-Amador (1959: 11, para. 41):
"Traditionally this right has been regarded as a discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory ... to further the welfare and economic progress of its population."

[56] Schrijver, op. cit., at 285.

[57] *Case Concerning the Factory at Chorzow*, (claim for indemnity) (merits), Germany v. Poland, (1928), P.C.I.J. Series. A, No. 17, 1.

[58] Schrijver, op. cit., at 287.

nationalisation issue. Although the well-known case of *Anglo-Iranian Oil Company*, the dispute between Iran and the United Kingdom over the nationalisation of the company in question, as shown in chapter 1, was referred to the Court, it declared that it had no jurisdiction on the issue.[59] Moreover, the Court's judgment in the *ELSI* case[60] was concerned with requisition, and only with the particular facts of this case and not with general conditions regarding the right to expropriate foreign property.

Unlike international jurisprudence, arbitral awards have explicitly recognised the right of States to expropriate alien property. For instance, in the arbitral awards in the *Texaco* and *Liamco* [61] cases, dealing with the nationalisations of oil companies by Libya, this right was confirmed. In the former case, although the measure of nationalisation was found unlawful, Arbitrator Dupuy stated that the right of a State to nationalise foreign property should be considered as an expression of its territorial sovereignty.[62] He goes on to say that:

> Territorial sovereignty confers upon the State an exclusive competence to organize as it wishes the economic structures of its territory and to introduce therein any forms which may seem to be desirable. It is an essential prerogative of sovereignty for the constitutionally authorized authorities of the State to choose and build freely an economic and social system ... just as it has the prerogative to determine freely its political regime and its constitutional institutions.[63]

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[59] *Anglo-Iranian Oil Company* case (*United Kingdom v. Iran*), Judgment of 22 July 1952, I.C.J. Rep. (1952) 93 at 114.

[60] *Case Concerning Elettronica Sigula S. P. A. (ELSI)*, (*United States of America v. Italy*), Judgment of 20 July 1989, I.C.J. Rep. (1989) 14.

[61] *Libyan American Oil Company* (*Liamco*) *v. The Government of the Libyan Arab Republic*, Award of 12 April 1977, *reprinted in* 20 I.L.M. (1981) 1 at 120.

[62] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award of 19 January 1977, *reprinted in* 17 I.L.M. (1978) 1 at 21. para. 59.

[63] Ibid. For the factual details of the Libyan nationalisation cases, including *Liamco* and *Texaco*, see chapter 1 of this thesis (OPEC countries take-overs).

In the *Aminoil* case,[64] the tribunal held that the sovereign right of a State to nationalise foreign property prevailed even over an express stabilisation clause. A further illustration of this recognition is found in the *Agip* case, the arbitration under the auspices of the International Centre for the Settlement of Investment Disputes, ('ICSID'), the tribunal held that the right of a State to nationalize is beyond doubt today by reason of concordant and "constant international practice."[65]

Similarly, in its awards on expropriation, the Iran-US Claims Tribunal has explicitly endorsed States' right to nationalise foreign property. The Tribunal, for example, in its seminal award in the *Amoco* case, held that:

> As a fundamental attribute of state sovereignty, this right, commonly used as an important tool of economic policy by many countries, both developed and developing, cannot easily be considered as surrendered.[66]

The same Tribunal continues:

> This right is today unanimously accepted, even by states which reject the principle of permanent sovereignty over natural resources, considered by a majority of states as the legal foundation of such a right.[67]

The ICSID tribunal, in the *Amco* case, also confirmed this right. There, the tribunal ruled that "This is the fundamental principle of a sovereign State to nationalize or expropriate property, including contractual rights previously

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[64] *The Government of Kuwait v. American Independent Oil Company (Aminoil)*, Award of 24 March 1982, *reprinted in* 21 I.L.M. (1982) 976 at 1012 and 1025.

[65] *Agip Co. v. The Republic of Congo*, (ICSID), Award of 30 November 1979, *reprinted in* 21 I.L.M. (1982) 726 at 735, para. 81.

[66] *Amoco International Finance Corp. v. The Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Limited*, Award No. 310-56-3 (14 July 1987), *reprinted in* 15 Iran-U.S. C.T.R. 189 at 243, para. 179.

[67] Ibid., at 222, para. 113. See also the *American International Group et al. v. The Islamic Republic of Iran*, Award of 19 December 1983, *reprinted in* 4 ibid., 97 at 105 and *INA Corporation v. The Islamic Republic of Iran*, Award No. 184-161-1 (12 August 1985) *reprinted in* 8 ibid., at 373.

granted by itself, even if they belong to aliens, by now clearly admitted in national legal systems as well as in international law."[68]

It has been stated that the right to nationalise "results from customary international law, established as the result of general practices considered by the international community as being the law."[69] Diplomatic precedents, or in a broader sense State practice, also affirm the right to nationalise foreign property subject to the fulfilment of certain conditions. As indicated in chapter 1,[70] soon after the Russian nationalisations of 1917, the Powers which met in Cannes did not protest in their Declaration of 6 January 1922 the right of Russia to nationalise foreign property. If the nationalisation measures were considered by them confiscatory, it was for lack of compensation, not because Russia had no right to nationalise. During the Mexican Agrarian Reforms of 1937, the US Secretary of State Hull, in a letter on behalf of the US Government to the Mexican Ambassador in Washington said:

> My Government has frequently asserted the right of all countries freely to determine their own social, agrarian and industrial problems. This right includes the sovereign right of any government to expropriate private property within its borders ...[71]

Again the Mixed Expert Commission, which was established for the calculation of compensation in the course of Mexican oil nationalisations in 1938, stated in its report of 17 April 1942 that "expropriation, and the exercise of the right of eminent domain ... are a recognised feature of sovereignty of all States."[72] Likewise, a British note dated April 8, 1938, to the Mexican Government acknowledged that "His Majesty's Government does not question the general right of a Government to expropriate in the public interest and on

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[68] *Amco Asia Corporation et al v. The Republic of Indonesia*, Award of 9 December 1983, *reprinted in* 24 I.L.M. (1985) 1022 at 1029, para. 188.

[69] *Texaco Award*, op. cit., at 21, para. 59.

[70] See chapter 1 of this thesis, at 16.

[71] Quoted by H. W. Briggs, *The Law of Nations, Cases, Documents, and Notes* (2nd ed.), Applenton-Century-Crofts, Inc., New York (1952) 556. The full text of the US letter containing this statement, ibid., at 556-561, and 32 A.J.I.L. (1938), (Supplement) 181 at 182.

[72] Quoted by Friedman, op. cit., at 28.

payment of adequate compensation."[73] At any time during the proceedings of the *Anglo-Iranian Oil Company* case before the ICJ, the British Government also did not question *in abstracto* the right to nationalise.[74] Another illustration of this recognition is found in the statement of August 2, 1956, by the Governments of France, the United Kingdom, and the United States of America regarding the nationalisation of the Suez Canal Company by Egypt.[75]

In the case of the Cuban Agrarian Reforms of 1959, the Government of the United States recognised the right of the Cuban Government to nationalise the property of American nationals.[76] Additionally, both the United Kingdom and the United States in their protest notes to the Libyan Government regarding the nationalisations of American and British interests restated their recognition, as a matter of principle, of the right of States to take nationalisation measures.[77] However, the two States in their notes spoke of some limitations on the right to nationalise, and that an act of nationalisation is not legitimate in international law unless it meets certain requirements.

Besides customary law, the recognition of the right to nationalise is reflected in treaty law. The various regional human rights treaties which include the right of individuals to own property recognise the right to nationalise. Moreover, the regional, interregional and bilateral investment treaties confirm the right of a host State to nationalise foreign property. The OIC Investment Agreement of 1981, for example, provides that it is permissible to expropriate the investment, subject to certain conditions.[78]

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[73] Quoted by D. P. O'Connell, *International Law* (2nd ed.), Vol. II, Stevens & Sons Ltd., London (1970) at 778.

[74] Note that the British Government contended that the right to nationalise was subject to the requirements of international law which in its view were not satisfied in this case. See *Anglo-Iranian Oil Co.* case (1951) I.C.J. Pleadings (Memorial of the United Kingdom), Vol. 1, at 1-37, and G. Schwarzenberger, *Foreign Investment and International Law*, Stevens & Sons, London (1969) at 66-83.

[75] See Article 2 of the statement in chapter 1 of this thesis, at 40.

[76] White, op. cit., at 36-37.

[77] For the British Note, see 53 I.L.R. (1974) 297 at 317. The US Note will be found in 13 I.L.M. (1974) 767 at 771.

[78] Article 10(2) of the Agreement for the Promotion, Protection and Guarantee of Investment among Member States of the Organisation of Islamic Conference. For the full text of the Agreement, see *The Charter of the Islamic Conference and Legal Framework of Economic Co-*

Finally, the ICC Guidelines,[79] the ILA Seoul Declaration,[80] the Draft UN Code of Conduct on TNCs[81] and the World Bank Guidelines[82] all endorse the host State's right to nationalise property within its jurisdiction.

In view of the foregoing considerations, we can safely conclude that the right of States to expropriate or nationalise foreign property nowadays is unanimously accepted. This right is an attribute of sovereignty of the State, as well as its jurisdiction in internal matters. The controversy in the present state of international law between the capital-exporting States and the nationalising States is focused on the limitations of this right and not on the existence of the right itself. Thus, the examination of the limitations on the right of States to nationalise foreign property will be our next task.

4. Limitations on a State's Right to Expropriate Foreign Property

As indicated above, a State possesses the right to nationalise the property belonging to aliens in its territory. However, its right to do so is subject to the conditions laid down by international law. The nationalisation of foreign property will be lawful only if such a measure was for a public purpose and was not discriminatory. Though there is a duty in international law to pay compensation for the nationalisation of foreign property, the non-satisfaction of the duty does not put the lawfulness of the measure under question. Put differently, there is a general agreement that nationalisation which lacks a public purpose, and a discriminatory nationalisation may be unlawful in international law. However, in modern international law, a great majority of jurists and a considerable number of arbitral awards take the view that the State is the best

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operation among its Member States, H. Moinuddin, Clarendon Press, Oxford (1987), Appendix III, 197 at 201.

[79] Section V(3)(iv) of the ICC Guidelines for International Investment (1972).

[80] Section 5.5 of the 'Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order' was adopted in the 62nd Conference of the International Law Association which was held in Seoul (24-30 August, 1986) (hereinafter the ILA Seoul Declaration), *reprinted in* 33 N.I.L.R. (1986) 326.

[81] Para. 55 of the Draft Code, see UN Document, Economic and Social Council/1990/94, 12 June 1990.

[82] Section IV(1) of the World Bank Guidelines on the Treatment of Foreign Direct Investment, *reprinted in* 31 I.L.M. (1992) 1363 at 1382.

judge to determine what constitutes its public interest. Accordingly, among the three criteria,[83] the requirement of public purpose is the weakest one. With these reservations in mind, the public purpose and non-discriminatory requirements, as well as compensation form the subject-matter of our discussion in the following sections.

4.1 The Public Purpose Principle

Historically the origin of the principle was to be found in the view of 'public purpose'[84] as a limitation on the powers of eminent domain by Grotius.[85] This requirement has formed an essential part of the 'international minimum standard' and is supported by Western States. For Professor Higgins, there was some authority in the inter-war period that a State could only take the property of aliens for reasons of public purpose. Writing in 1965, she concludes that "it is doubtful whether the law now requires a state to show true public necessity."[86] As will be shown in this section, in contemporary international law, it is generally agreed that the requirement of public purpose is not much of a limitation to the nationalisation of foreign property.

It is not clear what is meant by the phrase 'public purpose' and even Grotius did not offer a definition of the principle. Though the principle can be

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[83] A few jurists contend that a 'due process of law' constitutes an additional requirement for the expropriation of foreign property. The notion of a 'due process of law' has been described as "the manner of an expropriation may not be ... lacking in just procedures." R. Higgins, *Conflicts of Interests - International Law in a Divided World*, Dufour Editions, Chester Springs, Pennsylvania (1965) at 56. See, also W. Friedmann, *Law in a Changing Society*, Stevens & Sons, London (1972) at 491-492; Verwey and Schrijver, op. cit., at 5-6, and Schrijver, op. cit., at 359-361. However, this requirement is not considered as a condition of the legality of an expropriation by the overwhelming majority of authors. Among them, Schwarzenberger, the prominent advocate of the 'international standard', may be recalled. In his view, "so long as an expropriation takes place for public purpose and is accompanied by full or adequate, prompt and effective compensation, it is legal." Schwarzenberger, op. cit., at 4.

[84] Note that various terms may be used by the State to denote the same purpose, such as 'public utility', 'public necessity', 'public use', 'common good', 'general interest' and the like.

[85] White, op. cit., at 146. It has been stated that the term 'public interest' was first employed in the United Kingdom's protests to Greece in the Finlay's case in 1836. O'Connell, op. cit., at 778. Note that for the factual details of this case, see chapter 1 of this thesis, at 11.

[86] Higgins, op. cit., at 56. However, it appears that the same author has taken a contrary view in her lectures in 1982 at the Hague Academy "The Taking of Property by the State: Recent Developments in International Law", 176 Hague *Recueil* (1982-II) 259 at 288, 291 and 299. See also the citations by White, op. cit., at 5-6.

found in most legal systems, international law does not have any special definition of its own.[87] It has been submitted that a precise definition of these terms "for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested."[88] This has led Rafat to conclude that:

> As long as the international community remains composed of states with social systems so divergent from one another as they appear to be at the present time, one cannot hope for the emergence of an internationally agreed-upon definition of public utility.[89]

However, some attempts have been made to define the principle. White, for example, points out that in international as in municipal law, expropriation for public utility purposes means:

> Expropriation the aim and result of which was to benefit the community as a whole rather than any particular person.[90]

Jurists are divided on whether the requirement of public purpose is a limitation on the right to nationalise alien property. Broadly speaking, they might fall into three categories. The first category composed writers, such as Friedman,[91] Kissam and Leach,[92] Amerasinghe, [93] Arsanjani, [94] and White,[95] who totally deny that there exists such a limitation. Thus, the latter jurist observes that in the absence of any other element of illegality, such as discriminatory measures and the violation of a treaty undertaking, the mere lack of a public utility motive will not render an expropriation illegal. In her view:

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87 See Friedman, op. cit., at 141, and J. H. Herz, "Expropriation of Foreign Property", 35 A.J.I.L. (1941) 243 at 253.

88 *Amoco* Award, op. cit., at 233, para. 145.

89 Quoted by Jain, op. cit., at 110.

90 White, op. cit., at 146. See also the observations of Verwey and Schrijver in this regard in Verwey and Schrijver, op. cit., at 9.

91 Friedman, op. cit., at 142.

92 L. Kissam and E. K. Leach, "Sovereign Expropriation of Property and Abrogation of Concession Contracts", 28 Ford.L.R. (1959-60) 177 at 214.

93 Amerasinghe, op. cit., at 137-138.

94 M. H. Arsanjani, *International Regulation of Internal Resources - A study of Law and Policy*, University Press of Virginia, Charlottesville (1981) at 291-292.

95 White, op. cit., at 150.

> It is contrary to reason and to the general principles of international law that so grave a consequence should follow from the non-observance of *a rule whose content is as vague as that of the principle of public utility* has been shown to be (emphasis added).[96]

The second category has mostly been constituted of the older authors who claim that a public purpose must be present. Among them, Wortley,[97] McNair,[98] Schwarzenberger[99] and Bishop[100] may be recalled. Having surveyed the publicists' views on the public purpose requirement, Jain concludes that "it would not be prudent to altogether discard this test in the absence of a better alternative."[101] The third category consists of a vast majority of authors[102] who while considering public purpose a requirement, maintain that the nationalising State enjoys unlimited powers in this respect. Seidl-Hohenveldern, for instance, holds that the requirement of public interest is necessary for the legality of expropriation, since this principle serves a useful purpose as a brake to arbitrary acts. However, he qualified his position by stating that "as a rule, the State concerned will be held to be the best judge of its public interest."[103] In the same vein, Pellonpää and Fitzmaurice observe that in present day international law:

> It is up to the State itself to determine what its public purpose requires, and such a determination is likely to be overruled by an international tribunal only in very exceptional circumstances.[104]

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96 Ibid.

97 B. Wortley, *Expropriation in Public International Law*, University Press, Cambridge (1959) at 24-25.

98 Lord McNair, "The Seizure of Property and Enterprises in Indonesia", 6 N.I.L.R. (1959) 218 at 243-245.

99 Schwarzenberger, op. cit., at 4.

100 W. W. Bishop, "General Course of Public Law", 115 Hague *Recueil* (1965-II) 403 at 404. Some modern authors in this field took a similar view. See, e.g., Jain, op. cit., at 114, and Mouri, op. cit., at 324-327. The latter writer considered the public purpose requirement to be less settled than that of non-discrimination. Ibid., at 329.

101 Jain, op. cit., at 114.

102 See, for example, A. A. Fatouros, *Government Guarantees to Foreign Investors*, Columbia University Press, New York (1962) at 248; F. Wooldridge and V. Sharma, "The Expropriation of the Property of the Ugandan Asians", 14 Ind. J.I.L. (1974) 54 at 58-59 and Herz, op. cit., at 253.

103 I. Seidl-Hohenveldern, *International Economic Law* (2nd ed.), Martinus Nijhoff, Dordrecht (1992) at 138.

104 M. Pellonpää and M. Fitzmaurice, "Taking of Property in the Practice of the Iran-United States Claims Tribunal", 19 N.Y.I.L. (1988) 53 at 63.

Domke,[105] Baade,[106] O'Connell,[107] Kronfol,[108] Bring,[109] Asante,[110] Akinsanya,[111] Brownlie,[112] Higgins[113] and Weston[114] took a similar view. After noting that "The point is not that foreign-wealth deprivations should not be taken in the public interest", the latter author states that "the doctrine has found scant support in practice as a 'rule' of international law whose violation *independently* engages international responsibility." Referring to the ALI Second Restatement,[115] he observes that even the doctrine's erstwhile proponents now concede that States' discretionary powers in this respect can hardly be questioned.

The European Court of Human Rights appears to have shared the view that the expropriating state is the best judge in determining whether the expropriation in question was in the public interest or not. The Court, in the *James*'s case, held that:

> Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest' ... The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgement as to what is

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[105] M. Domke, "Foreign Nationalizations - Some Aspects of Contemporary International Law", A.J.I.L. (1961) 584 at 590.

[106] This writer reached the conclusion that in the absence of specific international agreements to the contrary, States are free to nationalise any foreign investments in their natural resources for any purpose that they judge appropriate. H. W. Baade, "Permanent Sovereignty over Natural Wealth and Resources", in R. S. Miller and R. J. Stanger (eds.), *Essays on Expropriations*, Ohio State University Press (1967) 3 at 29.

[107] O'Connell, op. cit., at 779.

[108] Kronfol, op. cit., at 26.

[109] Bring, op. cit., at 107.

[110] Asante, op. cit., at 610: "An assertion by a State that its expropriatory measure is in the public interest is not open to challenge by another State."

[111] He concludes that:
"Foreign-owned enterprises may be expropriated on grounds or reasons of public utility ... of which the expropriating state is the best judge." Akinsanya, op. cit., at 19-20 and 68.

[112] Brownlie (1998: 547) observes:
"Expropriation must be for purposes of public utility, or that it must not be 'arbitrary', only causes confusion. The determination of public utility is primarily a matter for individual states."

[113] Higgins (1982: 291).

[114] B. H. Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth", 75 A.J.I.L. (1981) 437 at 439-440.

[115] The American Law Institute's Restatement (Second) on Foreign Relations Law of the United States (1965), Section 185, comment b, at 553.

> "in the public interest" unless the judgement be manifestly without reasonable foundation (emphasis added).[116]

Whether the requirement of public purpose must be applied to nationalisation measures in the same way as to expropriation, Amerasinghe, like Piran,[117] is of the opinion that "it would seem that the definition of nationalization presupposes a taking of property in the public interest."[118] This view was endorsed by the statement in the *Liamco* case, when the Arbitrator stated that there was no authority to support the application of the public purpose criterion to the measures of nationalisation.[119]

International jurisprudence and arbitral awards are also divided on the issue. Some of them supported the need for the requirement of public purpose and others questioned the very existence of it. In the *German Interests in Polish Upper Silesia* case, the PCIJ held that international law permits the expropriation of alien property for reasons of "public utility."[120] The Court took a similar position in the *Chorzow Factory* case.[121] In the *Walter Smith* claim, an oft-quoted case on this issue, the arbitrator stated that the taking was not for public purpose but for the purpose of amusement and private profit, without any reference to public utility.[122] Interestingly, the arbitrator in this case was referring to an internal requirement of Cuban law. The necessity of public purpose for a lawful taking was stated in the *David Goldenberg* case, involving military requisition.[123] This policy was followed by the US Circuit Court of

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[116] *James et al. v. The United Kingdom*, Judgment of 21 February 1986, E.C.H.Rep. (1986) Series A, No. 98, 9 at 32, para. 46.

[117] Piran, op. cit., at 80:
"It could be argued that nationalization, by this definition, has in fact done away with the rule of public purpose."

[118] Amerasinghe, op. cit., at 137.

[119] *Liamco* Award, op. cit., at 58-59.

[120] (1926) P.C.I.J. Series. A, No. 7, at 22.

[121] *Chorzow Factory* Judgment, (1928) P.C.I.J. Series. A, No. 17 at 46-48.

[122] The *Walter Smith* claim (*United States v. Cuba*), 2 R.I.A.A. (1928) at 917. In the *Norwegian Shipowners* Arbitration, the tribunal held that courts are competent to decide *inter alia* "whether the taking is justified by public needs." *Norwegian Shipowners' Claims* (*Norway v. The United States*), Permanent Court of International Arbitration, Award of 13 October, 1922, 1 R.I.A.A. (1948) 307 at 332 and 335.

[123] The *David Goldenberg* case (*Romania v. Germany*), 2 R.I.A.A. (1928) at 909. See also the arbitration between Portugal and Germany, 2 ibid., (1928) 1039.

Appeals, in the *Sabbatino* case. The Court held that the Cuban expropriation was unlawful since, among other things, it was not for a public purpose.[124] Additionally, in the *Agip* case, the tribunal held that the Congolese State has a sovereign right to nationalise when "the general interest" requires.[125]

However, there are a considerable number of authoritative decisions which have either watered down or questioned the public purpose criterion. In the *Shufeldt* claim, which dealt with the cancellation of a concession by the Guatemalan Government granted to a US national, the arbitrator did not attach any significance to the public purpose requirement, by stating that:

> It is perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are no concern of this Tribunal.[126]

Similarly, the PCIJ, in the *Oscar Chinn* case, held that "the Belgium Government was the sole judge of this critical situation."[127] The decisions of these two cases have been relied on by Friedman to deny the need for the public purpose requirement.[128]

In the Libyan nationalisation cases, the issue of public purpose was raised, when the arbitrators discussed the relevance of the motives in determining the legality of the nationalisation measures. Thus, in the *Texaco* case, the motives of the Libyan action were not examined[129] and Arbitrator Dupuy held that "it must regard the Libyan government as having acted in accordance with its own sovereign appreciation of the national interest."[130] In the *Liamco* case, Arbitrator Mahmassani stated that there was no separate public purpose criterion in

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[124] Note that the decision in this case was reversed by the Supreme Court's decision of March 23, 1964, based on the 'act of State' doctrine. M. M. *Digest of International Law*, Vol. 8, Department of State Publications, Washington, D.C. (1967) at 1045.

[125] *Agip* Award, op. cit., at 734, para. 72.

[126] The *Shufeldt* case (*United States v. Guatemala*), 2 R.I.A.A. (1930) 1079 at 1095.

[127] The *Oscar Chinn* case (*United Kingdom v. Belgium*), Judgment of 12 December 1934, P.C.I.J. Series A/B, No. 63. 65 at 79.

[128] Friedman, op. cit., at 142.

[129] According to Harris, "it was neither thought necessary nor, in Libya's absence, appropriate to do." D. J. Harris, *Cases and Materials on International Law* (5th ed.), Sweet and Maxwell, London (1998) at 565, n. 89.

[130] *Texaco* Award, op. cit., at 25, para. 74.

international law, and motives are irrelevant to this law. The issue was treated by the Arbitrator in these terms:

> As to the contention that the said measures were politically motivated and not in pursuance of a legitimate public purpose, it is the general opinion in international law theory that the public utility principle is not a necessary requisite for the legality of nationalisation. This principle was mentioned by Grotius and other publicists, *but now there is no international authority*, from a judicial or other source, *to support its application to nationalisation. Motives are indifferent to international law, each state being free to judge for itself what it considers useful or necessary for the public good* ... (emphasis added).[131]

In the *BP* case, Arbitrator Lagergren found the measures of nationalisation unlawful on the ground that the taking "clearly violates principles of international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character."[132] It has been suggested that since the Libyan nationalisations, the public purpose requirement has gained a new lease of life in the claim that "where a nationalisation is motivated by way of reprisal, it would lack public purpose and should therefore be considered unlawful."[133]

The Iran-US Claims Tribunal has also touched upon the issue. The most explicit statement in this regard can be found in its seminal award of *Amoco*. The Tribunal held that:

> It is clear that, as a result of the modern acceptance of the right to nationalize, this term [public purpose] is broadly interpreted, and that States, in practice, are granted extensive discretion.[134]

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[131] *Liamco* Award, op. cit., at 58-59.

[132] *BP Exploration Company (Libya) Limited v. The Government of the Libyan Arab Republic*, Award of 10 October 1973, *reprinted in* 53 I.L.R. (1974) 296 at 329.

[133] Sornarajah (1994: 317-318). For a good account of the public purpose requirement and reprisal, see the same writer's (1986: 176-183).

[134] *Amoco* Award, op. cit., at 233, para. 145. Moreover, in the *American International Group* Award, op. cit., at 105: it could not hold "that the nationalization of Iran America was by itself unlawful ... as there is not sufficient evidence before the Tribunal to show that the nationalization was not carried out for a public purpose as part of a large reform programe." Also, in the *INA* Award, op. cit., at 378: "It has long been acknowledged that expropriations for a public purpose and subject to conditions provided for by law ... are not *per se* unlawful." Note that the statement of the last award was further endorsed by Lagergren in his Separate Opinion, when he states that it "is generally accepted that some types of expropriation are inherently unlawful - among these one

Commenting on the award, Professor Harris observes that, although the *Amoco* award requires that the public purpose criterion may be necessary, "that is easily satisfied by virtue of a wide 'margin of appreciation' doctrine."[135] Moreover, it seems that the Tribunal in one other case held that the onus of proving lies on those alleging the nationalisation was not for a public purpose.[136]

The public purpose requirement has also found expression in State practice. In the case of the Mexican oil expropriations, the British and the US Governments took the view that the right to expropriate foreign property was limited by a public purpose. However, the Mexican Government argued that "public interest may be determined by every State at its own discretion."[137] In a note dated December 18, 1959, following Indonesian nationalisations of Dutch-owned enterprises, the Netherlands Government protested to Indonesia that its action was at variance with international law, on the ground that "the Preamble to the [Nationalisation] Act shows that the measures are not based on the general interest in connection with the use to be made of the property to be nationalized, but have been taken for the purpose of exerting pressure in a political dispute."[138] During the nationalisations of the British and the US oil interests by Libya, these two governments restated their positions on this requirement. The British Government regarded the nationalisation of the *BP* assets as illegal on the grounds of, among other reasons, lack of public purpose.[139]

Moreover, the limitation appears in regional human rights treaties. Article 1 of the First Protocol to the 1950 European Convention on Human Rights, for example, provides that no one shall be deprived of his possessions except in "the

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can cite cases in which foreign assets are taken on a discriminatory basis or for something other than a public purpose." The Separate Opinion of Judge Lagergren in the *INA* Award, at 385.

[135] Harris, op. cit., at 565.

[136] *American International Group* Award, op. cit., at 105.

[137] White, op. cit., at 8.

[138] The Netherlands Note of December 18, 1959, to Indonesia regarding the nationalization of Dutch-owned enterprises, text in 54 A.J.I.L. (1960) 484 at 485.

[139] For the British Note, see 53 I.L.R. (1974) 297 at 317. The US Note can be found in 75 A.J.I.L. (1981) 476 at 486, and 13 I.L.M. (1974) 767, at 771.

public interest."[140] The 1967 OECD Draft Convention on the Protection of Foreign Property also refers to this requirement.[141] Likewise, the bilateral[142] and regional investment treaties, such as the ASEAN Agreement,[143] the Energy Charter Treaty,[144] NAFTA[145] and the OIC Agreement[146] all state that it is permissible to expropriate property in the public interest.

The requirement is incorporated in the 1962 General Assembly Resolution 1803; the resolution provides that the taking should be for "public utility, security or the national interest."[147] It has been suggested that the connection between national security and public utility shows that the State itself can be the judge of these criteria.[148] However, the 1974 Charter does not mention the public purpose limitation. With regard to its absence from the Charter, one commentator observes that the policy behind such a demand is that the taking by the State for public purposes should be assumed.[149] Weston took a similar view.[150]

The requirement of public purpose is also reflected in the 1961 Harvard Draft Convention on International Responsibility of States for Injuries to Aliens[151] as well as the ALI Third Restatement. However, in the latter the

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[140] To the same effect, see Article 21 of the 1969 American Convention on Human Rights, and Article 14 of the African Charter on Human and Peoples Rights, *reprinted in* 9 I.L.M. (1970) at 99 and 21 I.L.M. (1982) at 58, respectively.

[141] Article 3 (I) of the OECD Convention, *reprinted in* 7 I.L.M. (1968) at 128.

[142] See, e.g., Article IV of the 1954 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (entered into force on 16 June 1957) provides that "Such property shall not be taken except for a public purpose." *reprinted in* U.N.T.S., Vol. 284, at 93 and U.T.S., Vol. 8, at 899.

[143] Article VI(1) of the Treaty for the Promotion and Protection of Investments among South-East Asian Member States (ASEAN), *reprinted in* 27 I.L.M. (1988) 612.

[144] Article 10(1)(a) of the European Energy Charter Treaty, *reprinted in* 34 I.L.M. (1995) 391.

[145] Article 1110(1)(a) of the North American Free Trade Agreement (NAFTA), *reprinted in* 31 I.L.M. (1992) 1382.

[146] Article 10(2) of the Agreement, op. cit. (note 78).

[147] Article 4 of the resolution. To some, this article "would appear to be an attempt to diminish, rather than to increase, international-law restrictions upon nationalization by making the precedence of public over private interests a matter on international public policy." Baade, "Permanent Sovereignty over Natural Wealth and Resources", in Miller and Stanger (eds.), op. cit., at 23.

[148] Sornarajah, (1986: 175-176).

[149] Arsanjani, op. cit., at 295.

[150] Weston, op. cit., at 440.

[151] Article 10 of the Convention. The full text of the Convention, and its explanatory notes can be found in 55 A.J.I.L. (1961) 545.

relevance of the requirement to the lawfulness of nationalisation waned. Comment to section 712(1)e of the Restatement confirms our assertion, when it acknowledges:

> The concept of public purpose is broad and not subject to effective re-examination by other states. Presumably, a seizure by a dictator or oligarchy for private use could be challenged under this rule.[152]

In sum, in contemporary international law there is considerable unanimity in doctrinal, judicial and State practice spheres that the State would be the best arbiter to determine what its public interest requires. It is hardly conceivable that such a determination can be reviewed or overruled by any judicial or arbitral organs. Nonetheless, if this limitation can stand in principle as a brake to arbitrary acts, it comes down to very little in practice. When a State nationalises property, its main aim is to secure economic benefits for the nation, and it is guided solely by public purpose. Thus, it is submitted that the test of public purpose to determine the legality of nationalisation measures either plays a minor role or none whatsoever.

4.2 The Principle of Non-discrimination

The second condition under traditional international law for the legality of expropriation is the absence of discrimination.[153] Its origin can be traced back to Latin America,[154] the continent which gave birth to principles such as those embodied in the Calvo and the Drago doctrines as well as, as will be shown later in this chapter, the principle of permanent sovereignty over natural resources. In this context, discrimination consists in the differential treatment of aliens as

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[152] American Law Institute (1987: 200).

[153] See *inter alia:* Foighel, op. cit., at 46-47; Friedman, op. cit., at 189-193; White, op. cit., at 119-144; and the latter writer's other literature, "Expropriation of the Libyan Oil Concession - Two Conflicting International Arbitrations", 30 I.C.L.Q. (1981) 1; Amerasinghe, op. cit., at 138-142; Akinsanya, op. cit., at 20-25; Kronfol, op. cit., at 24-25; Sornarajah, (1986: 183-187) and (1994: 318-320); Verwey and Schrijver, op. cit., at 6-8; Lord McNair, op. cit., at 247-249 and O. Schachter, "General Course of Public International Law", 178 Hague *Recueil* (1982-V), which has been published under the heading *International Law in Theory and Practice*, Martinus Nijhoff, Dordrecht (1991). Thus, hereinafter the latter reference will be preferred. See, ibid., at 315-320.

[154] Francioni, op. cit., at 269.

compared to nationals or of any particular group of aliens as compared to other aliens.[155] It has been argued that if alien property is nationalised and that of the national left intact, the measure is discriminatory and thus contrary to international law.[156] The question arises as to whether there is any duty for the State not to discriminate between nationals and aliens. To some, the answer is in the negative. According to Abi-Saab, for example, it is impossible to confirm that the State cannot discriminate in exercising its power to nationalise between nationals and aliens. Referring to the principle of permanent sovereignty over natural resources, he maintains that it is a legitimate right of the State not to leave its economic destiny or fundamental national interest in foreign hands.[157] Pellonpää and Fitzmaurice seem to have shared this view, when they comment:

> While ... non-discrimination requirements are well established, a certain shift in favour of the State's economic sovereignty appears to be discernible in the way they are interpreted today.[158]

The second question is whether nationalisation measures which are expressly aimed at, or which in practice affect, a single and unique alien enterprise do constitute illegal discrimination. For White, "There is as yet no rule of international law which provides that a State is guilty of illegal discrimination if it nationalises alien property in a field where there are no national interests capable of being affected."[159] Two decades later, Professor Weston reached the same conclusion.[160] On this view the nationalisations of the Anglo-Iranian Oil Company of 1951, and the Suez Canal Company of 1956 which affected a single and unique alien undertaking respectively, are not discriminatory.[161] The Iranian

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155 A. A. Fatouros, *Government Guarantees to Foreign Investors*, Columbia University Press, New York (1962) at 249.

156 Wooldridge and Sharma, op. cit., at 61-63.

157 G. Abi-Saab, "Permanent Sovereignty over Natural Resources and Economic Activities", in M. Bedjaoui (ed.), *InternationalLaw: Achievements and Prospects*, UNESCO/Martinus Nijhoff, Paris/Dordrecht (1991) at 609-10.

158 Pellonpää and Fitzmaurice, op. cit., at 65.

159 White (1961: 144).

160 Weston, op. cit., at 442. See also Baade, "Permanent Sovereignty over Natural Wealth and Resources", in Miller and Stanger (eds.), op. cit., at 23-24.

161 White (1961: 130-138). See also Amerasinghe, op. cit., at 140; Kronfol, op. cit., at 24-25; Arsanjani, op. cit., at 297, and Verwey and Schrijver, op. cit., at 12, n. 36.

nationalisation was not considered a discriminatory measure by the Civil Court of Rome on the grounds that "By the Oil Nationalization Law it is intended to protect the interests of Iran, not to attack the interests of foreign nationals as such."[162] Similarly, nationalisation measures which aimed exclusively at alien property in a field where there are also national interests, in White's view, constitute illegal discrimination.[163] Weston, however, took a contrary view, and hence considered White's conclusion "too facile."[164]

As mentioned above, nationalisation measures may be directed against the property of a particular nationality. Whether there is a duty not to discriminate between various classes of aliens, is an issue on which the views of publicists are divided. Some argue that the evaluation of the public interest depends on the situation of the economy of the State involved rather than on the nationality of the interest holders.[165] Abi-Saab illustrated his view by giving an example. If a State is faced with a situation where much of its economy is controlled by aliens of the same nationality, or they control a key sector of the economy which the State wishes to nationalise, in such cases the nationalisation measures, while affecting only one nationality, cannot be considered to violate international law.[166] Others maintain that differential treatment between foreigners is forbidden by the rules of international law.[167]

State practice offers numerous examples of the acceptance of the principle of non-discrimination. "Developed states continue to insist that discrimination between or against foreigners vitiates an expropriation."[168] In a note to Romania protesting the Romanian nationalisation law of June 11, 1948, exempting Russian enterprises from the provisions of the law, the US Government stated that:

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162 *Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R.* (*Unione Petrolifera per l'Orentie S.P.A.*), 22 I.L.R. (1955) 23 at 40.
163 White (1961: 144).
164 Weston, op. cit., at 444.
165 Abi-Saab, "Permanent Sovereignty over Natural Resources and Economic Activities", in Bedjaoui (ed.), op. cit., at 610.
166 Ibid.
167 Verwey and Schrijver, op. cit., at 7.
168 Harris, op. cit., at 567.

> While the United States' Government recognized the right of a sovereign power to expropriate property ... belonging to American nationals, the United States has likewise refused to recognize the validity of such expropriations in cases where they are discriminatory by nature and effect.[169]

Moreover, following the nationalisation of American-owned interests by Cuba under the Nationalization Law of July 6, 1960, in a protest note to the Cuban Government, the nationalisation was regarded as a discriminatory action on the grounds that it was applied only to Americans and the American-controlled Cuban companies.[170] In 1951 on the nationalisation of the Anglo-Iranian Oil Company, the British Government challenged the legality of the Iranian Nationalization Act, among several reasons, on the ground that it was in fact directed exclusively against a particular foreign company.[171] The Netherlands Government protested, among other things, against the discriminatory character of the Indonesian nationalisation of Dutch enterprises.[172]

The non-discrimination requirement seems to have found expression in jurisprudence both at the international and the national level. Thus, in the *Oscar Chinn* case, the PCIJ held that:

> The form of discrimination which is forbidden is ... based on nationality and involving different treatment by reason of their nationality as between persons belonging to different national groups.[173]

Commenting on the judgment, White observes that the term 'forbidden' in this part of the judgement of the Court clearly refers to the treaty provision, and not to a general principle of customary international law.[174] In the Libyan nationalisation cases the arbitrators touched upon the non-discriminatory requirement. In the *BP* case, Arbitrator Lagergren found illegality of the

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169 Quoted by White (1961: 120).
170 The United States Note of 6 July, 1960 can be found in Whiteman, op. cit., at 1042-1043.
171 See *Anglo-Iranian Oil Company* case, I.C.J. Pleadings, op. cit., paras. 21-22.
172 See 54 A.J.I.L. (1960) at 485.
173 *Oscar Chinn* Award, op. cit., at 87. See also the *Norwegian Shipowners' Claims* Award, op. cit., at 339.
174 White (1961: 134).

nationalisation on the grounds that "it ... was arbitrary and discriminatory in character."[175] In the *Liamco* case, the nationalisation of American oil interests was not held discriminatory, because Liamco was not the only American Company to be nationalised.[176] However, the Arbitrator held that "purely discriminatory nationalization is illegal and wrongful."[177] In the *Texaco* case, Arbitrator Dupuy did not rule on the issue.

The Iran-US Claims Tribunal, as in the case of the public purpose requirement, faced the question of discrimination. The existence of a non-discrimination requirement was affirmed by the Tribunal. The latter, in the *American International Group* case,[178] denied the claimant's allegation that the nationalisation in question was unlawful, because it found that the evidence was insufficient to establish that the measure was discriminatory. In the *Amoco* case, it also accepted that the presence of a discriminatory act may render an expropriation unlawful. There, the claimant company alleged that the nationalisation was discriminatory on the ground that another company in the same position, which had different nationality, was not expropriated by the respondent, Iran. The Tribunal, however, found:

> it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or the expropriated one, or to both, may justify such a difference of treatment.[179]

Both the District and Appellate Courts of Amsterdam held that the Indonesian nationalisation of Dutch-owned tobacco companies was discriminatory because the measures were directed against the Netherlands enterprises in Indonesia.[180] However, when a similar case was brought before the

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175 *BP* Award, op. cit., at 329.
176 *Liamco* Award, op. cit., at 60.
177 Ibid., at 59.
178 *American International Group Award*, op. cit., at 105.
179 *Amoco* Award, op. cit., at 232, para. 142. See also *Aminoil* Award, op. cit., at 1019-1020.
180 M. Domke, "Indonesian Nationalization Measures before Foreign Courts", 54 A.J.I.L. (1960) 305 at 308 and 311.

German Court, it held that the nationalisation measures were not discriminatory. The Court rejected the argument that the nationalisation measures were unlawful since they were directed only against Dutch enterprises. It referred to the Dutch nationals as the former colonial masters and distinguished them from other foreigners and stated that they had control over the Indonesian economy. The Court ruled that:

> The equality concept means only that equals must be treated equally and that the different treatment of unequals is admissible. For the statement to be objective, it is sufficient that the attitude of the former colonial people to its former colonial masters is, of course, different from that toward other foreigners.[181]

It appears that Sornarajah agreed with the modification of the equality principle between foreigners. In his view, in the situation considered by the German Court, there is a justification other than racial motives involved in the nationalisation.[182] Arsanjani took the view that though the Indonesian nationalisation affected one group of foreigners more than other groups, it can be said that there was a basis for different treatment between the two groups.[183] However, Amerasinghe disagrees with the reasoning of decision given by the German Court, when he argues that in the issue of nationalisation aliens, as between themselves, should be treated equally. He points out that the acceptance of the modification made by the German Court would amount to discrimination between aliens, depending on whether they are the nationals of the former colonial power or not.[184] Jain has this to say:

> This view is not in consonance with the changing of the international community which is striving to achieve international economic order on a more equitable basis.[185]

Likewise, the statement of the German Court was characterised as an "erroneous" view by Domke.[186] The latter argues that "it would amount to an

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181 Ibid., at 328.
182 Sornarajah (1994: 319).
183 Arsanjani, op. cit., at 300.
184 Amerasinghe, op. cit., at 140-141.
185 Jain, op. cit., at 168.

encouragement to nationalize only property of nationals and corporations of countries that have been the primary purveyors of foreign investments."[187] To Wooldridge and Sharma, the statement of the German Court in this respect may not be a good law, because it could lead to injustice to ex-colonial powers. They reached the conclusion that the expropriations of the Asian properties in Uganda during the Idi Amin regime were discriminatory in character.[188]

In the *Sabbatino* case, both the two lower US courts, District Court and the Court of Appeals, recognised that the non-discriminatory principle was still a viable principle and applied it to the Cuban nationalisations. The former Court held the nationalisation measures discriminatory as "the act classifies United States nationals separately from all other nationals and provides no reasonable basis for such a classification."[189] To some, though the Courts' statements in this case provide direct authority, they "cannot be regarded as impartial."[190] Moreover, Fatouros goes further and states that the decisions provided no direct authority for the non-discrimination test.[191]

While General Assembly Resolution 1803 and the 1974 Charter are both silent on this issue, multilateral and bilateral investment treaties recognise the prohibition of discrimination in the case of expropriation.[192] Additionally, the requirement is reflected in various codes and guidelines concerning foreign investment. Thus, the ICC Guidelines call for "the avoidance of unreasonable and discriminatory measures."[193]

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[186] Domke (1961: 601).
[187] Ibid.
[188] Wooldridge and Sharma, op. cit., at 61-62.
[189] Domke (1961: 603).
[190] Sornarajah (1986: 229, n. 78). One commentator took a similar view. C. F. Murphy, "Limitations over the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization", in R. B. Lillich (ed.), *The Valuation of Nationalized Property in International Law*, Vol. III, University Press of Virginia, Charlottesville (1975) 49 at 62
[191] Fatouros, op. cit., at 250.
[192] See, e.g.,: The OIC Investment Agreement (Article 10.2), the ASEAN Investment Agreement (Article VI.1), NAFTA (Article 1110.1.a), and the Energy Charter Treaty (Article 13.1).
[193] Section V(3)(a)(ii) of the ICC Guidelines for International Investment (1972). For similar terms, see, *inter alia*: paragraph 50 of the Draft UN Code of Conduct on Transnational Corporations, in UN Doc. Economic and Social Council/1990/94, 12 June 1990; Article 5.5 of

The ALI Third Restatement also affirms the need for the requirement. In its blackletter rules it does not define 'discrimination', but in comment to Section 712(f) notes that discrimination implies:

> unreasonable distinction. Takings that invidiously single out property of persons of a particular nationality would be unreasonable; classifications, even if based on nationality, that are rationally related to the security or economic policies might not be unreasonable.[194]

The term 'invidiously' means "an unfair or offensive discrimination," and it is left to the decision-makers to determine what is unfair in the particular circumstances.[195] It seems that in the Restatement's approach to discrimination is not an absolute concept, but only unreasonable or unfair discriminatory conduct would result in the international responsibility of a State. To Professor Schachter, not all discrimination between nationals and foreigners constitutes wrongful discrimination.[196] In order to reach beyond the vague concepts of 'reasonableness' or 'arbitrariness', he divided the causes of discrimination into three categories. Firstly, discrimination against foreign enterprises based upon their economic characteristics and transnational links with the host State. Secondly, discrimination against foreign business because of political actions of their home governments (that is, retaliation or reprisal). Thirdly, discrimination against foreign nationals because of group prejudices and social tensions. In his view, the abstract standard of 'equality of treatment' cannot be applied in the first category in its full sense since there are policy and factual grounds for the differential treatment between foreign business or particular categories of business. With regard to the second category, Schachter examined the Cuban nationalisations of American interests and apparently shares the US Court's statement that a difference in treatment based upon reprisal is an unreasonable discrimination.[197] Finally, the same writer continues:

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the ILA Seoul Declaration, op. cit. (note 80), and Section IV(1) of the 1992 World Bank Guidelines, op. cit. (note 82), at 1382.

[194] The ALI Third Restatement (1987: 200).

[195] Schachter, op. cit., at 316.

[196] Ibid. See also Weston, op. cit., at 440-447.

[197] For a different view, see Sornarajah (1986: 176-183).

> State action that involves ... restrictions on businesses owned by a particular national or ethnic group because of popular prejudice or group hostility should be regarded as 'discriminatory' and as a sufficient basis for international liability.[198]

Likewise, one may conclude that expropriation measures "taken solely for reasons of racial, religious, cultural, ethnic or nationality aversion or preference should and do constitute unlawful discriminations for being arbitrary."[199]

That the requirement of non-discrimination is not an absolute concept has been confirmed by writers in different terms. Commenting on the *Amoco* award, Professor Harris observes that though the Iran-United States Claims Tribunal recognises the non-discrimination requirement, it is not an absolute principle. "Discrimination that is reasonably related to the public purpose that underlies the expropriation is not illegal."[200] Some authors distinguished between 'just' and 'unjust' discrimination.[201] Schwarzenberger spoke of 'lawful' and 'unlawful' discrimination. In his view, absolute discrimination goes beyond the international minimum standard.[202] O'Connell also refers to 'lawful' and 'unlawful' discrimination. For him, even if an expropriation is carried out without compensation, and lacks a public purpose, it cannot be taken place in a discriminatory manner. In his words:

> Even the writers who allow States to expropriate for any purpose and without compensation agree upon the one minimal rule that if an alien or class of aliens is singled out for expropriation this is unlawful.[203]

Pellonpää and Fitzmaurice, who examined the question of discrimination in the Iran-United States Claims Tribunal's jurisprudence, observe that:

> Differential treatment of various persons, or classes of owners of property, does not automatically amount to prohibited discrimination

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198 Schachter, op. cit., at 320.
199 Weston, op. cit., at 447.
200 Harris, op. cit., at 566.
201 J. B. Moore, *Digest of International Law*, Vol. 6, Department of State Publications, Washington D.C. (1906) at 698-701.
202 Schwarzenberger, op. cit., at 120-121.
203 O'Connell, op. cit., at 780.

> ... such differentiation is wrongful only if it is unreasonable, or lacks some objective justification.[204]

In their view, as in the case of public purpose, if the concerned State asserts that there is some justification for its conduct, it creates a strong presumption of the correctness of such an assertion.[205] Moreover, one commentator has advanced two reasons for the whole issue of non-discrimination being unclear: (1) the existence of several possible meanings of the term 'discrimination'; and (2) some discrimination against aliens is generally recognised as internationally lawful.[206] Some jurists go beyond and explicitly state that the principle of non-discrimination is not a rule of customary international law. In this respect, Baade comments:

> Since states are free to decide with whom to trade, they must also be free to decide with whom to stop dealing ... There is no support in law or reason for the proposition that *a taking that meets other relevant tests of legality is illegal under international law merely because it is discriminatory* (emphasis added).[207]

In the light of the above assessment, it would appear that, compared with the public purpose requirement, non-discrimination is "a relatively more settled term and has formed a basis for finding certain acts of expropriation unlawful."[208] However, it has undergone a considerable change in the field of international trade and investment. Restated differently, non-discrimination is not an absolute requirement, even from the standpoint of Western authorities. Some discrimination against aliens is internationally recognised as lawful, but only in the case of unreasonable or unfair discriminatory conduct would international responsibility of the State involved be incurred. Undoubtedly, the surrounding circumstances in each discriminatory conduct are of crucial importance in determining the illegality of discrimination.

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[204] Pellonpää and Fitzmaurice, op. cit., at 65.
[205] Ibid.
[206] Fatouros, op. cit., at 250.
[207] Baade, "Permanent Sovereignty over Natural Wealth and Resources", in Miller and Stanger (eds.), op. cit., at 24.
[208] Mouri, op. cit., at 329.

4.3 The Principle of Compensation

Of all the questions posed by nationalisation, compensation is undoubtedly the most important one; not only from the viewpoint of foreign investors, capital-exporting States and capital-importing States, but also from the perspective of legal scholars, and national as well as international tribunals. Moreover, it is to be characterised as one of the most controversial areas of international law. The standards of compensation, therefore, merit an exhaustive examination, which will be carried out in chapter 4. At this point, however, a brief survey of the principle of compensation along with two other requirements - public purpose and non-discrimination - is necessary.

It has been generally recognised that there is a duty to pay compensation for the expropriation of foreign property. The question arises as to whether such a duty is a condition of the legality of an expropriation, similar to those relating to public purpose and non-discriminatory requirements. Put in technical terms, does failure to meet the obligation render the expropriation illegal as such?

Juristic opinions are divided upon the issue. Generally speaking, two main approaches may be identified.[209] According to the first approach, a State has an inherent right to expropriate foreign property and compensation would be a subsequent and ancillary duty; failure to compensate does not affect the legality of expropriation (referred to as 'legality' theory). This theory is based on the argument that international law is a law between States and does not concern itself with individuals. It is also argued that an expropriating State has no duty towards the owner of the property, but only to its national State. "Since it may never make a claim, or may waive its rights and abandon a claim to compensation, it is concluded that the original expropriation must be valid independently of the question of compensation." Under the second approach, the legality of expropriation depends on the payment of compensation (known as 'illegality' theory). The rationale of this theory, conversely, is that international

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[209] O'Connell, op. cit., at 785-867. Note that O'Connell himself advocates the theory of 'legality'.

law concerns itself with the individual and protects his rights. A violation of the owner's interest, accordingly, is illegal as such if the conditions for expropriation, including the payment of compensation, are not fulfilled.

In the defence of the former approach, Sir Fischer Williams observes that in the absence of specific treaties or other contractual or quasi-contractual obligation to the contrary, there is no general principle of international law prohibiting a State from expropriating foreign property without compensation.[210] Friedman is of the opinion that the legality and justification of expropriation are not subject to the payment of compensation, but rather:

> by the fact of its being the exercise of a jurisdiction, which the State is recognised to possess by international law.[211]

Bring came to the conclusion that "The principle of permanent sovereignty over natural resources ... implies that compensation is not a *sin qua non* for the legality of a nationalization."[212] Foighel also speaks of the possibility that the nationalisation of foreign property without compensation may possibly be "a legitimate step justified by international law."[213] He further states that even if payment may be required by international law, the failure to pay may therefore be "an independent breach of the law." Fatouros appears to have shared the view that non-payment of compensation constitutes an independent wrongful act, and it does not affect the legality of expropriation. In his view, if a State expropriates alien property and does not provide a measure of compensation "it is responsible for its unlawful non-payment of compensation, but the measures themselves remain internationally lawful."[214] Akinsanya,[215] like Baade,[216] took the view that not the expropriation *per se*, but the non-payment of compensation is an

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[210] J. F. Williams, "International Law and the Property of Aliens", 9 B.Y.I.L. (1928) 1 at 28.
[211] Friedman, op. cit., at 204.
[212] Bring, op. cit., at 131.
[213] Foighel, op. cit., at 40-41.
[214] Fatouros, op. cit., at 314-315.
[215] Akinsanya, op. cit., at 27 and 68.
[216] Baade, "Indonesian Nationalization Measures before Foreign Courts - A Reply", 54 A.J.I.L. (1960) 801 at 808.

international tort. Likewise, in his fourth report to the ILC, on the subject of State responsibility, Garcia-Amador has treated the issue in these terms:

> According to a generally accepted principle, an expropriation is not necessarily unlawful even when the action imputable to the State is contrary to international law ... an expropriation can only be termed 'unlawful' in cases where the State is expressly forbidden to take such action under a treaty or international convention.[217]

Garcia-Amador did not, accordingly, enumerate compensation as a condition of the legality of an expropriation. Not only do earlier authorities hold the proposition that expropriation is not unlawful merely on the grounds that it is not accompanied by adequate compensation, Sornarajah, writing in 1994, also maintains that the absence of compensation does not affect the legality of an expropriation.[218]

However, advocates of the illegality approach assert that expropriation without adequate compensation is confiscation, and it is *per se* unlawful and contrary to international law. Thus, Hyde, one of the leading writers on international law, expressed the opinion that since payment of full compensation is a condition which must be satisfied by a requisitioning State due to its action in wartime, "the expropriation of alien-owned property in time of peace cannot lawfully be effected on lighter terms."[219] Kissam and Leach conclude that "The validity of the expropriation depends upon the ability and willingness of the expropriating State to pay for what it has taken", and that any State interference with private foreign-owned property in defiance of these principles should not be recognised by other States.[220]

As in the public purpose and non-discrimination requirements, capital-exporting States assert that compensation is a condition of the lawfulness of an expropriation. Therefore, the theory of 'illegality' has received some support in

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217 Garcia-Amador (1959: 13, para. 50). See also ibid., at 33, para. 131.

218 Sornarajah, (1994: 315). See further Jain, op. cit., at 164, and R. Delson, "Nationalization of the Suez Canal Company: Issues of Public and Private International Law," 57 Col.LR. (1957) 754 at 763-764.

219 Quoted by Kissam and Leach, op. cit., at 192.

220 Ibid., at 214. See also Wortley, op. cit., at 33, and Brownlie (1998: 540).

the practice of the United States. In the Mexican oil expropriation of 1938 the position was taken by the US Government that the legality of the expropriation depended on the payment of compensation. This point was stated explicitly by the US Secretary of State in a note of April 3, 1940, to the Mexican Ambassador at Washington. Hull said:

> The Government of the United States readily recognizes the right of a sovereign state to expropriate ... however ... the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.[221]

Similarly, in notes to Mexico in 1938 the British Government stated that it:

> cannot but regard the failure of the Mexican Government to discharge even their existing obligations as in itself rendering unjustified an expropriation an essential condition of the validity of which would be the payment of full and adequate compensation ...[222]

Again, in its Memorial before the ICJ in the *Anglo-Iranian Oil Company* case, this Government expressed its view in the following terms:

> It is clear that the nationalization of the property of foreigners, even if not unlawful on any other ground, becomes an unlawful confiscation unless provision is made for compensation which is adequate, prompt and effective.[223]

Municipal and international tribunals have also touched upon the issue. National courts in capital-exporting countries have refused to recognise any foreign expropriation measures that fail to provide (full) compensation or are essentially retaliatory. The dispute of 1951 between Britain and Iran over the nationalisation of the Anglo-Iranian Oil Company, was a source of some legal

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[221] G. H. Hackworth, *Digest of International Law*, Vol. 3, Government Printing Office, Washington D.C. (1942) 655. In the case of Mexican Agrarian Reform, the United States took a similar position. Ibid. See also the Note of 17 February, 1962, from the United States to the Brazilian Government regarding the expropriation of an American Company, in Whiteman, op. cit., at 1090.

[222] Quoted by O'Connell, op. cit., at 787.

[223] *Anglo-Iranian Oil Co.* case, I.C.J. Pleadings, op. cit., para. 30.

cases. Thus, in the *Rose Mary* case, the Supreme Court of Aden, (then a British colony) held that expropriation without compensation is contrary to international law.[224] An English Court, however, disagreed with this holding.[225] The Japanese Civil Court in a similar case ruled that "property belonging to foreign nationals can only be expropriated with compensation."[226] However, in another passage of the same judgement, it was held that:

> When an industrial nationalization law of a country was enforced, without discrimination, against nationals of the enacting State and aliens alike, such law would not infringe international law even if it did not provide for compensation unless there existed a special international treaty.[227]

In another case, the Civil Court of Rome took a similar position. The Court held that "no person should be deprived of his property without payment of compensation."[228] In the Indonesian nationalisation of Dutch interests, the Amsterdam District Court stated that the nationalisation was in violation of international law because of, among many reasons, the failure to provide adequate compensation.[229] However, the nationalisation was found legal, because the German Court upheld the validity of the Indonesian nationalisation, even though it failed to compensate.[230] Finally, in the *Sabbatino* case, though the US lower courts, namely the District Court and the Court of Appeals, conceded that nationalisation without payment of compensation is unlawful, the Supreme Court took a different view.[231]

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224 *Anglo-Iranian Oil Co. Ltd. v. Jaffrate et al.*, Judgement of 9 January 1953, 20 I.L.R. (1953) 316.

225 Sornarajah (1986: 208).

226 *Anglo-Iranian Oil Co. Ltd. v. Idemitsu Kosan Kabushiki Kaisha*, 20 I.L.R. (1953) 305.

227 Ibid., at 307.

228 *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, 22 I.L.R. (1955) 23.

229 Domke (1960: 318).

230 Ibid., at 315. Note that this statement was not endorsed by the German Courts which considered the validity of the Chilean nationalisation of the American copper mines by the Allende Government without the payment of compensation. See I. Seidl-Hohenveldern, "Chilean Copper Nationalizations before the German Courts", 69 A.J.I.L. (1975) 110.

231 *Banco Nacional de Cuba v. Sabbatino et al.*, reports of the decisions of the lower courts may be found in 56 A.J.I.L. (1962) at 1085-1106, and of the Supreme Court *reprinted in* 4 I.L.M. 381.

At the international level, the Iran-US Claims Tribunal practice, whose awards in fact signify the latest developments of international law on the subject of nationalisation, does offer that the payment of compensation is not a condition of the legality of an expropriation. For example, in the *INA Corporation* case,[232] the Tribunal explicitly made a distinction between those requirements, like public purpose, the absence of which renders an expropriation '*per se* unlawful' and the obligation to pay compensation in a lawful nationalisation. Commenting on the Tribunal's finding, Professor Harris observes:

> The inference is that if compensation is not paid as required, the position simply that the obligation to pay continues, with interest to the time of payment; *the rules as to reparation for an illegal act do not apply* (emphasis added).[233]

It appears that Harris has shared the view that non-payment of compensation does not transfer an expropriation into an illegal act which, as will be shown in due course, may require damages rather than compensation. To some, although non-payment of compensation does not render an expropriation illegal, some provision for the payment should be made at the time of expropriation.[234]

On the question of whether compensation is a condition of the legality of an expropriation, the above survey shows that there is a patent lack of agreement among authors; some support the approach of 'legality', others advocate the 'illegality' approach. Put briefly, juristic opinions do not firmly throw light on the issue in hand. Though the practice of capital-exporting States provides some support for the latter theory, the response of their national tribunals are almost contradictory. At the international level, the jurisprudence of the Iran-United States Tribunal, however, does uphold the former theory. The Tribunal held that

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[232] *INA* Award, op. cit., at 378. See also *Amoco* Award, op. cit., at 130-131, paras. 137-138, and *American International Group* Award. In the latter award, the Tribunal held that:
"It is a general principle of public international law that even in a case of lawful nationalisation the former owner of the nationalized property is normally entitled to compensation." Ibid., at 105.

[233] Harris, op. cit., at 572.

[234] Pellonpää and Fitzmaurice, op. cit., at 70.

there is a duty to compensate, but the non-satisfaction of the duty does not render the expropriation unlawful as such. It would appear appropriate to agree with such a proposition that the payment of compensation cannot be characterised as a legal condition of the expropriation, similar to those regarding public purpose and non-discrimination requirements.

5. Expropriation in Violation of a Treaty

In the preceding sections, we dealt with the limitations on States' sovereign right to expropriate alien property in customary international law. In this section, the question of limitation by an international agreement between the host State and the home State of an alien will be considered. States may enter into international agreements with each other for various purposes. Some of these treaties only create rights and obligations between the contracting States, while others also vest certain rights directly in the nationals of those States.[235]

Such treaties may expressly prohibit one of the Contracting States to expropriate certain property. Stipulations of this nature were contained in some of the Peace Treaties entered into at the end of World War I, and the Geneva Convention of 15 May 1922 between Poland and Germany. Under Article 6 of the Convention, Poland was entitled to expropriate in Polish Upper Silesia:

> in conformity with the provisions of Articles 7 to 23 ... Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals *may not be liquidated in Polish Upper Silesia* (emphasis added).

Poland, however, did not observe the prohibition and expropriated certain rural estates in Upper Silesia, including the Chorzow Factory.[236] Poland's non-compliance with the prohibition gave an opportunity to the PCIJ to rule on the issue. The Court held that such illegal action was to be distinguished from

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[235] The celebrated example of this category is the Agreement of 1921 between Poland and the City of Danzig. In this respect, the PCIJ declared that if, under this treaty, the Contracting Parties intended to vest direct rights in individuals, it was possible. Garcia-Amador (1959: 24, para. 95).

[236] For the factual details, see chapter 1 of this thesis, at 19.

expropriation of foreign property under normal circumstances, that is, in the absence of a treaty provision. It held that:

> The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation - to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation save under the exceptional conditions fixed by Article 7 of the said Convention.[237]

This holding indicates that limitations could be placed by a treaty on the right of a State to nationalise property, and non-observance of such limitations constitutes an international wrong. The Court's statement was supported by many scholars, among them Garcia-Amador,[238] Fatouros,[239] Kronfol[240] and White[241] may be recalled. The latter writer maintains that expropriation in breach of a treaty is illegal even if adequate compensation is paid for the nationalised property.[242]

There are some jurists who throw doubts on the authority of the judgment in the said case. Thus, Sornarajah argues that since the treaty involved in this case brought about a compromise settlement of a territorial dispute, it:

> could be distinguished on the ground that the surrender of the right to nationalize was indispensable to the settlement which was imposed on the parties.[243]

However, that a State may surrender its sovereign right to another State by international instrument, was confirmed in the *Wimbledon* case. It was held that "No doubt any convention creating an obligation of this kind places a restriction

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237 *Chorzow Factory* Judgment, op. cit., at 46.
238 Garcia-Amador (1959: 25, para. 98).
239 Fatouros, op. cit., at 222.
240 Kronfol, op. cit., at 65.
241 White (1961: 154).
242 J. Murphy, "Compensation for Nationalization in International Law", 110 S.A.L.J. (1993) 79 at 91 and 96.
243 Sornarajah, (1986: 170).

upon the exercise of the sovereign rights of the State in the sense that it requires them to be exercised in a certain way."[244]

As will be shown later in this chapter, the acknowledgement of the principle of permanent sovereignty over natural resources in the last five decades may support this argument that a State cannot surrender its sovereignty over its natural resources, and hence any limitation on the right to control the exploitation of such resources by way of nationalisation would be null and void. In his lectures at the Hague Academy, professor Brownlie points out that the principle of permanent sovereignty over natural resources is the assertion of:

> *the acquired rights of the host State which are not defeasible* by contract or, perhaps, *even by an international agreement* ... the concept of permanent sovereignty strikes unnecessarily at the stability of intergovernmental agreements on economic co-operation, the legal validity of which in all other respects be unchallengeable (emphasis added).[245]

The proposition that a State may not be able to bind itself by treaties relating to its natural resources has been confirmed by some authors in terms of the capacity of the State to deprive itself of permanent sovereignty over such resources. Thus, the former President of the ICJ, Arechaga observed that as a consequence of the proclamation of the principle of permanent sovereignty "the territorial State can never lose its legal capacity to change the destination or the method of exploitation of those resources, whatever arrangements have been made for their exploitation and administration."[246]

The above account may suggest that there is conflict between the impact of stabilisation treaties on the international community on the one hand, and economic independence of States on the other. One observer[247] concludes that as far as the stability of international agreements on economic co-operation are

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[244] The *Wimbledon* case (*France, Great Britain, Italy and Japan v. Germany*), Judgment of 17 August 1923, P.C.I.J. Series A, No. 1 (1923) at 25.

[245] I. Brownlie, "Legal Status of Natural Resources in International Law: Some Aspects", 162 Hague *Recueil* (1979-I) 253 at 271.

[246] Arechaga, Hague *Recueil*, op. cit., at 297.

[247] Sornarajah (1986: 171).

concerned, such agreements should be considered binding. However, the economic independence of States demands that a contrary rule should be adopted.

Under investment protection treaties, the host State pledges to the home State of the foreign investor that it will observe the agreements concluded with the investor (referred to as 'protection clauses'). The question arises as to whether the rule of the *Chorzow Factory*, is applicable to these treaties. Put differently, if the host State proceeds to attack such investment in a nationalisation measure, does it commit an international wrong? There is no consensus among writers. According to Seidl-Hohenveldern,[248] who refers to treaties which contain such protection clauses as 'umbrella treaties', the response is in the positive. He goes further and argues that any unilateral impairment of the contract between the host State and the investor will also be an international wrong, since it violates this umbrella treaty. Sornarajah,[249] however, points out that investment treaties do not interfere with the right of the State to nationalise foreign property but only seek to specify the manner in which such nationalisation should be made. He further states that because such a treaty itself, for any likely violations, contains a provision on compensation, the logical answer to the question is the application of such provision to the case. Relying on the practice of the Iran-US Claims Tribunal, the same writer argues that despite the violation of the 1955 Treaty of Amity between Iran and the United States by the nationalisation of the properties of American nationals, the Tribunal was reluctant to characterise such nationalisations as unlawful.[250]

Based on the foregoing, it may be concluded, as a general proposition, that a State may legally renounce its sovereign right to nationalise foreign property by international agreement. This general proposition may be modified in two cases: firstly, where the subject-matter of a treaty relates to the surrendering of the right

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248 Seidl-Hohenveldern, op. cit., at 154.

249 Sornarajah (1994: 320-321).

250 Sornarajah (1986: 171). Also, in the *ELSI* case (*The United States v. Italy*), a Chamber of the ICJ pronounced on the requisition of a US company in Italy and alleged violation of the bilateral treaty of Friendship, Commerce and Navigation between these two countries. It led to an interesting judgment on such issues as interpretation and status of an FCN treaty, exhaustion of local remedies and compensation for damages. *ELSI* Judgment, op. cit. (note 60).

to control over natural resources, there are some doubts as to whether a State can renounce its sovereignty over such resources. Secondly, apart from the allegation of the violation of the Treaty of Amity between Iran and the United States, which is not our concern in this thesis, it is suggested that the correct view is that violation of investment protection agreements does not constitute an international delict, and hence the application of the standards of compensation of such treaties would be the proper remedy.

6. Expropriation in Breach of State Contracts

So far we have dealt with only expropriation of property, but in the present section we will examine State interference with other forms of interests held by aliens, viz., nationalisation of contractual rights. A State may enter into contractual relations with foreign nationals, individual or juridical, just as with its own nationals, for many purposes: contracts for purchase and sale, contracts for services, contracts for exploitation of natural resources and, finally, loans and bonds contracts. Contracts involving resource exploitation are sometimes described as 'concessions', 'international contracts', 'investment agreements' and 'economic development agreements'.[251] Some writers insist on treating concessions as a special category,[252] however, others observe that there is no firm reason for regarding these contracts as a special category of State contracts.[253]

Let us begin with the question of whether concession rights are property rights like other proprietary rights. Friedman reached the conclusion that "cases of interference with a concession are outside the field of expropriation being mere violations of contractual obligations."[254] Article 12 of the Harvard Draft Convention places the concession agreements in the category of contracts but does not recognise them as a property. In their explanatory notes to the said article, Sohn and Baxter took a similar position.[255] According to this proposition, a concession therefore cannot be expropriated.

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251 Arsanjani, op. cit., at 179.
252 O'Connell, op. cit., at 976-997.
253 Brownlie (1998: 550).
254 Friedman, op. cit., at 151-152.
255 *Reprinted in* 55 A.J.I.L. (1961) 567.

However, the majority of jurists, among them Foighel,[256] Baade,[257] Higgins,[258] Akehurst,[259] Bowett[260] and Story[261] support the view that a concession is like any other proprietary interest. As White remarks:

> Whatever may be the dominant feature of a concession, it is generally accepted that the sum total of the rights acquired under it by the concessionaire constitute a legal interest of a proprietary nature.[262]

In his lectures at the Hague Academy, the late Judge Arechaga expressed the view that contractual rights are no more exempt from expropriation than a mine or a factory. Hence, they are subject to the eminent domain of the territorial State.[263]

State practice has also indicated that concession possesses a proprietary nature. In the *Anglo-Iranian Oil Company* case, the United Kingdom stated that it did not dissent the proposition that:

> A State possesses the right to nationalise and, generally, to expropriate property belonging to foreigners in its territory ... Such property includes concessions granted by a State to foreign nationals.[264]

Moreover, the subject under discussion has received support in international arbitral awards. Thus, in the *Liamco* case, the proprietary nature of concession rights was explicitly recognised by Arbitrator Mahmassani. He found concession rights to be included under the category of incorporeal property.[265]

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256 Foighel, op. cit., at 74.
257 Baade "Permanent Sovereignty over Natural Wealth and Resources", in Miller and Stanger (eds.), op. cit., at 20.
258 Higgins (1982: 271).
259 M. Akehurst, *A Modern Introduction to International Law* (6th ed.), Routledge, London (1991) at 96.
260 D. W. Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach", 59 B.Y.I.L. (1988) 49 at 67-69.
261 A. Story, "Property in International Law: Need Cuba Compensate US Titleholders for Nationalising their Property?", J.Pol.Phil. (1998), Vol. 6 (No. 3) 306 at 317.
262 White (1961: 84).
263 Arechaga, Hague *Recueil*, op. cit., at 307.
264 *Anglo-Iranian Oil Co.* case, I.C.J. Pleadings, op. cit., para. 7(1).
265 *Liamco* Award, op. cit., at 53.

As the above account suggests, a concession represents a proprietary right and therefore can be subject to expropriation by the conceding State.

Since questions regarding State responsibility for measures affecting contractual rights of an alien depend primarily on the law governing the particular contractual relationship between the State and the alien, the examination of the governing law of State contracts will be our next task.

6.1 The Choice of Law Governing State Contracts

There is a diversity of opinion as to what law governs concession agreements. Various laws and legal principles have been suggested as being applicable to these agreements. Some authors, such as Foighel,[266] expressed the view that concessions are generally governed by municipal law. The presumption "is in favor of the municipal law of the grantor."[267] It was held that in State contracts, the law of the forum "not merely sustains but, because it sustains, may modify or dissolve the contractual bond."[268]

The most unequivocal and explicit statement to this effect can be found in the *Serbian Loans* case where the PCIJ ruled that "any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[269] The Court in the *Brazilian Loans* case took a similar position.[270]

There is a second view, to the effect that the provisions of the contract itself, viz., its own *lex contractus*, may be chosen as the governing law. Thus, Verdross points out that "the *lex contractus*, created by a quasi-international agreement, is an independent legal order, regulating the relation between the

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266 Foighel, op. cit., at 74.

267 G. Schwarzenberger, "The Protection of British Property Abroad", 5 C.L.P. (1952) 295 at 312.

268 *Kahler v. Midland Bank*, quoted by Sornarajah, op. cit. (1994: 334). Of course, the parties may select a municipal system other than that of the contracting State, but will tend then to cause affront to the contracting State.

269 *France v. Kingdom of Serbs, Croats and Slovenes*, P.C.I.J. (1929), Series A, Nos. 20/21, at 41.

270 *France v. Brazil*, ibid., at 121.

parties exhaustively."[271] This view was upheld in the *Aramco* case, where the tribunal clearly stated that "the Concession Agreement is thus the fundamental law of the Parties."[272] However, the idea that a contract can create an independent, exclusive and self-sufficient legal order has been criticised by some authorities. According to Mann, such freedom for parties may result in the establishment of certain rules independent of a legal order, which are "doctrinally so unattractive, so impractical, so subversive of public international law."[273] In the same vein, Asante comments:

> This is dismissed as patently untenable on the grounds that the validity of every agreement must be derived from some external legal order - be it international or municipal.[274]

The third proposition is that 'international law' may be designated as applicable law to the contract. Mann, who was treated as one of the pioneers of this idea, observes that it is possible for contracts between States and aliens to be subject to public international law. In his words:

> (a) According to the theory referred to, a contract could be 'internationalized' in the sense that it would be subject to public international law *stricto sensu*; that therefore, its existence and fate would be immune from any encroachment by a system of municipal law in exactly the manner as in the case of treaty between two international persons.[275]

In this regard, Garcia-Amador has to say:

> By virtue of the choice-of-law clauses contained in modern concession agreements, the contractual relationship entered into by a State and a foreign private person is removed, wholly or in part, from the domestic law of the contracting State, and is subject to a different and hierarchically higher order which may be either the general principles of law or international law as a whole. This proposition

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271 Quoted by Domke (1961: 595-596).

272 *Saudi Arabia v. Arabian American Oil Co.* (*Aramco*), Award of 23 August 1958, 27 I.L.R. (1963) 117 at 168.

273 F. A. Mann, "The Proper Law of Contracts Concluded by International Persons", 35 B.Y.I.L. (1959) 34 at 49. See also the same author's other literature, *Further Studies in International Law*, Clarendon Press, Oxford (1973) at 230-231, and J. F. Lalive, "Contracts Between a State or a State Agency and a Foreign Company", 13 I.C.L.Q. (1964) 987 at 998.

274 Asante, op. cit., at 612.

275 Mann (1959: 43).

> can be sustained in light of arbitral precedents. Hence, the generally accepted view is that these clauses, in contrast to traditional ones, have the effect of 'internationalizing' or 'delocalizing' the contractual relationship (footnotes omitted).[276]

The logic behind this proposition is that concession agreements in all essential respects are analogous to treaties and therefore, like treaties, are governed primarily by international law. However, this view is not without its theoretical difficulties, which will be considered in this chapter.

Likewise, it sometimes happens that parties agree on the application of so-called 'general principles of law'. It is argued that concession agreements fall neither completely under the rules of international law nor under the rules of municipal law but somewhere in between, being governed in part by both and exclusively by neither. Hence, Lord McNair maintains that the system of law most likely to be suitable for the regulation of these agreements and the adjudication of disputes arising under them is "the general principles of law recognized by civilized nations."[277] It should be noted that though McNair supports the application of these principles to the concession agreements, he distinguishes between two different situations. Firstly, the contracting State possesses a sufficiently developed legal system to deal with modern contracts. Secondly, and conversely, situations where the contracting State lacks a developed legal system. In his view, only in the latter case would general principles of law apply. Similarly, Mann casts doubt on whether such general principles of law constitute a law or a legal system and observes that "unless they are equiparated to public international law, general principles are not a legal system at all, and Lord McNair clearly refused so to equiparate them."[278] An example of the application of international law or general principles of law to the contract is found in the Libyan concessions which provided that the concession:

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[276] F. W. Garcia-Amador, "State Responsibility in case of 'Stabilization' Clauses", 2 Fla.St.U.J.Trans.L.P. (1993) 23 at 29-30, and (1959: 33, para. 131).

[277] McNair, "The General Principles of Law Recognized by Civilized Nations", 33 B.Y.I.L. (1957) 1 at 19.

[278] Mann (1959: 45).

> shall be governed by ... the law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law ...[279]

6.2 Internationalised Contracts

When a State contract is governed by international law or general principles of law, the contract has been described by jurists[280] and in arbitral awards[281] as an 'internationalised' contract. The origin of the theory of internationalisation can be traced back to some legal writings as well as to three arbitral awards, namely *Abu Dhabi*,[282] *Qatar* [283] and *Aramco*, in which the disputes arose from oil concession agreements. The latter did not contain any choice of law clause and therefore, under private international principles, the arbitrators had to infer the law applicable to the agreement by looking at the State with which the contract had the closest link. The tribunals found that the applicable law should be the law of the State parties, viz., Islamic law. However, the arbitrators argued that this law was not developed enough to govern instruments of modern commercial transactions. In these circumstances, the arbitrators reached the conclusion that in the absence of an appropriate municipal law, they should apply 'general principles of law' to fill the vacuum. In the *Qatar* case, for instance, it was held that:

> This is a cogent reason for saying that such law [Islamic law] does not contain a body of legal principles applicable to a modern commercial contract of this kind.[284]

This holding was criticised by some commentators. Thus, Arsanjani states that the logic behind the application of general principles of law is that the parties

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[279] *Texaco* Award, op. cit., at 14, para. 36.

[280] See, e.g., Mann (1959: 34); R. Y. Jennings, "State Contracts in International Law", 37 B.Y.I.L. (1961) 156; Domke (1961: 595), and Garcia-Amador (1993: 30).

[281] See *inter alia*: *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, 35 I.L.R. (1967) 136; *Texaco* Award, op. cit. (note 62), and *Liamco* Award, op. cit., (note 61); and *Revere Copper and Brass Inc. v. Overseas Private Investment Corporation*, Award of 24 August 1978, *reprinted in* 17 I.L.M. (1978) 1321.

[282] *Petroleum Development (Trucial Coast) Ltd. v. The Ruler of Abu Dhabi*, 18 I.L.R. (1951) 144 (*reprinted* also *in* 1 I.C.L.Q. (1952) 247).

[283] *The Ruler of Qatar v. International Marine Oil Company Ltd.*, 20 I.L.R. (1953) 534.

[284] Ibid., at 545.

do not want to be bound by any single municipal law no matter how developed. She further observes that even if the municipal law of both parties was developed sufficiently the parties would not be exclusively bound by either law.[285] Moreover, the tribunal's statement that Islamic law was not developed enough to deal with modern commercial transactions is untenable, because: (1) the tribunal did not explain why such a law was not applicable; (2) today the contracting parties of the majority of oil contracts are countries whose law is Islamic law; and, more importantly, (3) while the contracting State had entered into the contractual relation, obtaining its competence from Islamic law, one wonders how the tribunal could take the position that for the settlement of disputes arising from the same contractual relation such a law was not applicable.

In the *Texaco* award (the oft-cited award on the theory of internationalisation) besides 'international law' or 'general principles of law',[286] two more grounds, namely 'an arbitration clause'[287] and 'an economic development agreement',[288] were pronounced for designating a State contract as internationalised. Thus, a brief examination of these three grounds seems appropriate. In this award, Arbitrator Dupuy held that the reference to international law or general principles of law is sufficient criterion for the internationalisation of a contract. The Arbitrator took the view that State contracts can, under certain conditions, fall within "a special legal order - the order of the international law of contracts."[289] Sornarajah,[290] however, observes that the subjection of the contract to international law or general principles of law goes no further than to authorise an arbitrator to have recourse to cognate rules of international law or general principles of law that may be applied to the contract. In his view, the choice of international law may be possible, but two theoretical difficulties may be enumerated. Firstly, the foreign party to the State contract

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285 Arsanjani, op. cit., at 212.
286 *Texaco* Award, op. cit., at 15, para. 42.
287 Ibid., at 16, para. 44.
288 Ibid., para. 45.
289 Ibid., at 16, para. 44.
290 Sornarajah (1994: 342-343).

does not possess sufficient personality in international law to enter into relations with a State or to be a holder of rights in international law.[291] Secondly, there is no body of international law on the subject of State contracts. Arechaga also stated that "We do not believe that there is an international law of contracts."[292]

The second ground of internationalisation is that the contract contains a provision for the settlement of disputes through arbitration on an international level, at least outside of the contracting State[293] (referred to as 'arbitration clause'). The rationale of this view is that the foreign party may have doubts as to the impartiality of the courts of the contracting State.[294] In the *Texaco* award, Dupuy concludes that the contract itself indicates that the parties intended to remove the dispute from the jurisdiction of the court of the contracting State or any other State. To reach the conclusion, the Arbitrator enumerated several factors: (1) the application of international law to the contract; (2) the appointment of the arbitrator through the international procedure, viz., by the President of the ICJ; (3) the exclusion of municipal law for the arbitration procedure; and (4) the competence of the arbitrator in respect to the procedure and jurisdiction. Based on these grounds, Dupuy was convinced that the arbitration was not intended to be in the province of any municipal law. He further states that "one cannot accept that the institution of arbitration should escape the reach of all legal systems and be somehow suspended *in vacuo*."[295] In the situations where the domestic law was excluded and the arbitration had to be placed within some legal order, the understanding is that it must be governed by international law.

Commenting on the *Texaco* award in this respect, however, Professor Schachter concludes that the appointment of an arbitrator by an international

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[291] For a contrary view, see Garcia-Amador (1993: 31-32).

[292] Arechaga, Hague *Recueil*, op. cit., at 308.

[293] It has been submitted that the choice of domestic court of another State will not be appropriate, as there could be problems of sovereign immunity. Sornarajah (1994: 334).

[294] Seidl-Hohenveldern, op. cit., at 152.

[295] *Texaco* Award, op. cit., at 8, para. 16.

procedure, under a contractual clause, does not necessarily require that the law governing arbitration should be international law.[296]

The crucial question raised here is whether in the case of the termination of the contract, an arbitration clause would survive. General arbitral practice shows that an arbitration clause survives by the termination of the contract.[297] Seidl-Hohenveldern is of the opinion that the very purpose of such a clause requires that it could not be abrogated unilaterally by one of the partners to the contract.[298] According to Arechaga, if the concession agreement contains an arbitration clause, such a clause would not be affected by the cancellation of the contract:

> in accordance with the established principle of *the autonomy or independence of the compromissory clause of a contract.* The arbitration clause stands on its own and *is separable from the contract*: if that were not the case the purpose of having such a clause in a contract would be defeated (emphasis added).[299]

Regarding the issue under discussion, Sornarajah distinguishes between a reference in the arbitral clause to *ad hoc* arbitration on one hand, and a reference to the International Centre for Settlement of Investment Disputes tribunal, on the other. While in the latter, the arbitration clause is kept alive by operation of the treaty provision on the subject, in the former, the answer cannot be in the positive. In his words:

> Unlike private contracts which are broken by the choice of private parties or terminated by other external events, the act which terminates a concession agreement is a public act of sovereignty and a sovereign state which decides to perform that public act will seek *to destroy the contract, arbitral clause and all.* (emphasis added).[300]

Based on this statement, the same writer reached the conclusion that it might be too simplistic to contend that the arbitral clause inserted into a contract

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296 Schachter, op. cit., at 308.
297 Sornarajah, (1994: 336).
298 Seidl-Hohenveldern, op. cit., at 152.
299 Arechaga, Hague *Recueil*, op. cit., at 306.
300 Sornarajah (1994: 337).

survives the unilateral termination of the agreement by the legislative act of the state.[301]

International tribunals also touched on the issue. In the *Texaco* award, Dupuy faced the contention of the Libyan Government that, by nationalising the enterprise concerned, the State had also terminated the contract - including its arbitration clause. Hence, the arbitral tribunal lacked jurisdiction to consider the case. To respond to this argument, the Arbitrator relied on writings of legal scholars and international jurisprudence, including the *Losinger and Company* case in which also the (former) Yugoslav Government claimed that the arbitration clause had lapsed following the cancellation of the contract. Libya's argument was rejected by Dupuy by virtue of separability of the arbitration clause.[302] The same line of reasoning, which is based on the separability of the arbitration clause, was used by Arbitrator Mahmassani in the *Liamco* award, as follows:

> It is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the state of the contract in which it is inserted and continues in force even after that termination. This is a logical consequence of the interpretation of the intention of the contracting parties ...[303]

This holding is tenable as far as private international arbitrations are concerned.[304] As indicated above, none of the arbitrators accepted the distinction made by Sornarajah, and they held that the arbitration clause survives the termination of the contract whether or not the arbitral tribunal is an *ad hoc* tribunal or one established by treaty.

Turning to the internationalisation theory, its third ground is that the contract falls into the category of 'economic development agreements'. Once again, the award in *Texaco* is relevant in this regard. There, this category of contracts was considered to be internationalised by virtue of their character.

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301 Ibid.
302 *Texaco* Preliminary Award, 53 I.L.R. 393 at 408-412.
303 *Liamco* Award, op. cit., at 77.
304 Sornarajah (1994: 337).

Arbitrator Dupuy advanced several reasons why what he called 'economic development agreements' should be regarded as 'internationalised'. As he stated, the agreements involved: (1) a broad subject-matter, viz. substantial investment; (2) for a long duration; and (3) associated with the State's development plans.[305] He further noted that due to the purpose of the co-operation, and the magnitude of the investments the investor concerned:

> must in particular be protected against legislative uncertainties, that is to say the risks of the municipal law of the country being modified, or against any government measures which would lead to an abrogation or recession of the contract.[306]

Therefore, the Arbitrator concludes that in these circumstances, the relevant law cannot only be that of the host State and it must be international law or some supranational system. This type of internationalisation, which infers merely from the nature of the contract, is considered as the extreme version of the theory of internationalisation.[307] The other two grounds of the theory discussed above - namely the subjection of the contract to international law or general principles of law, and the insertion of an arbitration clause - indicate the intention of the parties and are therefore considered as less extreme varieties of the theory.[308]

It has been submitted that if an investor considers that it necessary to obtain protection against unilateral changes of the contract, it can insist on a so-called 'stabilisation clause', which will be studied in this chapter, that attempts to preclude legislative changes from modifying the contract terms. Professor Schachter further observes that if the agreement provides that domestic law should apply or if it is silent on applicable law, we cannot argue that:

> The magnitude of the contract or its relation to development transfers it into some kind of international contract that involves obligations on the international level different from other contracts.[309]

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305 *Texaco* case, op. cit., at 16, para. 45.
306 Ibid., at 17.
307 Sornarajah (1994: 346). For further arbitral awards which form the basis of this extreme version of the theory, see the citations in ibid., n. 63.
308 See the citations in ibid., n. 65.
309 Schachter, op. cit., at 310.

Nonetheless, he states that the impact of political and economic factors on the internationalising of large-scale economic development agreements is indisputable. In such agreements the host State and the private enterprise are not the only parties interested; the home State of the enterprise is often involved. The latter plays a role, in many cases, by financing the company and insuring it against political risks and by entering into a bilateral treaty with the host State in this respect. Also, State practice confirms the protection of private enterprises and the host States tend to accept such protection as legitimate. Based on these arguments, Schachter observes that "In this sense, it may be said that the development agreements are internationalized."[310] However, the same writer points out that we need to be cautious in using the term 'internationalised' contracts. One cannot say that due to such features as non-national governing law, non-national arbitration and international economic and political significance:

> the contracts have been transposed to another legal order or that they have become subject to international law in the same way as a treaty between two States.[311]

Commenting on the *Texaco* award, Fatouros states that none of the grounds mentioned by the Aribtrator can be construed as necessarily leading to the internationalisation of State contracts. In his view, among the reasons in this connection, the element of 'economic development agreement' is the "vaguest" one.[312] Jain is of the opinion that "the award does not clarify how the outcome would be different if there was a breach of treaty and not of contract."[313]

Besides its extreme and less extreme versions, the theory of internationalisation of State contracts has some controversial consequences.

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310 Ibid.

311 Ibid., at 311.

312 A. A. Fatouros, "International Law and the Internationalised Contracts", 74 A.J.I.L. (1980) 134 at 136, and the same writer's other literature, op. cit., at 259-262.

313 Jain, op. cit., at 67. For further critical comment on the 'internationalisation' theory, see Bowett, op. cit., at 51-52.

There is a great diversity of opinions among writers on this issue.[314] According to Sornarajah,[315] the theory has two important consequences. First, the host State cannot thereafter rely on its own laws to contend that the contract is a nullity. It has been asserted that the rationale of this view is that a foreign multinational corporation could not be expected to know all laws and regulations of the host country and this assumption would also apply to the contract. However, the assumption is unsound, because it is well established in all legal systems that aliens entering a State should abide by the laws of the State concerned, otherwise aliens could break the law. Why this rule must not be applied to a foreign multinational corporation is unclear. Second, the immutability of State contracts. For the advocates of internationalisation theory, this consequence can be met by the absolute application of the principle of *pacta sunt servanda* to the contract. "Its application is made to rest not on the assimilation of foreign investment agreements to treaties ... but it is claimed that the norm is a general principle of law."[316]

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[314] In his survey of the various views expressed by different authors on the consequences of the theory, Paasivirta divided them into four groups. The first group comprises those authors, such as Weil and Wehberg, who insist on absolute protection of private property. In fact, they advocate the thesis that concession agreements in all essential respects are assimilated to treaties, and that any acts of States which contravene contractual provisions are unlawful in accordance with the applicable international law. The jurists of the second group take a very different position. They maintain that the designation of international law, which governs relations between States, as proper law of the contract is inappropriate. The third group of publicists, such as Lauterpacht and Schwarzenberger, generally agree on the application of international law to State contracts, but do not insist on absolute protection of the private party. Though the views of group four are similar to those of the third group, these writers, such as Arechaga, emphasise international law as a general standard, "instead of the narrower interpretation of it as the proper law of contract." The common opinion of this group is that contracts are not analogous to treaties. Commenting on the positions of the above four groups, Paasivirta concludes that the approaches of the third and fourth groups of authors entail some uncertainties. As to the views of the second group, he observes that it seems out-moded entirely to exclude contracts from the ambit of international law since none of the recent arbitral tribunals felt precluded from applying international law to State contracts and the very existence of the ICSID system suggests the same. Finally, regarding the approach of the first group, he states that the views of this group are marginally reflected in arbitral decisions. In his view, "the idea of international law as *lex contractus* is thought to provide the most powerful means of giving effect to the individual terms of a contract." As the last two sentences suggest, Paasivirta himself would appear to support the approach of the first group. E. Paasivirta, "Internationalization and Stabilization of Contracts versus State Sovereignty", 60 B.Y.I.L. (1989) 315 at 316-323.

[315] Sornarajah (1994: 346-348).

[316] Ibid., at 348.

With regard to the argument of the assimilation of State contracts to treaties, it will be recalled that the ICJ, in the *Anglo-Iranian Oil Company* case, rejected Britain's argument to this effect, and explicitly confirmed that a concession contract could not be considered as an international agreement. The Court cannot accept the view that:

> the contract between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation.[317]

According to Brownlie, the proposition that a choice of public international law by the parties places the State contract on the international plane is wrong, as a State contract is not a treaty.[318] While accepting the application of *pacta sunt servanda*, as a principle of international law, to State contracts, Garcia-Amador maintains that one cannot say that there is "a total assimilation" between the breach of obligations emanating from an internationalised contract and that of treaty obligations.[319] In addition, to some, the assimilation of a foreign investment agreement to treaty is far-fetched.[320]

The absolute applicability of the principle of *pacta sunt servanda* to State contracts is a controversial issue. There are some jurists who support the concept of absolute sanctity of contract. In supporting their view, they refer to several pertinent arbitral awards in this respect, which characterise the maxim *pacta sunt servanda* as a general principle of law, and assimilate State contracts to treaties. Thus, Kissam and Leach comment:

> In the area of concession agreements, States are bound to observe these agreements with other States. The principle of *pacta sunt servanda* should apply. Principles of acquired rights and sanctity of contracts, as well as common justice, support this conclusion.[321]

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317 *Anglo-Iranian Oil Co.* case, I.C.J. Rep. (1952) at 112.
318 Brownlie (1998: 553).
319 Garcia-Amador (1993: 33-34).
320 Sornarajah (1994: 331).
321 Kissam and Leach, op. cit., at 214.

Wehberg, after studying the origin and sanctity of the principle of *pacta sunt servanda*, concludes that "the principle is valid exactly in the same manner, whether it is in respect of contracts between states or in respect of contracts between states and private companies ... The principle of sanctity of contracts must always be applied."[322] In its memorandum to the PCIJ in the *Losinger and Company* case, the Swiss Government contended that such a principle "must be applied not only to agreements directly concluded between States, but also to those between a State and an alien."[323] The PCIJ, however, did not take any decision on the case, as it was settled out of Court.[324]

On the contrary, there are other authors who consider that no principle of absolute sanctity of contract exist as such. In his fairly recent study, Maniruzzaman concludes that:

> In a contractual relationship the presence of a sovereign State as a contracting party bears special significance for its people as it represents their interests and it has the responsibility to protect those interests whenever it is necessary, even against contractual commitments. *In principle, no contract is absolutely immune from unilateral modification or premature termination* (emphasis added).[325]

Jennings has shared the view that the principle of *pacta sunt servanda* is not absolute, when he states that "Neither the principle of acquired rights nor the principle of *pacta sunt servanda* is therefore to be regarded as being necessarily absolute or unconditional in application. As so often in law it is a question of drawing limits and defining exceptions."[326] Likewise, a rigid application of the

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322 H. Wehberg, "Pacta Sunt Servanda", 53 A. J. I. L. (1959) 775 at 786.

323 *Switzerland v.* (former) *Yugoslavia*, P.C.I.J. (1936), Series. C, No. 78, 10 at 32. See also the *Certain Norwegian Loans* case (*France v. Norway*), I.C.J. Rep. (1957) 15.

324 However, in *Czechoslovakia v. Radio Corporation of America*, which involved a unilateral termination of a concession agreement, the tribunal dealt with the issue and applied implicitly the principle of *pacta sunt servanda* to the agreement. For the factual details, see 30 A.J.I.L. (1936) 523 at 531.

325 A. F. Maniruzzaman, "State Contracts with Aliens - The Question of Unilateral Change by the State in Contemporary International Law", 9 J.Int.Arb. (1992) 141 at 168.

326 Jennings, op. cit., at 177. See also Sornarajah (1986: 110).

principle of *pacta sunt servanda* to State contracts "is neither warranted by doctrine nor sound on practical and functional grounds."[327]

Once again, the jurisprudence of the Iran-US Claims Tribunal is highly relevant on the issue. In its award in the *Anaconda-Iran, Inc.* case,[328] the Tribunal stated that the doctrine *pacta sunt servanda* is in effect nothing "but a condensed expression of a group of rules of great complexity." It further noted that the doctrine is incorporated in the 1969 Vienna Convention on the Law of Treaties, and has a variety of applications in that field of law.[329] Moreover, while recognising as "a rule of international law that a State has the duty to respect contracts freely entered into with a foreign party",[330] the Tribunal, in the *Amoco* case, stressed that:

> The quoted rule, however, must not be equated with the principle *pacta sunt servanda* ... To do so would suggest that sovereign States are bound by contracts with private parties exactly as they are bound by treaties with other sovereign States. *This would be completely devoid of any foundation in law or equity and would go much further than any State has ever permitted in its own domestic law. In no system of law are private interests permitted to prevail over duly established interest, making impossible actions required for the good public. Rather private parties who contract with a government are only entitled to compensation when measures of public policy are implemented at the expense of their contract rights* (emphasis added).[331]

According to Professor Higgins, this is the result of "a strategy that sought to turn the emphasis from *pacta sunt servanda* and respect for acquired rights ... towards the new notion of permanent sovereignty over natural resources."[332]

Additionally, the principle of *pacta sunt servanda* "is complementary to, and qualified by, the principles of *jus cogens* and of *clausula rebus sic*

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[327] Asante, op. cit., at 613.

[328] *Anaconda-Iran, Inc. v. The Islamic Republic of Iran*, Interlocutory Award No. 65-167-3 (10 December 1986), *reprinted in* 13 Iran-U.S. C.T.R. 199

[329] Ibid., at 231, para. 128.

[330] *Amoco* Award, op. cit., at 242, para. 177.

[331] Ibid., at 242-243, para. 178.

[332] Higgins (1982: 287). See also Arechaga, Hague *Recueil*, op. cit., at 179, and Mouri, op. cit., at 313.

stantibus."[333] Thus, the application of such principle by the concessionaire can invite the conceding State to invoke the *rebu sic stantibus* clause, which sanctions the revision of international agreements on the basis of a fundamental change of circumstances. As Seidl-Hohenveldern puts it:

> Whatever promises this State had made to the private party concerned, the principle of good faith commands that any agreement is subject to the *clausula rebus sic stantibus*. Where continued validity of such an agreement hurts a public interest ... recourse to the *clausula* may appear justified.[334]

Some authors go further and cast doubt on accepting *pacta sunt servanda* as a general principle of law. Thus, Sornarajah argues that contractual sanctity has never been treated as an absolute and unqualified principle in any of the major legal systems. In his view, it is a common feature to these legal systems that State contracts "are subject to public interests and that a State may terminate such contracts if public interests so require it."[335] Having surveyed the major legal systems of the world on the issue, Maniruzzaman concludes that "the State party to a public contract has exceptional prerogative powers to vary or even terminate the contract for the public good and in the public interest, subject only to the duty to pay compensation."[336]

Following the change of circumstances which occurred after the sharp rise in oil prices in the early 1970s, both the traditional oil-producing, viz., OPEC countries, as well as the new producing countries, like Britain and Norway, readjusted the fiscal regimes in their oil concession contracts. Thus, the latter countries invoked the notion of 'police power' or 'eminent domain' "in unilaterally revising the fiscal regimes for the exploration of petroleum resources in the North Sea despite the financial burden such a revision imposed on foreign

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333 Arsanjani, op. cit., at 260.
334 Seidl-Hohenveldern, op. cit., at 28.
335 Sornarajah (1994: 348).
336 Maniruzzaman, op. cit., at 156.

companies operating in the North Sea."[337] International arbitral awards also indicate a substantial modification of the traditional notion of a rigid contractual mechanism for State contracts. In one of the cases before it, for example, the Iran-US Claims Tribunal invoked the doctrine of changed circumstances to justify Iran's termination of a contract under which the claimant was involved in expanding the Iranian Air Force's electronic intelligence-gathering system.[338] In these circumstances, one should note that the concept of contractual sanctity "will have to give way to the idea of the defeasibility of State contracts in the public interests."[339]

In situations where international law is the governing law of State contract, if the latter conflicts with any peremptory norm of international law (*jus cogens*), the contract will be invalid. It has been suggested that, if this be so, the notion of immutability of contracts - the most important consequence of internationalisation theory - will conflict with the principle of economic sovereignty, and hence it will be invalid. It may be argued that these contrary norms, viz., the norms concerning permanent sovereignty over natural resources, are weak norms. Sornarajah further observes that "the difficulty with this argument is that the notion of internationalization and the extraction of *pacta sunt servanda* also rely on the weakest norms of international law [i.e. writings of publicists and arbitral awards]."[340] He continues:

> The notion of contractual sanctity ... depends on general principles of law which are also a weak source of law. A contractual system of investment protection constructed on the basis of weak norms which are contested by other weak norms cannot inspire much confidence.[341]

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[337] Asante, op. cit., at 613. See also K. Hossain, "Introduction", in K. Hossain and S. R. Chowdhury (eds.), *Permanent Sovereignty over Natural Resources in International Law*, Frances Pinter, London (1984) at xi.

[338] *Questech Inc. v. The Ministry of National Defence of Iran*, Award No. 191-59-1 (20 September 1985), *reprinted in* 9 Iran-U.S. C.T.R. 107 at 122.

[339] Sornarajah (1994: 349).

[340] Ibid., at 350.

[341] Ibid. Note that the last sentence of the statement, that the principle of permanent sovereignty over natural resources is based on the weak norms of international law, is not without its difficulties which will be considered in the last section of this chapter.

The above account suggests that the theory of 'internationalisation' is untenable, especially in its extreme version which is inferred from the nature of the agreement, because it rests on some weak norms of international law, viz., arbitral awards and legal writings. The notion of contractual sanctity may not be an absolute concept in the modern contract system, as it clashes with the well-settled principle of permanent sovereignty over natural resources. The principle of *pacta sunt servanda* is not absolute, and hence its rigid application to State contracts has been replaced by a modified version.

6.3 State Responsibility for Breach of Contract

Generally speaking, there are two school of thoughts as to when State responsibility comes into existence. Some argue that State responsibility appears immediately after the breach of a contract by a State. Put differently, to them a breach of contract by a State is a breach of international law as such. Advocates of this school buttress their view by referring to various doctrines, such as acquired rights (appropriate here to contractual sanctity), and *pacta sunt servanda*. They also use arguments based on an international law of contract.[342] According to Kissam and Leach, the unilateral abrogation of a concession agreement would be a violation of international law irrespective of the provisions of the agreement. For them, "In some respect there is less justification for violating a concession agreement than for violating a treaty."[343] Carlston[344] distinguishes between a breach in claimed exercise of a contractual right, which should not by itself incur international responsibility, and a breach affected by an exercise of sovereign power, which may be held to be a violation of the contractual right. For Garcia-Amador,[345] State contracts, in this context, may be divided into two categories: ordinary State contracts and modern concession agreements. In the former, which are governed by the municipal law of the contracting State, the mere breach of the contract will not engage the State's

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[342] Note that we have already dealt with the last two doctrines, and the principle of acquired rights will be discussed in chapter 4.

[343] Kissam and Leach, op. cit., at 212.

[344] K. S. Carlston, "Concession Agreements and Nationalization", 52 A.J.I.L. (1958) 261 at 267.

[345] Garcia-Amador (1993: 33-34).

international responsibility; "the concurrence of a denial of justice, or of any other wrongful or arbitrary state conduct, must still be required." In the latter, in his view, given the international character of such a relationship, "the mere breach of the contractual obligations was considered the only sufficient ground to establish international responsibility." Moreover, Jennings,[346] like Dupuy, argues that if there is an international law of contract, then its violation by the contracting State would be tantamount to international wrong.

There are those who argue, however, that a breach of a contract by a State is not a breach of international law *per se*. As shown above, they argue that since a concession agreement is not a treaty, its cancellation before the expiry of its term (e.g. as a result of nationalisation) cannot be considered a breach of an international agreement. Among them, Brownlie,[347] Akehurst,[348] Schachter,[349] Arechaga[350] Akinsanya[351] and Maniruzzaman[352] may be recalled. After noting that "we disagree with jurists who try wholly to deny the competency of states for the unilateral termination of agreements", Arsanjani argues that due to unequal distribution of power and enlightenment in the present world, the State should possess competency to terminate agreements concerning its natural resources when it considers such termination is vital to the public interest.[353] Likewise, it has been suggested that nationalisation in defiance of a contractual obligation is not contrary to international law, since the same rules that apply to the nationalisation of property should apply to contracts. As Foighel has rightly stated:

> The fact that nationalization is not a breach of international law cannot be altered by the fact that nationalization destroys contract rights, for example, a concession which the nationalizing state has granted to a foreign company ... There is no rule in international law

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346 Jennings, op. cit. (note 280).
347 Brownlie (1998: 550).
348 Akehurst, op. cit., at 96.
349 Schachter, op. cit., at 311.
350 Arechaga, Hague *Recueil*, op. cit., at 306.
351 Akinsanya, op. cit., at 68.
352 Maniruzzaman, op. cit. (note 325).
353 Arsanjani, op. cit., at 273-274.

> that gives a greater degree of protection to rights secured by contract than to other rights of property.[354]

Fatouros maintains that "a breach of contract by a state is still not considered, by itself, as an internationally unlawful act."[355] However, there are special circumstances in which international law may directly be infringed in the case of a breach of contract by a State. Put in technical terms, for a State to be held responsible on an international plane, it requires more factors than the mere breach of contract. Amerasinghe, after surveying the issue thoroughly,[356] concludes that under the following circumstances a breach of contract simultaneously brings about a violation of international law: (1) where express protection is granted to the contractual rights by international instrument, viz., by concluding a treaty between the contracting State and the home State of the alien; (2) where a breach of contract is accompanied by a violation of international law (the contracting State, for example, changes the contractual rights and obligations by legislation outside the existing legal rules governing the contractual relationship); and (3) where the contracting State does not provide a provision for adjudication on a contract for its alleged breach. The second circumstance needs some clarification. It is generally agreed that a State cannot fetter or hamper its future action, e.g. exercising its legislative and administrative authority by contract. However, the State "may not use these sovereign powers in an 'arbitrary' or 'discriminatory' manner to the detriment of the private party's contractual rights."[357] The term arbitrary is defined, in this context, as State action without public purpose.[358] Because of its vagueness, the application of the standard of 'arbitrariness' to the problem of legislative changes affecting contracts is confusing. In Schachter's view, for a State to avoid international responsibility, it should act in a non-discriminatory manner, pay compensation when due, and provide appropriate means of redress to an affected party.[359]

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354 Foighel, op. cit., at 74.
355 Fatouros, op. cit., at 244.
356 Amerasinghe, op. cit., at 119-120.
357 Schachter, op. cit., at 312-313. See also Maniruzzaman, op. cit., at 165-167.
358 Brownlie (1998: 551). See also the definition suggested by Schachter, op. cit., at 313.
359 Schachter, op. cit., at 313.

The ALI Third Restatement took a similar position. Under which, a State is liable for breach or repudiation of a contract only if such a breach is discriminatory or motivated by non-commercial considerations and compensatory damages are not paid, or where the foreign national is denied an adequate forum to determine his claim for breach or compensation for any breach deemed to have occurred.[360]

It is clear from the above survey that the arguments of advocates of the second school seem more to be logical. Thus, the mere breach of State contracts will not incur the international responsibility of contracting States; the breach does not count as a violation of international law *per se*. To hold the State responsible, the concurrence of a denial of justice or of any other wrongful or arbitrary State conduct, such as discrimination, is required.

6.4 Stabilisation Clauses

As indicated above, the theory of internationalisation as a technique which is capable of stabilising the relationship between a State and a private party, from the perspective of some writers and foreign investors, is unsuccessful. Put differently, it does not secure foreign investment agreements to the extent desired by the proponents of the theory. We have seen that a State contract is normally governed by the law of the contracting State. On the one hand, this law may be changed by the passage of time, on the other, the foreign investor tries to protect himself against this risk. When this is so, the issue of stabilisation clauses and their insertion into the contract are raised. Thus, stabilisation clauses are designed to freeze the future legislative power of the contracting State at the time of entry of the foreign investor. They are also purported to preclude unilateral interference with the contract by the State, e.g. not to nationalise. The former are called 'stabilisation clauses' (*stricto sensu*) and the latter 'intangibility clauses.'[361]

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[360] The ALI Third Restatement, op. cit. (note 5) at 197.

[361] Seidl-Hohenveldern, op. cit., at 239, n. 1086. Garcia-Amador (1993: 23, n. 1) also made such a distinction.

There is no consensus among publicists on the legal effect of stabilisation clauses. According to Paasivirta,[362] three different positions may be identified among authors. The first position is that the existence of such a clause makes a contract different in type, and hence a unilateral termination of the contract constitutes an international wrong. Though White believes that a State is able to restrict its future legislative competence, she emphasises time-limits in this respect. In her words:

> While it may be that a State is unable to restrict its future for an indefinite period, there is neither principle nor authority to prevent it from so doing *for a limited number of years*. If a State violates such a promise made to a foreign concessionaire ... on the international level it is sufficient grounds for interposition by the alien's national State. The nationalising State in these circumstances has infringed a limitation of its sovereignty voluntarily assumed by it (emphasis added).[363]

This position was invoked by the British Government, in the *Anglo-Iranian Oil Company* case, before the ICJ regarding the termination of the Anglo-Iranian concession agreement of 1933.[364]

The second approach, conversely, rests on the view that stabilisation clauses cannot render a contract different in kind as far as the question of the international legality of unilateral termination is concerned. Mann, for instance, denies any effect of such a clause on the contract. He has treated the issue in the following terms:

> The truth is that even in international law the express exemption from the efforts of future legislation is redundant. Such exemption cannot and ought not to preclude the genuine exercise of the State's political power. On the other hand, where, in substance, the State takes property without compensation, its international liability is engaged even in the absence of the [stabilisation] clause.[365]

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362 Paasivirta, op. cit., at 323-331.
363 White (1961: 178).
364 *Anglo-Iranian Oil Co.* case, I.C.J. Pleadings, op. cit., paras. 12-18.
365 Mann (1973: 322).

In the same vein, Schachter points out that the inclusion of stabilisation clauses does not place the contract into an international plane:

> in the sense that a State departing from the clause commits an international delict. If it pays the required compensation and its action is not otherwise unlawful (as by denial of justice or discrimination) it incurs no international responsibility.[366]

Arechaga maintained that the proposition that stabilisation clauses deprive the contracting State of the power to put an end to the contract except with the private party's consent, runs counter to the principle of a State's sovereignty over its natural resources and wealth.[367] This argument was invoked by Saudi Arabia, in the *Aramco* case, and Kuwait, in the *Aminoil* case. To some, the inclusion of stabilisation clauses may be considered as a derogation from the State's sovereignty.[368]

In the third approach, as in the second, stabilisation clauses cannot make a contract different in type, but can render a difference only in the amount of compensation. Thus, Arsanjani observes that in situations where a concession does not secure the common interest because of conflict with the public benefit of the conceding State, "its termination is inevitable." In her view, the only difference that stabilisation clauses might make would be in the amount of compensation.[369] Professor Harris took a similar view. To him, when a measure of expropriation runs counter to such clauses, it may "be relevant to the determination of 'appropriate compensation.'[370] It is also interesting to note what the late Judge Arechaga observed in this regard:

> An anticipated cancellation in violation of a contractual stipulation of such a nature would give rise to a special right to compensation; the amount of the indemnity would have to be much higher than in normal cases since the existence of such a clause constitutes a most pertinent circumstance which must be taken into account in determining the appropriate compensation. For instance, there would

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366 Schachter, op. cit., at 315.
367 Arechaga, Hague *Recueil*, op. cit., at 307. Sornarajah (1994: 331) took a similar view.
368 Sornarajah (1986: 93). See also the ALI Third Restatement, op. cit., at 215.
369 Arsanjani, op. cit., at 270.
370 Harris, op. cit., at 585.

> be a duty to compensate also for the prospective gains (*lucrum cessans*) to be obtained by the private party during the period that the concession still has to run.[371]

Commenting on the above-mentioned approaches, Paasivirta states that the third approach "seems the most attractive."[372]

Writing in 1993 on the issue, Garcia-Amador[373] is of the opinion that "the [stabilisation] clauses *per se* do not impose international commitments on the contracting State." In his view, "It is the choice-of-law clause of the agreement which, by 'internationalizing' the contractual relationship as a whole makes those commitments internationally valid." As in the case of State responsibility, therefore, he has divided State contracts into two categories: ordinary State contracts and modern concession agreements. In the former, there will be no international responsibility for the mere breach of stabilisation clauses. To hold the State responsible, "a requirement will be a related act or omission constituting a breach of the State's international obligations, which includes prohibiting the abuse of rights." However, if such clauses are included in the latter category "governed by a non-municipal legal system, the mere breach of the clauses will give rise to State responsibility." The same author shares this part of the third approach that the breach of stabilisation clauses will affect the amount of indemnity, albeit, he speaks of reparation, not compensation.

In situations where an alleged breach or repudiation of a contract by the contracting State constitutes the subject-matter of arbitrations, the validity or effect of stabilisation clauses is raised. In short, international arbitral tribunals also touched upon the issue under consideration. Two main approaches may be identified among the arbitral awards in this respect. According to the first approach, such clauses constitute valid limitations on the legislative or executive powers of the contracting State irrespective of the nature or duration of such restraints. It is asserted that the rationale of this view is that a State may use its

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371 Arechaga, Hague *Recueil*, op. cit., at 307.
372 Paasivirta, op. cit., at 331.
373 Garcia-Amador (1993: 48-50).

sovereign powers to impose limitations on itself. This was the position of Arbitrator Dupuy in the *Texaco* case. There, Clause 16 of the Deeds of Concession between Libya and the foreign oil companies, including Texaco, contained a stabilisation clause under which "the contractual rights expressly created by this concession shall not be altered except by the mutual consent of the parties."[374] The Arbitrator dismissed the possible contention that the stabilisation clause in the concession diminished the sovereignty of Libya, and discarded the nature of the clause and presumed that a generally worded stabilisation clause may preclude nationalisation.[375] The said clause is considered, however, as an indirect stabilisation clause which does not have the same effect as a direct clause which precludes the making of any change to the contract.[376] Nonetheless, the clause was given full effect by the Arbitrator.[377]

The second approach is that stabilisation clauses are essentially incompatible with national sovereignty, particularly to the extent that such clauses designed to impose comprehensive and indefinite limitations on the legislative freedom of the State. The tribunal, in the *Aminoil* case, took such a position. It held that contractual limitations on a State's sovereign right (in the present case, Kuwait) to nationalise could not be easily understood from a general stabilisation clause, especially where the nationalisation involved no confiscatory character. While endorsing the juridical possibility of contractual limitations on the State's right to nationalise, the tribunal emphasised that the clause should not be read literally:

> what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of State contracts; and it is to be

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374 *Texaco* Award, op. cit., at 24, para. 70.
375 Ibid., at 24-25, para. 71.
376 Sornarajah (1994: 330).
377 For other arbitrations followed the *Texaco* award on the issue of stabilisation clauses, see *Revere* Award, at 1335, and *Agip* Award, op. cit., at 735, paras. 85 and 86.

> expected that *it should cover only a relatively limited period* (emphasis added).[378]

Thus, it held that the clause could not be presumed to prohibit nationalisation for a period of 60 years. Commenting on the award, Asante observes that it would seem to support the principle that:

> *A general stabilisation clause does not constitute a valid restraint on a State's sovereign right to nationalise* unless the prohibition against nationalisation is expressly stipulated in the clause, the prohibition complies with the regulations governing the conclusion of State contracts, and the prohibition against nationalisation covers only a relatively *limited period of time* (emphasis added).[379]

That a stabilisation clause cannot achieve the effect of fettering the legislative sovereignty of a State for a long period of time, was explicitly reflected in the 1981 report of the Secretary-General of the United Nations on permanent sovereignty over natural resources. There, he acknowledges that "Long and comprehensive 'freezing' clauses seem to run counter to the principle of permanent sovereignty over natural resources."[380] In his explanatory notes on stabilisation clauses, Professor Harris observes that of the two different approaches taken in the *Texaco* case and in the *Aminoil* case, "the more balanced view in the [latter] seems likely to prevail."[381] However, the statement of the *Aminoil* case was criticised by Professor Higgins in her lectures at the Hague Academy. She comments:

> While this perhaps represents an imaginative method of reconciling the right to nationalise with stabilization provisions freely entered into ... the present writer confesses to finding it implausible as a matter of construction and unpersuasive as a matter of reasoning.[382]

Nonetheless, in the same lectures, after examining the legal effect of stabilisation clauses on various oil concessions, including the petroleum licences

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378 *Aminoil* Award, op. cit., at 1023, para. 95.
379 Asante, op. cit., at 615. See also Seidl-Hohenveldern, op. cit., at 150.
380 Quoted by Paasivirta, op. cit., at 331.
381 Harris, op. cit., at 584-585.
382 Higgins (1982: 304).

concerning North Sea oil explorations given to foreign companies by the British, she observes that those licences were altered through later legislation by the United Kingdom and some of the Acts were even given retroactive effect. Higgins continues:

> The British Government took the view that its sovereign right to legislate in respect of the natural resources on its shelf was *in no way impeded by contracts that it had previously entered into with foreign licensees* (emphasis added).[383]

While confirming the value of a stabilisation clause as a safeguard against arbitrary acts of the contracting State, the ICSID tribunal, in the *Letco* case, held that such a clause could not prevent the nationalisation measures, provided the State concerned pays full, prompt and effective compensation.[384]

So far as the Iran-United States Claims Tribunal is concerned, to the present author's best knowledge, it dealt with the issue only on one occasion, viz., the *Amoco* case. There, the agreement between the claimant company, Amoco, and the respondent, the National Iranian Petrochemical Company, provided for limitation on the right of the other party to terminate or modify the agreement. The claimant asserted that Articles 30-2 and 21-2 of the agreement,[385] combined together, constituted stabilisation clauses, under which the Government of Iran could not annul the agreement. The Tribunal, however, rejected the assertion, and held that the agreement did not contain a stabilisation clause binding on the Government of Iran. It further noted that "the clauses

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[383] Ibid., at 309, and see further 349-350. Likewise, the 1981 Canadian Oil and Gas Act modified the leases, granted under regulations enacted in the 1960s, so as to secure 50% Canadian ownership. As a result, the balance of interests previously established between the governmental authorities and alien investors altered, and weakened the alien's position. R. Dolzer, "Indirect Expropriation of Alien Property", 1 I.C.S.I.D.L. Rev-F.I.L.J.(1986) 41 at 53-54.

[384] *Liberian Eastern Timber Corporation (Letco) v. The Republic of Liberia*, Award of 31 March, 1986, *reprinted in* 26 I.L.M. (1987) 647.

[385] Paragraph 2 of Article 30 (which deals with applicable law) reads as follows:
"The provisions of any current laws and regulations which may be wholly or partly inconsistent with the provisions of this Agreement shall, to the extent of any such inconsistency, be of no effect in respect of the provisions of this Agreement." Also, in paragraph 2 of Article 21 it was stipulated that "Measures of any nature to annul or modify the provisions of this Agreement shall only be made possible by the mutual consent of NPC and AMOCO." *Amoco* Award, op. cit., at 236, para. 155, and at 240, para. 168, respectively.

referred to by the Claimant bind only the parties to the ... Agreement, namely NPC and Amoco."[386]

Not only may a stabilisation clause be incompatible with several principles, such as permanent sovereignty over natural resources, but it may also conflict with some other theories. It has been submitted that as a matter of constitutional theory, it may be impossible for any State to bind itself by contract, or to fetter its legislative competence. The rationale of this view is that "a legislature is not bound by its own legislation and has the power to change it."[387] If this proposition is accepted, then a legislature cannot be bound by a provision in a simple contract. Thus, it may fairly be stated that from the standpoint of constitutional theory, "the stabilisation clause may not achieve what it sets out to do."[388] Professor Harris is of the opinion that the increased bargaining power of oil producing countries has resulted in the majority of oil contracts being governed by the municipal law of the contracting State and being subject to the jurisdiction of its courts. If it continues, the role of stabilisation clauses may be diminished.[389] In his comment on the *Letco* award, Seidl-Hohenveldern remarks that the relevance of such a clause is declined to a promise by the State to observe the clause on which, "according to international law depends the validity of a nationalization."[390]

The foregoing assessment shows that this technique, as nationalisation theory, does not achieve what it sets out to do, viz., to stabilise the relationship between the host State and foreign investors. Long-term and unlimited stabilisation clauses are incompatible with the principle of permanent sovereignty over natural resources. It is submitted that the role of such clauses has been reduced and they no longer have absolute character. Nonetheless, this does not mean that stabilisation clauses have no effect whatsoever. In relatively short-term contracts, while the present author does not share the view that the

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386 Ibid., at 241, para. 173.
387 Sornarajah (1994: 329).
388 Ibid.
389 Harris, op. cit., at 585.
390 Seidl-Hohenveldern, op. cit., at 150.

premature termination of contracts containing such clauses is an international delict, it is suggested that the anticipated cancellation of such contracts can give rise to a higher amount of compensation.

7. Permanent Sovereignty over Natural Wealth and Resources

As indicated above, one of the important sources in which States' right to nationalise or expropriate foreign-owned property has been recognised is the principle of permanent sovereignty over natural resources. In short, the right to nationalise emanates from this principle. The latter has been enshrined in numerous UN resolutions. Thus, the survey of the principle of permanent sovereignty over natural resources will be our last task in this chapter.

Although the concept of sovereignty is not a new phenomenon, the notion of permanent sovereignty over natural resources emerged on the international scene in the early 1950s. Problems relating to sovereignty over natural resources had become important in the decolonisation period. Put differently, there is a close relationship between the concept of permanent sovereignty and the issue of decolonisation. Colonialism itself was ended by the growth of the principle of self-determination. In the course of decolonisation, political self-determination was deemed incomplete without economic self-determination. The newly independent States wished to be masters in their own houses and to shape their own fate. This movement eventually resulted in the establishment of a principle, under which States enjoy permanent sovereignty over the natural wealth and resources within their territory. As will be shown later, the principle is nowadays recognised as a well-established principle of international law.[391]

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[391] See, *inter alia*:

- S. R. Chowdhury, "Permanent Sovereignty over Natural Resources", in Hossain and Chowdhury (eds.), op. cit., 1-42, and Chowdhury's other literature, "Permanent Sovereignty over Natural Resources", in de Waart *et al.*, *International Law and Development* (eds.), Martinus Nijhoff, Dordrecht (1988) 59-85;
- de Waart, P. Peters and N. J. Schrijver, "Permanent Sovereignty, Foreign Investment and State Practice", in Hossain and Chowdhury (eds.), op. cit., at 88-143;
- N. J. Schrijver, "Permanent Sovereignty over Natural Resources", in Waart *et al.*, (eds.), op. cit., at 87-101, and Schrijver's other literature, *Sovereignty over Natural Resources*, Cambridge University Press, 1997;
- Schachter, op. cit., at 301-305; and

Since its emergence in 1952, the principle has been extensively invoked by States. Thus, the newly independent States felt that the principle of permanent sovereignty was necessary to modify inequitable concessions and contractual arrangements, inherited from the colonial period, under which foreign investors were exploiting their natural resources. It is also invoked by States in support of positions and action taken by them in a variety of situations. These situations have arisen largely in their relations with transnational corporations involved in the exploitation of natural resources in their territory.[392]

The evolution of the principle of permanent sovereignty owes much to UN resolutions. Between 1952-1974 the General Assembly of the United Nations and organs associated with it adopted numerous declarations and resolutions in this respect. Although UN resolutions have been the main device for the establishment of this principle, reference should also be made to other instruments, such as the two International Human Rights Covenants of 1966, which clearly contain the principle of permanent sovereignty.[393] The human rights aspect identified the principle in relation to both the history of decolonisation and the principle of self-determination.

The principle of permanent sovereignty takes root in UN General Assembly resolutions which, from a formal point of view, merely have the status of recommendations. That, under certain conditions, norms created by UN resolutions may become part of customary international law, is a controversial issue. Thus, our purpose is to examine this controversy. In the first part of this section the nature and content of permanent sovereignty will be studied. This

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- S. K. Banerjee, "The Concept of Permanent Sovereignty over Natural Resources - An analysis", 8 Ind. J.I.L. (1968) 515.

[392] K. Hossain (ed.), *Legal Aspects of the New International Economic Order,* Frances Pinter, London (1980) at 33-43.

[393] See Articles 1, paragraphs 2 of both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, adopted in 1966, entered into force 1976. *Reprinted in* I. Brownlie, *Basic Documents in International Law* (3rd ed.), Clarendon Press, Oxford (1991) 270. See also the other multilateral treaties, such as the African Charter on Human and Peoples' Rights (1981), the two Vienna Conventions on Succession, of States in respect of Treaties (1978), and in respect of Property, Archives and Debts (1983), and the United Nations Convention on the Law of the Sea (1982).

will be followed by a survey of the evolution of the principle, and its relation to the principle of self-determination. Finally, the legal status of UN General Assembly resolutions on permanent sovereignty will be considered.

7.1 The Nature and Content of Permanent Sovereignty

The term 'sovereign' emanates from the Latin word 'supra'. Etymologically, it often meant one of various forms of superiority. In legal and political theory the sovereign is the holder of ultimate power. Nowadays it is the State.[394] The origin of the concept of sovereignty in modern times can be traced back to the Middle Ages.[395] Various definitions of sovereignty were suggested by jurists in international law. We recall some of them below.

A Russian jurist, Levin, defines sovereignty as "the supremacy of State power inside the country and its independence of any other power in international relations."[396] According to Lauterpacht, sovereignty is the supreme power, depending on no other territorial power and presuming full independence inside the State and beyond its limits.[397] Wildhaber holds that sovereignty has two aspects: one internal and the other external, the former expressing State dominion internally and the latter signifying independence, which excludes any subordination in relation to foreign States.[398] To Professor Brownlie, "'sovereignty' characterizes powers and privileges resting on customary law and independent of the particular consent of another state."[399] Moreover, in the *Island of Palmas* case, Arbitrator Max Huber suggests the following classic definition:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to

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394 L. Wildhaber, "Sovereignty in International Law", in R. St. J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory,* Martinus Nijhoff, Dordrecht (1986) at 425-431.

395 Seidl-Hohenveldern, op. cit., at 21.

396 Quoted by G. Elian, *The Principle of Sovereignty over Natural Resources,* Sijthoff & Noordhoff, Leiden (1979) at 6.

397 Ibid., at 5.

398 Wildhaber, op. cit., at 436-437.

399 Brownlie (1998: 292).

> exercise therein, to the exclusion of any other State, the functions of a State.[400]

The above account suggests that "in international law the most common meaning ascribed to sovereignty is the idea of independence."[401]

Modern authors hold that sovereignty is a relative concept. Thus, according to Russian jurists, State sovereignty is one of the foremost principles of international law, but not an absolute concept.[402] Wildhaber is of the opinion that "the old theory of absolute sovereignty may have fitted with the actual conditions of prior centuries, but it is totally incompatible with the present-day interdependence and solidarity of states, peoples and individuals."[403] Schwarzenberger expressed the view that "a sovereign state may *exercise* its sovereignty only subject to compliance with all other rules of international law."[404]

The industrialised States advocate a relativist view of sovereignty. From the viewpoints of Third World governments and writers, State sovereignty "is emphasized as the very basis of international relations and as a means of achieving a larger share of universality, equity, solidarity and participation in the international decision-making process."[405] In stating the importance of the principle of State sovereignty for developing countries, Okoye comments:

> Sovereignty for the new State is a powerful instrument for shaping national identity, breaking the chains of subordination which are factors of backwardness and furthering social and economic progress ... It provides them with a legal shield against any further domination or intervention by the old colonial powers and enables them to claim in international relations all the privileges and immunities traditionally associated with nation States.[406]

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400 *The Island of Palmas* case (*The Netherlands v. The United States of America*), 2 R.I.A.A. (1928) 829 at 838.

401 Paasivirta, op. cit., at 331.

402 Wildhaber, op. cit., at 438.

403 Ibid. Seidl-Hohenveldern, op. cit., at 22, took a similar view.

404 Schwarzenberger, op. cit., at 8.

405 Wildhaber, op. cit., at 439.

406 Ibid.

International jurisprudence tends to follow the view that sovereignty is a relative notion. The PCIJ, in its Advisory Opinion regarding *Nationality Decrees in Tunis and Morocco*, held that "sovereignty is a relative notion in that, international society being essentially dynamic in nature, no State can exist in absolute isolation from all others."[407] Moreover, in the direction of limitations on sovereignty, numerous restrictions or situations are conceivable.[408] Among them, the effects of treaty obligations may be recalled. It has been argued that treaty obligations do not infringe upon formal sovereignty or independence of the parties, nor they do hamper material sovereignty.[409] "All international law of today is made up of the limitations of sovereignty, limitations created by sovereignty itself."[410] This rule has been endorsed, in the *Wimbledon* case, by the PCIJ.[411] The latter held that treaty obligations are not an abandonment of State sovereignty, but rather they are an attribute of it.

Therefore, we can safely say that, irrespective of whether sovereignty is absolute or relative, it indicates the whole interests of a State in certain territory, persons and property, and is a permanent quality of States.

Having examined the concept of sovereignty, we now come to the phrase 'permanent sovereignty.' The General Assembly of the United Nations has qualified sovereignty over natural resources as 'permanent'. However, the precise meaning of this adjective has never been clarified. Different interpretations have been suggested by legal commentators: (1) that it could aim at protecting the sovereignty over natural resources of peoples which had not yet attained self-determination; (2) that it qualifies the resources as 'resources *in situs*', so that raw materials extracted would no longer be subject to the principle; and (3) that it could express that a State cannot alienate its sovereignty over

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[407] Quoted by P. J. O'Keefe, "The United Nations Permanent Sovereignty over Natural Resources", 8 J.W.T.L. (1974) 239 at 241-242.
[408] Wildhaber, "Sovereignty in International Law", in Macdonald and Johnston (eds.), op. cit., at 442.
[409] Ibid.
[410] Ibid.
[411] The *Wimbledon* case, op. cit. (note 244).

natural resources.[412] Among these interpretations, the last one seems closer to the objectives of the principle of permanent sovereignty. As Salem puts it:

> The word 'permanent' should be understood as indicating that the State concerned can avail itself of this sovereign right at any time.[413]

Likewise, Giardina points out that if a meaning is to be attached to the term 'permanent', that "it is the inalienable character of a State's power to use the natural resources in its territory as it deems fit."[414] In the same vein, Elian remarks:

> Sovereignty is inalienable and indivisible. As regards sovereignty over natural resources, this is no different form of sovereignty, but is comprised within the latter's general elements, within supremacy and independence.[415]

As to the issue of inalienability of the right of permanent sovereignty, in his lectures at the Hague Academy, Arechaga commented:

> The description of this sovereignty as *permanent* signifies that the territorial State can never lose its capacity to change the destination or the method of exploitation of those resources, whatever arrangements have been made for their exploitation and administration.[416]

He further observed that such control over its resources can be exercised by a State "even if a predecessor State or a previous government engaged itself, by treaty or contract, not to do so." For Professor Brownlie, Arechaga's "particular innovation" can be justified, in accordance with Article 64 of the Vienna Convention on the Law of Treaties, "if and when the principle of permanent sovereignty emerges as a new peremptory norm of general international law (*jus cogens).*"[417] Brownlie himself took the view that "loosely speaking, permanent

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412 Waart *et al.* (1984: 90).

413 Quoted by Seidl-Hohenveldern, op. cit., at 27-28.

414 A. Giardina, "State Contracts: National versus International Law?", 5 I.Y.I.L. (1980-1981) 147 at 164.

415 Elian, op. cit., at 10-11.

416 Arechaga, Hague *Recueil*, op. cit., at 297.

417 Brownlie (1979: 267-268). There are some governments, like Libya, in its early 1970s nationalisation measures, and Kuwait, in the *Aminoil* case, as well as some jurists, such as

sovereignty is the assertion of the acquired rights of the host State which are not defeasible by a contract or perhaps even by an international agreement."[418] It has been stated that the inalienability of the right of permanent sovereignty is no longer a controversial matter between the developed countries and the developing countries.[419] Besides the two adjectives of 'permanent' and 'inalienable', there is a third term to qualify the sovereignty, namely 'full', which also signifies an identical concept.

However, some, like Nwogugu, argue that a State may exercise its sovereign right even by conferring a concession on a third person, e.g. a foreign oil company, and/or a promise not to nationalise for a certain period of time.[420] In Seidl-Hohenveldern's view, "these arguments may appear too subtle to a State which feels compelled by overriding reasons of public interest to assert its sovereign rights even after having thus signed them away for the time being."[421]

On the basis of the above discussion, we can conclude that the main objective of the principle of permanent sovereignty is to preserve State control over natural wealth and resources.[422] Otherwise, it would be incompatible with the whole idea of State and its sovereign nature.[423] Moreover, the purpose of such terms as 'permanent', 'inalienable' and 'full' is to emphasise that sovereignty is the rule and can be exercised at any time. Limitations on this rule are exceptions and cannot be permanent, but are limited in scope and time.[424]

Since the principle of permanent sovereignty over natural resources has emanated from the principle of self-determination, the examination of the

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Arechaga, Chowdhury and Giardina, who took the view that the principle of permanent sovereignty has the status of *jus cogens*.

418 Ibid., at 271.

419 P. J. I. M. de. Waart, "Permanent Sovereignty over Natural Resources as a Cornerstone for International Economic Rights and Duties", 24 N.I.L.R. (1977) 304 at 312.

420 Seidl-Hohenveldern, op. cit., at 28. See also Waart *et al.*, "Permanent Sovereignty, Foreign Investment and State Practice", in Hossain and Chowdhury (eds.), op. cit., at 88.

421 Ibid.

422 Paasivirta, op. cit., at 345.

423 O'Keefe, op. cit., at 244.

424 Chowdhury (1988: 62-63).

principle of self-determination in the context of permanent sovereignty will therefore be our next task.

7.2 Permanent Sovereignty over Natural Resources and the Right of Self-determination

In his lectures at the Hague Academy in 1979, Brownlie comments:

> The concept of permanent sovereignty over natural resources has its historical origins in the principle of self-determination.[425]

The origin of the modern concept of self-determination can be traced back to the American independence in the eighteenth century.[426] The concept was given a new lease of life following the 1917 Socialist Revolution in Russia. It further developed and eventually became a principle of international law. As the Russian jurist, Tunkin, puts it:

> One of the most important generally recognized principles of contemporary international law is the principle of self-determination, which has received recognition as a result of the persistent struggle of the Soviet Union and other progressive forces.[427]

On the basis of the teachings of Marxism-Leninism, however, Russia raised the right of self-determination in a new way, "in the aspect of the interests of the class struggle of the proletariat for the liberation of all working people."[428]

Likewise, the right of self-determination is stated to have been voiced in 1918 by President Wilson of the United States in his 'fourteen points'.[429] The principle did not appear in the 1918 Covenant of the League of Nations, because at that time the principle of self-determination was a political rather than a legal concept.[430]

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425 Brownlie (1979: 255).

426 D. Thurer, "Self-determination", Vol. 8, Encycl. P.I.L., 470. However, to one commentator: "The origin of the said principle dates back to the period of the bourgeois revolutions. Under the banner of the 'principle of nationality', the bourgeoisie, striving to establish its predominance, struggled in the nineteenth century for the creation of independent national states in Europe." Tunkin, op. cit., at 61.

427 Tunkin, op. cit., at 60-61.

428 Ibid., at 8.

429 O'Keefe, op. cit., at 243.

430 Thurer, op. cit., at 471.

During World War II the principle was invoked on many occasions. Moreover, before it was formulated in the Charter of the United Nations, it had been proclaimed in a number of international instruments, such as the Atlantic Charter of 14 August 1941, the Declaration by the United Nations signed in Washington on 1st January 1942, and the Moscow Declaration of 1943. [431]

Eventually, the right of self-determination was formulated in several articles of the newly emerged UN Charter in 1945. Its Article 1(2) provides that the purposes of the Organisation include the development of:

> ... friendly relations among nations based on respect for *the principle of equal rights* and *self-determination* (emphasis added).

Articles 55 of the Charter also dealt with the issue. Under this article, the member States shall promote the principle of self-determination of peoples and conditions of economic and social progress and development. Some authors argue that these obligations have *jus cogens* status for the member States. In their view, UN General Assembly resolutions on permanent sovereignty over natural resources are said to have interpreted Article 55 of the Charter with binding force and thus, in their turn, have become *jus cogens.*[432] However, Seidl-Hohenveldern took a different view.

Prior to 1945, the majority of Western jurists asserted that the principle of self-determination had no legal content, being a mixture of political policy and morality. Since its developments in the United Nations, the position has been changed, and Western jurists generally accept that self-determination is a legal principle.[433] However, some of them doubt whether the principle of self-determination can be considered as a principle of international law. Thus, Visscher is of the opinion that self-determination "in its present total lack of precision, in no way represents a principle of law."[434] Similarly, Eagleton in

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431 Ibid.
432 G. Hartmann, quoted by Seidl-Hohenveldern, op. cit., at 34.
433 Brownlie (1998: 600).
434 Quoted by Tunkin, op. cit., at 64.

going through the question of self-determination as a principle of international law, attempted to reduce it as a moral principle.[435]

The principle of self-determination was further evolved through the practice of the General Assembly of the United Nations. The first significant evolution was made on December 14, 1960, by the adoption of the 'Declaration on the Granting of Independence to Colonial Countries and Peoples.' The Declaration provides that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[436] To some, the document is a genuine Charter of De-Colonisation which goes one step further than the Charter of the United Nations. Adopted in 1960 and developed by numerous subsequent resolutions, the Declaration reflected the way of thinking, the expression of a changing world; what had been specified by the United Nations in 1945, because of political considerations, was achieved in 1960.[437]

The principle was also incorporated in the two International Human Rights Covenants of 1966, and in the General Assembly 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.'[438] In addition, the ICJ, in its Advisory Opinion regarding the *Western Sahara*, explicitly endorsed the validity of the principle of self-determination in the context of international law.[439] Interestingly, the British Government, which formerly opposed the principle, relied on it in the cases of Gibraltar and Falklands.[440]

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435 C. Eagleton, "Self-determination in the United Nations", 47 A.J.I.L. (1953) 91 at 91-93.

436 Resolution No. 1514 (XV), 14 December 1960. It was adopted by 89 votes; 9 abstentions (the United States, the United Kingdom, France, Australia, Belgium, Portugal, Spain, the Union of South Africa, the Dominican Republic) and not one state against. The full text in Brownlie, *Basic Documents*, op. cit., at 298.

437 Elian, op. cit., at 23.

438 Resolution No. 2625 (XXV) of 24 October 1970. Adopted by consensus (without formal vote), and its full text can be found in Brownlie, *Basic Documents*, op. cit., at 35.

439 I.C.J. Rep. (1975) 12 at 31-33.

440 Brownlie (1998: 601).

Thus, not only is the principle of self-determination a well-established principle in contemporary international law, but it has also been regarded as a *jus cogens* or peremptory norm. As Asante observes:

> The concept of permanent sovereignty over natural resources, which has been enshrined in numerous UN resolutions, is now a well-settled principle of international law, emanating from the *jus cogens* principle of self-determination.[441]

7.3 UN General Assembly Resolutions on Permanent Sovereignty over Natural Resources

Specific reference to the notion of permanent sovereignty over natural resources was first made during the debates on human rights in the United Nations, in the early 1950s. The United Nations, specifically the General Assembly, the Economic and Social Council as well as the Human Rights Commission (hereinafter the 'Commission'), were at that time engaged in preparing the draft covenants on human rights in the pursuance of the General Assembly Resolution 545 (VI) of 5 February 1952. The issue of permanent sovereignty over natural resources was raised in the Eighth Session of the Commission. There, the concepts of self-determination and permanent sovereignty over natural resources were proposed as a part of human rights covenants by Chile, in the following terms:

> The right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.[442]

Despite the opposition of the Western capital-exporting States to the proposal, it was adopted by the Commission.[443] Thus, the capital-importing States which felt that the right of peoples to self-determination should not be

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[441] Asante, op. cit., at 594. See further Brownlie (1979: 269-270), and Chowdhury (1984: 8 and 38).

[442] Quoted by S. K. Banerjee, "The Concept of Permanent Sovereignty over Natural Resources - An Analysis", 8 Ind. J.I.L. (1968) 515 at 518.

[443] In 1955 the proposal was incorporated in both the Draft Covenants on Human Rights and eventually appeared in Article 1 of each of the two Covenants on Human Rights of 1966.

regarded only from the political point of view, but should also be considered from the economic aspect, were able to insert the concept of permanent sovereignty over natural resources into the draft human rights covenants. "In the jargon of the Commission, as well as its draft article on self-determination, this principle came to be known as an economic self-determination."[444] The concept of 'economic self-determination' was further elaborated by the General Assembly Resolution 523 (VI) of 12 February 1952. In this resolution, related to economic development in general and commercial agreements in particular, the General Assembly "considering that under-developed countries have the right to determine freely the use of their natural resources and that they must utilise such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests."[445]

Legal commentators also noticed the significance of the concept of economic self-determination. As Schwarzenberger observes:

> Without a minimum of political, economic or military *de facto* independence, *de jure* independence is meaningless.[446]

After noting that the principle of self-determination is a legal principle, Brownlie states that the principle has three aspects, including its application in the different context of economic self-determination.[447] The latter principle has been characterised as a "powerful principle."[448]

As alluded to earlier, between 1952-1974 the United Nations adopted a number of declarations and resolutions on sovereignty of States over their natural resources (referred to as the principle of economic self-determination). Among them, only the nine most important resolutions will be considered here, namely: 626 (VII) of 21 December 1952; 1314 (XIII) of 12 December 1958; 1803 (XVII)

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444 J. N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources", 50 A.J.I.L. (1956) 854 at 855.

445 Quoted by Banerjee, op. cit., at 519.

446 G. Schwarzenberger, "The Principles of International Economic Law", 117 Hague *Recueil* (1966) 1 at 31. See also U. O. Umozurike "Owned Property and Economic Self-determination", 6 East A.L.J. (1970) 79.

447 Brownlie (1998: 601).

448 Sornarajah (1994: 322).

of 14 December 1962); 2158 (XXI) of 25 November 1966; 2692 (XXV) of 11 December 1970; 3016 (XXVII) of 18 December 1972; 3171 (XXVIII) of 17 December 1973; 3021 (S-VI) of 1 May 1974 and 3281 (XXIX) of 12 December 1974.

In Resolution 626 (VII) of 21 December 1952, the General Assembly explicitly acknowledged that "the right of peoples to exploit freely their natural resources and wealth is inherent in their sovereignty", and recommended international co-operation in the exercise of that right. It also recommended restraint from "acts direct and indirect, designed to impede the exercise of the sovereignty of State over natural resources."[449]

It should be noted that this resolution was invoked by both State and municipal courts. In 1953, only a few months after the adoption of the resolution, Guatemala relied on it as supporting the argument for its position in expropriating the property of the United Fruit Company, a United States corporation.[450] Moreover, the validity of the Iranian Oil Nationalisation Law of 1951 was challenged in the Japanese and Italian High Courts. The two courts upheld the validity of such a law by referring explicitly to this resolution. Thus, the Italian Court held that:

> It is evident that the decisions of the United Nations at that meeting, taking into consideration the date when it was taken and the international situation to which it related, constitutes a clear recognition of the international lawfulness of the Persian Nationalization Laws.[451]

A similar position was taken by the High Court of Tokyo.[452]

As indicated above, in 1955 the United Nations gave more prominence to the principle of economic self-determination when the Third Committee of the General Assembly adopted a provision for inclusion in both the draft covenants

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[449] Resolution No. 626 (VI) of 21 December 1952. For full text of the resolution, see Brownlie (1979: 311, n. 10).

[450] See Whiteman, Vol. 8, op. cit., at 1021-1022.

[451] *Anglo Iranian Oil Co. v. S.U.P.O.R.* (1955), op. cit., at 41.

[452] *Anglo Iranian Oil Co. v. Idemitus*, op. cit., at 313.

on human rights. This provision eventually appeared in Article 1 of each of the two Covenants on human rights.[453]

Similarly, the General Assembly adopted Resolution 1314 (XIII) of 12 December 1958 entitled 'Recommendations concerning International Respect for the Right of Peoples and Nations to self-determination.'[454] This resolution characterises permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination.[455] In order to clarify the extent and effective nature of this right, the Assembly decided to set up a commission, viz., the United Nations Commission on Permanent Sovereignty (hereinafter the 'Permanent Sovereignty Commission'), to formulate recommendations aimed at strengthening this right. The Commission was instructed "to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right of self-determination" and, where necessary, to make recommendations for strengthening that right, having regard to the rights and duties of States under international law. It should be noted that before the two International Human Rights Covenants were opened for signature in 1966, the General Assembly, through a resolution, recommended "that the sovereign right of every State to dispose of its wealth and its natural resources should be respected."[456]

Work in the Commission on permanent sovereignty over natural resources and the UN Economic and Social Council culminated in the adoption of Resolution 1803 (XVII) of 14 December 1962 by the General Assembly.[457] This resolution was adopted in the form of a 'Declaration on Permanent Sovereignty over Natural Resources' and its provisions set out in eight operative paragraphs.[458] The Declaration reiterated that 'the sovereign right of every State

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453 See note 29 in this chapter.

454 Resolution No. 1314 (XII) of 12 December 1958.

455 Waart, op. cit., at 310.

456 Resolution No. 1515 (XV) of 15 December 1960.

457 The full text of the resolution *reprinted in* 2 I.L.M. (1963) 223, and Brownlie, *Basic Documents*, op. cit., 230.

458 For a full description of the process of elaboration of the resolution, see K. N. Gess, "Permanent Sovereignty over Natural Resources - An Analytical Review of the United Nations Declaration and its Genesis" 13 I.C.L.Q. (1964) 398, and O'Keefe, op. cit. (note 407).

to dispose of its natural wealth and resources should be respected', and recognised 'the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interest'. De Waart rightly states that after the adoption of this resolution, the principle of permanent sovereignty over natural resources was given "a more independent life."[459] Some jurists characterised it as the landmark resolution.[460] Although capital-exporting States have accepted this resolution as declaratory of standards of customary international law, many capital-importing States considered it as conservative in character.[461] Also, in Akinsanya's view, the resolution "is a victory to the investor States."[462]

Paragraph 4 of the resolution, which dealt with nationalisation and compensation, reads as follows:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest ... In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation ... the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

To Friedmann, the resolution was a compromise between capital-exporting and capital-importing States. In his words:

> Neither endorses the claim for 'prompt, full and adequate' compensation usually made by Western lawyers nor the claim made by some representatives of the less-developed countries that compensation is purely a matter of internal discretion and not an obligation of international law.[463]

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[459] Waart, op. cit., at 310.
[460] Hossain, "Introduction", in Hossain and Chowdhury (eds.), op. cit., at ix, and Chowdhury (1984: 2).
[461] Brownlie (1979: 261).
[462] Akinsanya, op. cit., at 54.
[463] W. Friedmann, *The Changing Structure of International Law*, Stevens & Sons, London (1964) at 138.

Resolution 1803 was invoked in the disputes between the host States and foreign investors, and has been accepted as reflecting customary international law in a number of arbitration awards, such as the *Texaco* and *Liamco* arbitrations, which will be examined in this section.

Resolution 2158 (XXI) was adopted by the General Assembly on 25 December 1966.[464] There, the Assembly reaffirmed the principle of permanent sovereignty over natural resources with particular reference to developing countries with a view to securing for them greater participation in exploiting natural resources. This is the resolution in which Brownlie finds the historical origin of the New International Economic Order.[465]

In Resolution 88 (XII) of 19 October 1972, the Trade and Development Board of the United Nations Conference on Trade and Development (the 'UNCTAD')[466] restated "the sovereign right of all countries freely to dispose of their natural resources for the benefit of their national development, and reiterated that:

> in the application of this principle, such measures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to *fix the amount of compensation and the procedure for these measures*, and any dispute which may arise in that connection falls within the *sole jurisdiction of its courts, without prejudice to what is set forth in General Assembly resolution 1803* (XVII) (emphasis added).[467]

The resolution as originally drafted did not make any reference to international law, but in the revised draft this phrase "without prejudice to ... 1803 (XVII)" was added to meet the objections of those countries that had seen a conflict between the original draft and Resolution 1803.[468]

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464 The full text of the resolution *reprinted in* 6 I.L.M. (1967) 147.
465 Brownlie (1979: 262).
466 UNCTAD is an organ of the General Assembly set up in 1964.
467 The full text of the resolution *reprinted in* 11 I.L.M. (1972) 1474.
468 Garcia-Amador (1980: 31).

A significant development occurred when Resolution 3171 (XXVIII) of 17 December 1973 was adopted by the General Assembly. In contrast to Resolution 1803, this resolution did not strike any kind of balance between different interests. In the resolution, the Assembly made the following affirmation:

> 3. Affirms that the application of the principle of nationalisation carried out by States as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine *the amount of possible compensation and the mode of payment*, and that *any disputes* which might arise should be settled in accordance with the *national legislation* of each State carrying out such measures (emphasis added).[469]

A comparison of this paragraph with the pertinent provisions of Resolution 1803, shows that regarding the question of compensation as well as the settlement of disputes a new approach was taken in Resolution 3171. To some,[470] the new position is as an expression of the host State's sovereignty. Garcia-Amador, however, observes that the new position was the starting point of the radical departure from what was perceived to be the standards of international law by developed States.[471]

Also, Resolution 3171 (XXVIII) was followed in quick succession by Resolution 3201 (S-VI). It was a Declaration on the Establishment of a New International Economic Order.[472] The Declaration was accompanied by a programme, viz., Resolution 3202 (S-VI). It acknowledged that the New International Economic Order should be founded on 20 principles, the most important for the present discussion being paragraph 4(e), which reads as follows:

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469 For the full text of the resolution, see 68 A.J.I.L. (1974) 381.

470 Chowdhury (1984: 4).

471 He has mentioned three factors for this departure: (1) increased membership of the United Nations by a considerable number of newly emerged developing countries; (2) profound departure of the Latin American nations from their traditional position; and (3) the effect of the well-known Economic Declaration adopted by the Algiers Conference of Non-Aligned Countries just a couple of months earlier. Garcia-Amador (1980: 30-32).

472 Resolution No. 3201 (S-VI) of 1 May 1974 was adopted by consensus (without formal vote). For the full text of the resolution, see 13 I.L.M. (1974) 715.

> *Full permanent sovereignty of every State over its natural resources and economic activities*. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization of transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the States. No State may be subjected to economic, political or any type of coercion to prevent the free and full exercise of this inalienable right (emphasis added).

This process ultimately culminated in the inclusion of the principle of permanent sovereignty over natural resources in the Charter of Economic Rights and Duties of States (hereinafter the 'Charter') which was approved by the General Assembly as part of Resolution 3281 (XXIX).[473] As in the case of permanent sovereignty over natural resources, the idea of such a Charter was proposed by a Latin American nation, Mexico.[474] The Charter was adopted by a roll-call vote of 120 in favour, 6 against with 10 abstentions.[475] Its substantive provisions are contained in four chapters. The Charter includes fundamental principles in different spheres of international economic relations. Among the areas covered are: international trade, transnational corporations, nationalisation, international economic co-operation, development of natural resources, transfer of technology, and the exploitation of natural resources of the seabed. The fundamental principles which are set out in the Charter include: equity, sovereign equality, interdependence, common interest and co-operation among all States, permanent sovereignty over natural resources and the common heritage of mankind. Its Article 2 provides that:

> 1. Every State has and shall freely exercise full permanent sovereignty, including possession, use, and disposal, over all its wealth, natural resources and economic activities.
>
> 2. Each State has the right:

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[473] Resolution 3281 (XXIX) of 12 December 1974. For the full text of the resolution, see 14 I.L.M. (1975) 251, and Brownlie, *Basic Documents*, op. cit., 235.

[474] E-U. Petersmann, "Charter of Economic Right and Duties", Vol. 8, Encycl. P.I.L., 71 at 71.

[475] The States voting against the Charter were Belgium, Denmark, the F. R. Germany, Luxembourg, the UK and the US The abstaining States were Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain.

...

> (c) To nationalise, expropriate or transfer ownership of foreign property, in which case *appropriate compensation* should be paid by the State adopting such measures, *taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.* In any case where the question of compensation gives rise to a *controversy,* it shall be settled under the *domestic law of the nationalising State* and by its tribunals, unless it is freely and mutually agreed by all States concerned that *other peaceful means* be sought on the basis of the sovereign equality of States and in accordance with the principle of *free choice of means* (emphasis added).

Regarding Article 2(1), two points are worth noting.[476] In the first place, there is an argument that "sovereignty of a State concerning its natural wealth could be limited by the fact that such wealth may be sorely needed in other parts of the world." However, to some, the word 'full' which is incorporated in Article 2(1) of the Charter refutes the aforesaid idea. Secondly, Resolution 1803 was criticised for restricting State sovereignty only to 'natural wealth and resources'. Thus, Katzarov suggests that it should be extended to 'all economic activities'. As shown above, the Charter rectified this omission. In UN General Assembly resolutions, such as Article 1(2) of the 'Declaration on the Right to Development' of 1986, [477] and other legal instruments[478], however, the coverage of permanent sovereignty over natural resources is again confined to 'natural wealth and resources'.

The 'appropriate compensation' formula was reintroduced in the Charter. Thus, in Article 2(2)(c) it was stipulated that appropriate compensation should be paid by the State adopting nationalisation or expropriation measures, "taking into account its relevant laws and regulations and all circumstances that the State considers pertinent."

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476 See Seidl-Hohenveldern, op. cit., at 27-28.

477 Resolution 41/128 of 4 December 1986 , *reprinted in* 25 I.L.M. (1986).

478 For example, the two Vienna Conventions on Succession of States in respect of Treaties (1978), and in respect of Property, Archives and Debts (1983).

Through the above-mentioned resolutions, the situation concerning sovereignty over natural resources located within a State or territory has become satisfactorily settled. However, there are other problems connected with natural resources. Natural resources located outside the borders of individual States have created legal interests in the last two decades. This is mainly due to the series of events leading to the Third UN Conference on the Law of the Sea (hereinafter 'UNCLOS III'). Sovereignty over natural resources has become a topic of special interest in so far as the legal status of the seabed and subsoil is concerned. The proposals for UNCLOS contained various separate parts, on the territorial sea, on the continental shelf, on the new concept of the exclusive economic zone, and on the deep seabed. Part V of the 1982 Convention[479] relates to the exclusive economic zone. Article 55 of the Convention acknowledges the economic exclusive zone as "an area beyond and adjacent to the territorial sea ..." which "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." Article 56(1)(a) of the Convention gives the coastal State sovereign rights over all the economic resources of the sea, seabed and subsoil in its exclusive economic zone; this includes not only fish, but also minerals beneath the seabed.

Since the days of Grotius, international law has developed the idea of the freedom of the high seas. Prior to 1945 the freedom of the high seas meant that every State had the right to exploit the seabed and subsoil of the high seas. This right was shared with all other States; no State could claim an *exclusive* right to any part of the seabed or subsoil of the high seas. [480]

However, the law began to change when it became technologically and economically possible to exploit oil deposits beneath the sea by means of offshore oil wells. On 28 September of 1945, President Truman of the United States issued a proclamation under which "the USA had the exclusive right to exploit the seabed and subsoil of the continental shelf of the coasts of the

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[479] For the full text of the 1982 UN Convention on the Law of the Sea, see 21 I.L.M. (1982) 1261.

[480] Akehurst, op. cit., at 188.

USA."[481] President Truman's proclamation was copied by certain other States, and offshore drilling for oil and natural gas became common in the Persian Gulf and the Caribbean. In fact, the action of the US created a precedent which other States followed.[482] Before 1958 customary law on the continental shelf was vague and controversial; the Geneva Convention added more precision and detail to the rules (Articles 1 and 2 of the Convention). Thus, Article 76(1) of the 1982 Convention, which differs considerably from Article 1 of the Geneva Convention, defines the continental shelf as follows:

> The continental shelf of a coastal state comprises the sea-bed and sub-soil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Under the 1982 Convention, the coastal State's rights are exclusive, and exploration and exploitation activities may not be undertaken without the consent of the coastal State. Natural resources are defined as the mineral and other non-living resources of the seabed and subsoil, together with living organisms belonging to sedentary species.

Moreover, the General Assembly Resolution 2749 (XXV) of 17 December 1970,[483] declares that the deep sea bed was the common heritage of mankind, and laid down numerous principles to govern the future exploitation of its resources. This idea has been expressed in Article 136 of the 1982 Convention, under which the Area and its resources are the 'common heritage of mankind.'[484] The significance of this principle to the 1982 Convention on the Law of the Sea becomes evident through Article 311(6) which provides that there will be no amendments to the basic principle relating to the common heritage of mankind

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[481] For the full text of Truman Proclamation, see M. M. Whiteman, *Digest of International Law*, Vol. 4, Department of State Publication, Washington D.C. (1965) 756.

[482] Akehurst, op. cit., at 188-189.

[483] For the full text of the resolution, see Brownlie, *Basic Documents*, op. cit., at 122.

[484] The principles which are set forth in the resolution elaborated in detail in Articles 133-199 and Annexes III and IV of the 1982 Convention.

set forth in Article 136. However, the advanced industrial States that have the potential capability to exploit the sea bed expressed reservations about the legal basis of the concept of common heritage of mankind.

We now come to the crucial question: what effects do the principles and formulations, incorporated in the above-mentioned resolutions, have on customary international law? Put in technical terms, are United Nations resolutions concerning permanent sovereignty over natural resources binding on its members? The legal status of General Assembly resolutions is a highly controversial issue. Thus, the examination of this controversy will be our task in the following sections.

7.4 Legal Status of UN General Assembly Resolutions

The object of the present and the following sub-sections is to inquire into the legal validity of resolutions on permanent sovereignty over natural resources adopted by the General Assembly of the United Nations. For doing so, it is proposed to consider, first, the legal relevance and weight of General Assembly resolutions as a *genus*, and then the legal validity of the most two significance resolutions, namely Resolution 1803 and the 1974 Charter.

It is to be regretted that the Charter of the United Nations contains no provisions on the status of General Assembly resolutions. Perhaps that would have been impracticable or undesirable.[485] However, this general question of the legal validity of UN resolutions has been widely discussed by jurists.[486]

The processes of law-making in the international community have never been very clearly understood by international lawyers. It has been traditional to associate the creation of international law with the sources of international law

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[485] O. Asamoah, "The Legal Effect of the Resolutions of the General Assembly", 3-4 Col.J.T.L. (1964-66) 210 at 211.

[486] See on the issue generally:
- Arechaga, Hague *Recueil*, op. cit., 30-34;
- F. B. Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations", 25 B.Y.I.L. (1948) 1-34;
- Schachter, op. cit., 84-104; and
- D. H. N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", 32 B.Y.I.L. (1955-56) 97-122.

contained in Article 38 of the Statute of the ICJ. These sources include conventions, international customs and the general principles of law recognised by civilised nations as primary sources, as well as judicial decisions and teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

Apparently no express provision was made for General Assembly resolutions as a source of international law. However, this does not mean that such resolutions have no legal effect.[487] According to Article 13(1)(a), the General Assembly has the function of initiating studies and making recommendations for the progressive development of international law and its codification. It may be argued that General Assembly resolutions are 'recommendations' only and as such cannot be the source of legal rights and duties. This argument was upheld to some extent by the Joint Opinion of seven of the judges of the ICJ in the *Corfu Channel* case, when they stated that, "having regard to the normal meaning of the word 'recommendation,' a recommendation of the Security Council that Britain and Albania refer their dispute to the Court, was not sufficient to establish the compulsory jurisdiction of the Court in the absence of the consent of both parties."[488] To some, this argument is "singularly unconvincing" because the fact that the form "recommendation" was used, is not decisive one way or the other.[489]

It is true that in most cases the Assembly's power of decision is only one of making recommendations. However, it is not true of all cases. The Assembly does and can make binding decisions. As the late Judge Lauterpacht, in his Separate Opinion in the *Voting Procedure* case,[490] observed:

> In some matters - such as the election of the Secretary-General, election of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and

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487 Asamoah, op. cit., at 210.
488 Quoted by Asamoah in ibid., at 216.
489 Johnson, op. cit., at 108.
490 Advisory Opinion on *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, I.C.J. Rep. (1955) 67.

> approval of the budget and the apportionment of expenses - *the full legal effects of the Resolutions of the General Assembly are undeniable* (emphasis added).[491]

Johnson took a similar view,[492] and added some more matters to those which Lauterpacht enumerated.[493] In another passage of the Separate Opinion, Lauterpacht emphasised that:

> It would be wholly inconsistent with the sound principles of interpretation as well as with high international interests, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly - one of the principal instrumentalities of the formation of the collective will and judgement of the community of nations represented by the United Nations - and to treat them, for the purpose of this Opinion and otherwise, as nominal, insignificant and as having no claim to influence the conduct of the Members. International interest demands that no Judicial support, however indirect, be given to any such conception of the Resolutions of the General Assembly as being of no consequence.[494]

According to Professor Brownlie, it is misleading and a "capital error" to characterise such resolutions as non-binding simply on the basis that General Assembly resolutions are not binding.[495] Dolzer attributes to General Assembly resolutions, if not the power to establish new rules of customary international law, at least the power to demolish the existing rules.[496] After noting that General Assembly "resolutions are not a formal source of law within the explicit categories of Article 38(1) of the Statute of the ICJ", and that "under the UN Charter the General Assembly does not have the legal power to make law or to adopt binding decisions" Schachter remarks:

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[491] Ibid., at 115.

[492] Johnson, op. cit., at 121. Note that resolutions on organisational matters are also called 'house-keeping resolutions'. M. Mendelson, "The Legal Character of General Assembly Resolutions: Some Consideration of Principles", in K. Hossain (ed.), op. cit., 95 at 96.

[493] They include, *inter alia*: Articles 22, 23, 60, 63, 87, 93, 96 (1)(2), 101, 108, 109 of the Charter of the United Nations, and Article 8 of the Statute of the ICJ. Ibid., at 101-102.

[494] *Voting Procedure* case, op. cit., at 122.

[495] Brownlie (1979: 260).

[496] R. Dolzer, "New Foundation of the Law of Expropriation of Alien Property", 75 A.J.I.L. (1981) 553 at 564.

> Yet few would deny that General Assembly resolutions have had a formative influence in the development of international law in matters of considerable importance to national States.[497]

Wildhaber goes further and observes that since modern international law has expanded and become more ambitious in the course of the twentieth century, its sources have also extended. Thus "Resolutions and the secondary law of international organizations ... have become essential as sources of international law, as have treaties, custom and general principles of law."[498] While accepting UN General Assembly resolutions are only recommendations and therefore not binding on member States, Akinsanya emphasised that:

> However, such resolutions dealing with legal matters constitute strong evidence of state practice, and the principles embodied in such resolutions may well acquire the character of customary international law.[499]

Likewise, Brownlie states that General Assembly resolutions "are vehicles for the evolution of state practice and each must be weighed in evidential terms according to its merits."[500] In his lectures at the Hague Academy, he continues:

> The fact that in principle resolutions as a class are not binding has led to no little confusion and it is sometimes said that General Assembly resolutions 'have no legislative effect'. In one sense this is correct: as such the resolutions do not make new law. However, if it is inferred that such resolutions can have no effect on the shaping of international law this is a capital error. The circumstances in which a particular resolution is adopted, the statements of delegations in the debate, the voting, the explanation of votes and the content of the resolution itself, are all indicators of the *evidential* significance of the individual resolution. The key to the problem is the fact that the proceedings of the General Assembly, as of any international conference, are a vehicle for the formulation and expression of the practice of States in matters pertaining to international law. Thus the

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497 Schachter, op. cit., at 85.

498 Wildhaber, "Sovereignty in International Law", in Macdonald and Johnson (eds.), op. cit., at 438.

499 Akinsanya, op. cit., at 49.

500 Brownlie (1998: 545).

> proceedings and the resolution themselves, constitute *evidence* of the formation of rules of customary (or general) international law.[501]

Almost two decades later, Brownlie restates his view on the issue. After noting that UN General Assembly resolutions are not binding on member States, he observes:

> But, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of the governments in the widest forum for the expression of such opinions. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules.[502]

To appraise the legal value of General Assembly resolutions, the same author enumerated several factors which include, *inter alia*, the circumstances in which a particular resolution is adopted; the statements of the delegations; the voting patterns; and the content of the resolution itself. He further observes that the practice of States subsequent to the adoption of the resolution should be considered. In the same vein, the late Judge Arechaga commented:

> In the exercise of its power under the [United Nations] Charter, the General Assembly may not legislate for the world ... But, as the "town meeting of the world" it is a centre where States may express their consensus on an existing or emerging rule of international law or provide the basis and the starting point for a progressive development of that law through the uniform conduct of States.[503]

Similarly, Mendelson states that "in certain very limited circumstances a General Assembly resolution may constitute, or bring about the birth of, a principle of international law."[504] In Bring's view, "today, customary law is created not only by concrete acts of States but also by the legal conscience and conviction of nations as expressed in the various fora of modern international

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501 Brownlie (1979: 260).
502 Brownlie (1998: 14).
503 Arechaga, Hague *Recueil*, op. cit., at 34.
504 Mendelson, "The Legal Character of General Assembly Resolutions: Some Considerations of Principle", in Hossain (ed.), op. cit., at 103.

life."[505] Asamoah distinguishes between the "binding nature" and the "legal effect" of General Assembly resolutions. In his view, resolutions may have a legal effect though they are not regarded by States as binding upon them. Thus, the scope of legal effect is wider than that of legally binding.[506] To him, the significance to be attributed to a resolution may depend on certain factors which have been termed as "value determinants or variants."[507]

While considering the role of quasi-legislative competence of the General Assembly a complicated task, Falk[508] suggests some general directions in this respect. For doing so, the language of the resolution, the objectives pursued by those who supported or opposed the resolution, and the circumstances surrounding the vote should be taken into account. Having surveyed the opinions of numerous writers on the issue, Johnson concludes that there is a fair amount of support for the view that although a recommendation of the General Assembly may be without true legal effects, it may have effects of a moral or political character.[509] However, in his view "the term 'moral effect', has no meaning in connection with resolutions of the General Assembly and is often wrongly used to convey the meaning of 'political effect."[510] The same author argues that General Assembly resolutions cannot be a source of law but are only a subsidiary means for the determination of law within the meaning of Article 38(1)(d) of the Statute of the ICJ.[511] In Asamoah's view, Johnson was distinguishing 'formal form' from 'material' source of law. However, he disregarded the fact that the decisions of international organisations are made by States which are members, and that if the practice of States is a formal source of law, the decisions of international organisations which are the collective acts of States are capable of

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505 Bring, op. cit., at 127.
506 Asamoah, op. cit., at 220.
507 For such factors, see ibid., at 228-229.
508 R. A. Falk, "On the Quasi-legislative Competence of the General Assembly", 60 A.J.I.L. (1966) 782 at 786-787.
509 Johnson, op. cit., at 107.
510 Ibid., at 121.
511 Ibid., at 116.

being a formal source of law.[512] Moreover, Johnson has himself accepted that there is nothing to prevent "members incurring binding legal obligations by the act of voting for Resolutions in the General Assembly, provided there is a clear intention to be so bound."[513]

As mentioned above, to assess the juridical value of a resolution, its language is relevant. As Brownlie observes:

> Moreover, the language of the resolution itself is significant since this indicates the extent to which the resolution is concerned with the legal aspects of the subject-matter in the first place. For example, a resolution may on its face be *declaratory* of existing legal principles and standards or have the status of an agreed interpretation of the Charter of the United Nations (emphasis added.)[514]

Professor Higgins emphasises the extent to which an appreciation of the legal status of General Assembly resolutions is associated with the over-all process of law-making applicable to customary international law. In her words:

> Resolutions of the Assembly are not *per se* binding: though those rules of general international law which they may embody are binding on member states, with or without the help of the resolutions. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence.[515]

She also noticed the inherent discretion enabling the drafters of a resolution to develop new rules of law in the form of *declaring* old rules.

The relevance of the language of the resolution raises the question: what will be the effect of a resolution being expressed in the form of a declaration? According to Asamoah, various opinions exist on the nature of General Assembly declarations. One group see them "as a vehicle for the reformulation and adaptation of traditional principles of international law or the development of 'new' law to take account of the diversity of interests generated by increasing of

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512 O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations,* Martinus Nijhoff, the Hague (1966) at 15.

513 Johnson, op. cit., at 121.

514 Brownlie (1979: 260)

515 R. Higgins, *The Development of International Law Through the Political Organs of the United Nations,* Oxford University Press, London (1963) at 5.

statehood." Thus, Arechaga[516] pointed out that General Assembly resolutions "aimed at formulating principles and rules of law for the conduct of States normally appear under the title of Declarations." He further noted that "in United Nations practice, a declaration is a formal and solemn instrument, suitable for rare occasions when principles of general and lasting importance are being enumerated." The same author listed three possible effects they could be given with respect to developing customary international law:

> Thus in a General Assembly declaration rules of customary law may be recognized as pre-existing norms and declared to be so; an emerging rule of customary law *in status nascendi* may crystallize thanks to a unanimously adopted General Assembly declaration; a resolution by the General Assembly which clearly *de lege ferendae* may however provide the basis for a subsequent and concordant practice of States which will transform the resolution into a rule of customary international law.

However, Arechaga stated that the determination of when each effect occurs requires careful analysis of all the provisions of a resolution and the circumstances surrounding its passage, such as "the drafting of the text; the voting strength it obtained; the statements made by members during the process of deliberation and the subsequent conduct of States in respect of each resolution." Castaneda took a similar view, when he comments:

> The basic foundation for the binding force of rules or principles that are 'declared', 'recognized' or 'confirmed' by a resolution rests, in the final analysis, on the fact that they are customary rules or general principles of law. But the declaratory resolution that incorporates and formulates them as a fully probative legal value. As Jessup states concerning the Nuremberg principles and the crime of genocide, the declarations in which the principles 'are embodied are persuasive evidence of the existence of the rules of law which they enunciate.[517]

In this regard, Falk observes:

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[516] Arechaga, Hague *Recueil,* op. cit., at 31.

[517] Quoted in the Dissenting Opinion of Ameli in *INA Corporation v. The Islamic Republic of Iran*, Award No. 184-161-1 (12 August 1985) *reprinted in* 8 Iran -U.S. C.T.R. 403 at 408.

> If *declaratory language* is used in the resolution, then the problem of acknowledging the formal absence of legislative competence of [the General Assembly] is more or less solved (emphasis added).[518]

The other group, those writers who are interested in emphasising the absence of legislative competence in the Assembly, is quite pessimistic and argue that "resolutions of the Assembly, whether declarations or not, have nothing beyond a moral value." However, Asamoah has himself taken the view that sometimes declarations are of more weight than ordinary resolutions.[519] To appreciate the Assembly's declarations, it is necessary to examine the circumstances of their adoption. Thus, no general statement can explain the significance of all the declarations adopted.[520] The third group of authors consider that the adoption of a General Assembly resolution in the 'declaratory' form has additional psychological significance.[521]

International tribunals also touched upon the issue. Arbitrator Dupuy, in the *Texaco* case, took the view that without doubt "the United Nations' activities have had a significant influence on the content of contemporary international law."[522] The Arbitrator suggests two criteria to determine the legal validity of General Assembly resolutions, namely voting patterns and the analysis of the provisions concerned. The latter factor might be understood to mean that of the content of the resolution.

After noting that such resolutions "are not directly binding" and "are not evidence of customary law", the Iran-US Claims Tribunal, in the *Sedco* case, held that:

> It is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute ... to the creation of such law.[523]

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518 Falk, op. cit., at 786.
519 Asamoah, *The Legal Significance of the Declarations,* op. cit., at 23.
520 Ibid., at 24-25.
521 D. P. O'Connell, *International Law,* Vol. I, Stevens & Sons Ltd., London (1970) at 26.
522 *Texaco* Award, op. cit., at 28, para. 83.
523 *Sedco Inc. v. National Iranian Oil Company et al.,* Interlocutory Award No. 59-129-3 (27 March 1986) *reprinted in* 10 Iran-U.S. C.T.R. 180 at 186.

From the above survey, the following conclusions may be drawn:

(1) to assess the legal weight of General Assembly resolutions, the type of resolution and the circumstances surrounding its adoption - including the voting pattern, whether the resolution is of a declaratory nature, the statements made by member States in the deliberations and post-adoption State practices - should be taken into consideration;

(2) the full legal value and authority of General Assembly resolutions on organisational matters are undeniable;

(3) since the General Assembly is a principal organ of the United Nations and a forum where almost all States meet and where these States may express their views and their collective will with respect to principles and rules of law for the conduct of States, it is reasonable to assume that a legal act of the Assembly has legal validity. This view was given the stamp of authority by the late Judge Arechaga's statement: "whenever it appears that all nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law."[524]; and

(4) if our assumption is correct and General Assembly resolutions have some degree of legal weight, those which are adopted in the 'declaratory' form are of special priority.

Having appreciated the juridical value of General Assembly resolutions in general, the resolutions on permanent sovereignty over natural resources, which have been recalled above, may now be assessed individually from a legal point of view. Thus, in the following sub-section, two of the resolutions which have created the most controversy at international level will be considered.

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524 Arechaga, Hague *Recueil*, op. cit., at 31.

7.4.1 Legal Status of Resolution 1803

As indicated above, Resolution 1803 has been invoked in many disputes between the host States and foreign investors. As a result, it has been accepted in numerous international arbitral awards as reflecting customary international law. Thus, in the *Texaco* case, involving the nationalisation of concessions of foreign oil companies by Libya, Arbitrator Dupuy devoted some 11 paragraphs to the examination of the resolutions concerning natural resources and wealth.[525] After applying two criteria, namely the conditions governing the vote which adopted it, and the degree of precision of its terms, to Resolution 1803, Dupuy reached the conclusion that:

> On the basis of the circumstances of adoption ... and by expressing an *opinio juris communis,* Resolution 1803 (XVII) seems to this Tribunal *to reflect the state of customary law existing in this field.* (emphasis added).[526]

In another Libyan nationalisation case, *Liamco*, Arbitrator Mahmassani took the view that:

> In this connection, the Arbitral Tribunal has reached the conclusion that the said Resolutions [including Resolution 1803 (XVII)], if not a unanimous source of law, *are evidence of the recent dominant trend of international opinion* concerning the sovereign right of States over their natural resources (emphasis added).[527]

In the *Aminoil* case, the tribunal held that:

> The most general formulation of the rules applicable for a lawful nationalisation was contained in ... Resolution No. 1803 ... This text which obtained a unanimous vote in the General Assembly, *codifies positive principles* ... (emphasis added).[528]

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525 *Texaco* Award, op. cit., at 27-31, paras. 80-91. It was the first time that in an international decision the concept of permanent sovereignty over natural resources was considered in light of a new international economic order.

526 Ibid., at 30, para. 87.

527 *Liamco* Award, op. cit., at 103.

528 *Aminoil* Award, op. cit., at 1032, para. 143.

The same tribunal ruled that this resolution "is to be regarded, by reason of the circumstances of its adoption, as reflecting the then state of international law."[529]

> Additionally, The Iran-US Claims Tribunal, in the *Sedco* case, held that:
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> There is considerable unanimity in international arbitral practice and scholarly opinion that of the resolutions cited above, it is Resolution 1803 ... *which at least reflects, if it does not evidence, current international law* (emphasis added).[530]

After noting that "a few recent resolutions of international bodies or conferences, including the General Assembly of the United Nations have cast doubts on the existence of an international rule to this effect", the same Tribunal, in the *Amoco* case, ruled that:

> Other less controversial resolutions, such as G.A. Res. 1803 (XVII) ... confirm the existence of the rule [relating to the determination of compensation].[531]

Legal scholars took a similar view. After dealing with the evolution of UN work on permanent sovereignty over natural resources in the context of this resolution, Gess concludes that:

> The General Assembly intended to set forth, within *the solemn vehicle of a declaration*, the basic principles and modalities of the exercise of permanent sovereignty over natural resources ... (emphasis added).[532]

In the same vein, Banerjee comments:

> The very adoption of a resolution [i.e. Resolution 1803] by a majority of the Members reflects a large degree of consensus and is indicative of common beliefs and practice.[533]

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529 Ibid., at 1021-1022, para. 90.
530 *Sedco* Award, op. cit., at 186.
531 *Amoco* Award, op. cit., at 223, para. 116.
532 Gess, op. cit., at 411. See also Asamoah, *The Legal Significance of the Declarations,* op. cit., at 100.
533 Banerjee, op. cit., at 542.

Moreover, some writers regarded Resolution 1803 as an important example of law-making resolutions of the General Assembly. Among them, Friedmann[534] and Brownlie[535] may be recalled.

Based on the foregoing, it would seem clear that Resolution 1803 has been accepted as being declaratory of international law on the issues of expropriation and of compensation.

7.4.2 Legal Status of the Charter

Having evaluated Resolution 1803, the appreciation of the Charter will be our task in this sub-section. As indicated above, its substantive provisions are contained in four chapters. The most significant for the present discussion is Chapter II, bears the heading 'Economic Rights and Duties of States'. It sets out rights, such as the sovereign right of each State to choose its own political, economic, social and cultural system, without outside interference, coercion or threat (Article 1). Its Article 2 sets forth permanent sovereignty over natural resources, and the right to regulate and exercise authority over foreign investment within its national jurisdiction.

The legal status of the Charter as a whole, and especially Article 2 of Chapter II, and particularly sub-paragraph (c) of the said article, is a very controversial question among jurists.[536] Some authors see in the Charter a hopeful trend. Thus, to one observer, though Article 2(2) was rejected by the major Western countries, "the Charter is at least significant as a declaration by the overwhelming majority of States of their concept of international law."[537]

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534 W. Friedmann, op. cit., at 138.

535 Brownlie (1998: 14).

536 See on the Charter generally:
- Garcia-Amador (1980: 1-58);
- E-U. Petersmann, op. cit. (note 474);
- Weston, op. cit. (note 114);
- A. Rozental, "The Charter of Economic Rights and Duties of States and the New International Economic Order", 16 Virg. J.I.L. (1976) 309;
- G. White, "A New International Economic Order", 16 Virg. J.I.L. (1976) 323; and
- C. N. Brower and J. B. Tepe, "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?", 9 Int. Lawyer (1975) 295.

537 Asante, op. cit., at 609.

After noting that in the case of the Charter there was a consensus among the developing States as regards the question of compensation, Bring concludes that "this consensus amounts to an *opinio juris* in the sense that the principle embraced is regarded as part of existing law, or as a necessary part of future law."[538] Chowdhury took the view that "Some of the principles laid down in the Charter undoubtedly represent the recognized legal norms under existing international law while others indicate emerging norms or directives principles relating to economic relations."[539] In his view, the principles contained in paragraphs 1 and sub-paragraphs (a) and (b) of paragraph 2 of Article 2 are definitely legal in character.[540] Likewise, Professor Weston[541] has advanced four arguments for the proposition that the Charter is law: (1) the Charter was intended to place its articulated principles on 'a firm legal footing'; (2) the provisions are framed by such weighty and solemn preambular imagery as to at least imply binding legal effect; (3) the Charter is no ordinary resolution and hence, unlike other General Assembly resolutions, is more prescriptive than recommendatory; and (4) the Charter, having won the overwhelming endorsement of UN membership (by a vote of 120-6-10), reflects mature legal concepts and expectations that go beyond pious expressions of morality.

While stating that good intentions and weighty imagery are not enough to make law, with regard to the third and fourth propositions, Murphy comments:[542]

> It is not enough to insist that General Assembly resolutions have only recommendatory force. *The Charter is no ordinary resolution.* One could ... argue that *the Charter enjoys a juridical status akin to the Universal Declaration of Human Rights*, which, although it originally did not intend to create binding obligations in international law, today has come to do so. The process leading to the elevation of the Declaration to *jus cogens* signifies as crucial the consistency of state practice in invoking its provisions as evidence of the content of international law. Post-adoption state practices in the final analysis will be decisive. And herein lies the nub of the issue.

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538 Bring, op. cit., at 127.
539 Chowdhury (1984: 6).
540 Ibid. See also Brownlie (1979: 266-267), and Garcia-Amador (1980: 24-25).
541 Weston, op. cit., at 451.
542 Murphy, op. cit., at 91.

Thus, he concludes that at best Article 2 of the Charter "may be the start of a fresh practice ultimately aimed at the creation of new law." Weston reached the same conclusion, albeit as to Article 2(2)(c), when he observes that the said article "may be the start of a fresh practice whose impact on the law, although currently without immediate binding force, could be substantial in the future."[543] Similarly, Arbitrator Mahmassani, in the *Liamco* case, took the position that the resolutions which were invoked by Libya, including the Charter "if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources."[544] Arechaga went further and treated Article 2 as a source of contemporary international law.[545] In this regard, Baxter remarks:

> So far as the dissenters and abstainers are concerned, the Charter could be taken as binding only if it were declaratory of the existing customary international law, which the dissenters contended it was not. But as among those who voted in favour of the Charter, the understanding *inter se* approaches the level of legal effectiveness that a treaty has. It is no answer to say that the provisions on nationalization have materially less weight than if they had been incorporated in a treaty, because the question of a treaty on this particular subject had never arisen.[546]

Other authors are quite pessimistic and consider that the Charter is not law. For instance, Arbitrator Dupuy, in the *Texaco* case, considered Article 2 of the Charter as "*de lege ferenda*", and not as a statement of current law (*lex lata*).[547] While accepting that "the Charter does not purport to be a declaration of pre-existing principles and overall it has a strong programmatic, political and didactic flavour",[548] Professor Brownlie argues that Arbitrator Dupuy's "view is contradicted by evidence that Article 2(2)(c) is regarded by many States as emergent principle, applicable *ex nunc*."[549] To support his proposition, he

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543 Weston, op. cit., at 455.
544 *Liamco* Award, op. cit., at 103.
545 Arechaga, Hague *Recueil*, op. cit., at 297-310.
546 R. R. Baxter, "International law in her Infinite Variety", 29 I.C.L.Q. (1980) 549 at 564.
547 *Texaco* Award, op. cit., at 30, para. 87.
548 Brownlie (1979: 268).
549 Brownlie (1998: 545).

identifies two arguments. In the first place, the language of this article harks back to paragraph 4 of 1962 Declaration. Secondly, "the attitude of States opposed to Article 2 indicates all too clearly that governments are aware of the need to 'contract out' of such formulations by reservations of position either by explanations of negative votes and abstentions or by the making of specific reservations after adoption of a resolution by consensus."[550] The same author points out that the following consequences will emerge if one assumes that the provisions of Article 2 of the Charter are assessed as evidence of new customary law:

> (1) the concept of permanent sovereignty reinforces the existing principle that taking for public purposes is lawful; (2) the compensation principle is not, as such, denied and recent comment has neglected to notice that, if the term compensation has an objective content, then failure by the local courts to provide compensation would be contrary to the principle of Article 2; (3) it is also clear that liability for denial of justice may arise if certain standards are not observed; (4) expropriation contrary to treaty, or any breach of an independent principle of customary law (e.g. the principle of non-discrimination on grounds of race or religion) will continue to be unlawful; and (5) although it has been stated on occasion that the reference to the domestic law of the nationalising state is entitled to give general recognition to the Calvo doctrine, in fact the reference to the domestic law occurs exclusively in relation to compensation and this is by no means a reference to domestic law willy-nilly (numbers added).[551]

That Article 2 of Chapter II of the Charter deals with principles of international law cannot be disputed. However, controversy arises as to its inconsistency with what are assumed to be some of the existing rules of international law. In short, it has been asserted that in some respects the provisions of Article 2 are incompatible with some of the established principles recognised in Resolution 1803. A comparative study of the pertinent paragraphs of Resolution 1803 and of the Charter indicates that there are several controversial points, including the principles of public purpose, non-

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550 Ibid.

551 Brownlie (1979: 268-269) and (1998: 545-546).

discrimination and compensation. Also, there is an assertion that international law has been "utterly rejected" by the Charter. Finally, controversy about the question of jurisdiction in the event of compensation disputes. Thus, in the remaining discussion of this sub-section, the examination of these issues, respectively, will be our next task.

As far as the principle of public purpose is concerned, it has been argued that while Article 4 of Resolution 1803 recognises the right of a State to expropriate foreign property "on grounds or reasons of public utility, security or the national interest", the right to expropriate is not qualified under Article 2(2)(c) of the Charter.[552] Put in technical terms, the public purpose requirement, contained in 1962 resolution, has been omitted in the Charter. However, this omission may be justified on several grounds: (1) as shown above,[553] among the traditional principles governing the expropriation of foreign property, the public purpose requirement is the weakest one; and (2) today the overwhelming view is that the State would be the best arbiter to determine what its public interest requires. It is hardly conceivable that such a determination can be reviewed or overruled by any judicial or arbitral organs.

Garcia-Amador[554] contends that while paragraph 4 of Resolution 1803 expressly subjects domestic and foreign interests to the same measures of nationalisation, Article 2(2)(c) of the Charter authorises a State to exclude its nationals from the application of any measures it adopts, and hence the possibility of the violation of the traditional principle of non-discrimination between foreigners and nationals may arise. Moreover, some argue that whereas in Article 2(2)(a) of the Charter stipulated that "No State shall be compelled to grant preferential treatment to foreign investment", it "fails to include the natural collorary of non-discrimination."[555] However, these arguments are not without difficulty. First, Chowdhury maintains that as much as all that paragraph 4 of

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552 See, e.g., Garcia-Amador (1980: 28), Brower and Tepe, op. cit., at 305.
553 See our discussion on the public purpose requirement in this chapter, at 89-98.
554 Garcia-Amador (1980: 27-28).
555 Brower and Tepe, op. cit., at 306.

resolution 1803 provides is that "the public purpose of nationalization overrides private interests, both domestic and foreign, and not that the same standards of nationalization shall apply to both domestic and foreign interests."[556] Second, even if Garcia-Amador's argument is correct, as discussed earlier,[557] there is no international duty to treat foreign property and domestic property identically, as Garcia-Amador has himself accepted. The same writer has recognised that the departure of the Charter from the national treatment "conforms with one of the basic postulates of New International Economic Order, i.e. the claim to preferential treatment in favor of developing countries."

As regards the principle of compensation, the controversy is whether the payment of compensation constitutes a legal duty under the Charter. In support of the assertion that there is no such duty under the Charter, Garcia-Amador[558] has advanced three arguments: (1) while paragraph 4 of Resolution 1803 provides that the dispossessed owner "*shall* be paid appropriate compensation", Article 2(2)(c) of the Charter stipulates that "appropriate compensation *should* be paid." He contends that the use of *should* in lieu of *shall* clearly indicates that under the Charter the payment of compensation ceased to be a legal duty; whether compensation is to be paid is left to the discretion of the nationalising State. Thus, Garcia-Amador concludes that the Charter has departed from a well-established principle of customary international law; (2) while Resolution 1803 provides for the payment of appropriate compensation "in accordance with the rules in force in the State taking such measures ... and in accordance with international law", the Charter specifies that the dispossessed owner should be paid "appropriate compensation ... by the State adopting such measures taking into account its relevant laws and regulations and all circumstances that the State considers pertinent." It has been contended that this is certainly a departure from the principle contained in Resolution 1803, according to which the determination of the appropriateness of compensation is not left entirely to the discretion of the

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556 Chowdhury (1984: 9-10).

557 See our discussion on the principle of non-discrimination in this chapter, at 98-108.

558 Garcia-Amador (1980: 28-32).

expropriating State. He further argued that this provision of the Charter obviously gives the State exclusive jurisdiction for the determination of compensation; and (3) the legislative history of the Charter shows that there is not an international obligation to pay compensation.

Garcia-Amador's first and second arguments were expressed in another way by other commentators. For instance, the absence of any reference to international law in Article 2 of the Charter is described as "utter rejection of international law" in respect of nationalisation or expropriation measures. Brower and Tepe[559] maintain that "the only obligation, prefaced with the precatory rather than mandatory 'should', is to grant such compensation, if any, as is subjectively thought to be 'appropriate', considering only local law and 'circumstances' to which international law is not necessarily 'pertinent'."

However, the mere use of the word *'should'* instead of *'shall'* does not necessarily exclude the duty to pay compensation. "When read in the context of the entire Article 2 and other pertinent provisions of the Charter, the mandatory obligation to pay compensation cannot be disputed."[560] Murphy took the view that Article 2(2)(c) of the Charter "does not repudiate compensation in its entirety but instead seeks to remove the requirement from international jurisdiction."[561] Moreover, in response to the criticism about the exclusive reference to domestic jurisdiction and the possibility of arbitrary exercise of power of the host State, Arechaga had this to say:

> It must be recognized that Article 2, paragraph 2, the result of differing views, is so vague and ambiguous as to lend support to such an understanding of the provision. However, a reading of the entire article in relation to other parts of the instrument and basic principles of international law, compels a different interpretation. It is true that Article 2, paragraph 2(c) does not include the provision of ... Resolution 1803 requiring, in cases of nationalization or expropriation, the payment of appropriate compensation 'in accordance with rules in force in the State taking such measure in the exercise of its sovereignty and *in accordance with international law*.'

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559 Brower and Tepe, op. cit., at 305.
560 Chowdhury (1984: 10).
561 Murphy, op. cit., at 89.

> The developed countries continuously asserted that customary international law provided for 'prompt, adequate and effective compensation.' The phrase 'in accordance with international law' was eliminated because of Third World countries' 'suspicions as to what Western countries expect from international law.'[562] However, once it is established that the alleged customary rule of 'prompt, adequate and effective' compensation is no longer accepted by the vast majority of the international community, the reference to international law lost the meaning intended by the developed countries (two footnotes omitted).[563]

The late Judge continued:

> The *travaux préparatoires* of the Charter also show that the provision of paragraph 2(c) is not based on a position which denies the existence of any obligation to pay compensation. This position originally adopted by the working group which drafted the Charter, was abandoned during discussion of the instrument.[564]

Likewise, as will be shown in due course, the negative position is incompatible with State practice.

Thus, the foregoing examination indicates that not only does the Charter impose the duty to pay (appropriate) compensation, but also that it provides that such compensation shall be determined by "taking into account ... all circumstances that the State considers pertinent." It should be noted that the last words "all circumstances that the State considers pertinent" have been the subject of controversy.[565] While some consider them as an attempt "to re-establish a claim to absolute sovereignty", others interpret it "as a reference to international law." However, for Chowdhury, "the standard of pertinent circumstances limits the scope of arbitrariness in the subjective determination of the quantum of compensation by the host State." He goes on to say that:

> The guidelines for the formulation of pertinent circumstances must be found within the parameters of the concept that nationalization is a

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562 Waart, op. cit., at 313.

563 Arechaga, "State Responsibility for Nationalization of Foreign-Owned Property", op. cit., at 186.

564 Ibid., at 184.

565 Seidl-Hohenveldern, op. cit., at 28-29.

> legitimate exercise of the right of permanent sovereignty on the one hand, and the obligation of equitable restitution on the other.[566]

Therefore, the same writer suggests various circumstances which should be considered as pertinent.[567]

Having dealt with the above-mentioned criticisms against the Charter, Arechaga concluded that:

> It is not entirely accurate to say that international law has been utterly rejected by the Charter ... Though expelled through the door because of its alleged identification with the doctrine of 'prompt, adequate and effective compensation', it has come back through the window in the garb of an equitable principle which takes into account the specific circumstances of each case.[568]

The last controversial point relates to the issue of jurisdiction in the event of compensation disputes.[569] In this respect, Article 4 of Resolution 1803 provides that:

> ... the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication

It has been argued that preference was given to arbitration or international adjudication, which always favours the deprived alien owners, since more often international tribunals apply principles of public international law, rather than the

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[566] Chowdhury (1984: 16).

[567] They include: (1) the nationalising State's financial capacity to pay; (2) the period during which the nationalised undertaking has exploited a public service or the nationalised resources; (3) whether or not the nationalised undertaking has recovered its initial investment; (4) whether or not the profits received have been excessive; (5) whether or not there has been any undue enrichment as a result of a colonial situation; (6) the contribution of the nationalised undertaking to the economic and social development of the host country and its respect for labour laws of that country; (7) the reinvestment policies of the nationalised undertaking; and (8) the loss of future earnings of the nationalised undertaking due to cancellation in spite of a stabilisation clause Ibid., at 16-17. See also Arechaga, Hague *Recueil*, op. cit., at 301-302.

[568] Arechaga, "State Responsibility for the Nationalisation of Foreign-Owned Property", op. cit., at 188.

[569] Since the settlement of compensation disputes are not our concern in this thesis, therefore, we confine ourselves only to state the differences between Resolution 1803 and the Charter from this aspect. See on the issue: Arechaga, Hague *Recueil*, op. cit., at 304-305; Garcia-Amador (1980: 40-43), and Chowdhury (1984: 17-23).

law of the State concerned.[570] However, regarding the dispute settlement mechanism, Article 2(2)(c) of the Charter stipulates that:

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

These provisions differ in two aspects from Article 4 of Resolution 1803. First, under the Charter, instead of exhausting local remedies and then proceeding to arbitration or international adjudication as embodied in Resolution 1803, national courts are the final arbiters in compensation disputes. Second, any resort to 'other peaceful means' must be between 'States concerned' rather than 'upon agreement by sovereign States and other parties concerned' as set forth in Resolution 1803.

Based on the above analysis, the present author shares the view that some of the principles embodied in the 1974 Charter of Economic Rights and Duties of States "undoubtedly represent the recognised legal norms under existing international law while others indicate emerging norms or directive principles relating to economic relations."[571]

Additionally, from the foregoing survey of the principle of permanent sovereignty over natural resources, the conclusion may be drawn that the principle of permanent sovereignty has emerged as a principal economic factor in completing political self-determination. It is now a well-established principle of international law, and, again to the present writer, is one of the candidate rules which may have the special status of *jus cogens*. The main objective of the principle is to preserve State control over natural wealth and resources. This may come close to what Professor Schachter has observed:

> On the international level, the principle of permanent sovereignty has become the focal normative conception used by States to justify their

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570 Akinsanya, op. cit., at 65.
571 Chowdhury (1984: 6).

> right to exercise control over production and distribution arrangements without being hampered by the international law of States responsibility as it had been traditionally interpreted by the capital-exporting countries ... *It would be a mistake to consider the idea of permanent sovereignty over natural resources as anachronistic rhetoric. It should be viewed as a fresh manifestation of present aspirations for self-rule and greater equity* (emphasis added).[572]

8. Conclusion

As seen in this chapter, for any single issue, the relevant conclusion was drawn immediately after its examination. Nonetheless, it seems appropriate to summarise these conclusions.

1) Due to the shortcomings of the two standards, viz., the 'international minimum standard' and 'national treatment', neither of them can be used as a standard by which to measure the international responsibility of the State with regard to the treatment of aliens. To the same effect is the argument that there are several human rights instruments which, instead of referring to nationals or aliens, are concerned with 'individuals' within a certain jurisdiction without discrimination. As shown above, the rights and obligations of nationals and aliens are not the same in all circumstances. In short, there is no single standard regarding the treatment of aliens which enjoys universal support. Thus, the international legal scene demands the formulation of new standards.

2) A State has the right to expropriate the property belonging to aliens in its territory. However, its right to do so is subject to the conditions laid down by international law. The expropriation of foreign property will be lawful only if such a measure was for a public purpose and was not discriminatory. Though there is a duty in international law to pay compensation for the nationalisation of foreign property, the non-satisfaction of such a duty does not render the measure unlawful. Moreover, among the three criteria, the public purpose requirement is the weakest one.

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572 O. Schachter, *Sharing the World's Resources*, Columbia University Press, New York (1977) at 172.

3) One of the important sources in which the right to expropriate foreign property has been endorsed is the principle of permanent sovereignty over natural resources. The principle has been enshrined in numerous UN resolutions, and is now a well-settled principle of international law. This conclusion comes close to what the Iran-US Claims Tribunal stated that the right to nationalise foreign property is "today unanimously recognized, even by States which reject the principle of permanent sovereignty over natural resources, considered by a majority of States as the legal foundation of such a right."[573]

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[573] *Amoco* Award, op. cit., at 222, para. 113.

CHARTER THREE

INDIRECT EXPROPRIATION

1. Introduction

Broadly speaking, the international 'law of expropriation' consists of three main distinct branches, namely the rules relating to the definition of the subject-matter of expropriation (i.e. the concept of property), the identification of expropriation and the question of compensation. In the last chapter we have seen that not only tangible but intangible property, including contractual rights, can be subjected to expropriation or nationalisation. As far as the rules governing compensation are concerned, the issue of compensation for nationalisation of foreign property is a well-known cause of controversy among authors in international law. Thus, the next chapter is devoted to consideration of this issue.

The second branch of rules governing expropriation, that is the identification of expropriation, constitutes the whole discussion of the present chapter. As shown in chapter 1, in pursuance of its economic programmes, a State may nationalise foreign-owned property by legislation. When this happens, it results in an immediate and outright vesting of the property in the hands of the State or a State entity created for this purpose. There is no particular legal problem in identifying such measures. Attempts have also been made to narrow the definition of expropriation to outright expropriations accomplished by legislation.[1] Moreover, in the *Biloume* case, the tribunal held that no distinction should be made between direct and creeping expropriations.[2]

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[1] See M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press (1994) at 282.

[2] Quoted in ibid., at 283.

In addition to direct expropriation, however, it is evident that there could be other instances of interferences with property rights which could amount to expropriation of foreign property for which the State may be responsible. Hence, they constitute the subject for the discussion of the law of expropriation. Although there is a substantial body of literature, such as legal writings and international arbitral awards on expropriation and its components, the sources relating to this category of expropriation are quite few. This has been explained by Dolzer in the following terms:

> Historically, State measures affecting property rights in an indirect manner have not been as prominent in State practice as they are now in the modern interventionist type of State.[3]

In modern literature and arbitral awards, however, the subject under discussion has received special attention. Several facts contributed to this. Firstly, in contrast to a *laissez faire* State, the imperatives of welfare States have led them to interfere frequently with the property rights of private persons, including aliens. But often such interference or action falls short of direct expropriation. Secondly, under certain circumstances, States can diminish property rights without affecting direct ownership of the investment. For instance, when the management of a company is taken over, the company, its assets and shares are not affected but the foreign investors' interests are decreased.

It is worth noting that most expropriation cases brought to the Iran-US Claims Tribunal are related to claims that fall short of direct expropriation.[4] In those cases, Iran denies any encroachment of the rights of ownership of American nationals in their property so as to constitute an expropriation. This could cause Iran to incur responsibility, and since ownership of the property remains with US

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[3] R. Dolzer "Indirect Expropriation of Alien Property", 1 I.C.S.I.D. Rev-F.I.L.J. (1986) 41 at 42.

[4] This has been explained by one writer in the following terms:
"The reason for this lies in the actions of the Revolutionary Government and its economic policies after the Revolution of 1979." H. Piran, "Indirect Expropriation in the Case Law of the Iran-United States Claims Tribunal", F.Y.I.L. (1995) 140 at 151.

nationals, the latter consider themselves to have been deprived of the rights of use, enjoyment and control of the property. Thus, they claimed that their property was expropriated. In these circumstances, the preliminary task of the Tribunal is the identification of expropriation. Put in technical terms, it must decide whether an expropriation has occurred, despite the fact that the foreigner still maintains ownership. Hence, the awards of the Tribunal in those cases constitute a fruitful source for the present subject. However, to some,[5] the awards of this Tribunal must be used cautiously as it deals with expropriations in the context of the revolutionary situation of 1979 in Iran, and its constituent documents gave the Tribunal power to deal not only with direct expropriations of physical assets but "all [sic] measures affecting property rights."[6] It is true that such a wide definition of expropriation will not be tenable in international law, simply because all governmental interferences with property rights, such as taxation and the like, will not amount to expropriation so as to give rise to international concern. The amount of the Iran-US Claims Tribunal's awards, however, based on "other measures affecting property rights" in comparison with other awards in this respect could be negligible. Therefore, it is submitted that they constitute a rich source on the present topic. As Piran puts it:

> This is a unique situation in which so many cases on this subject have been decided by an international tribunal, and it undoubtedly should enrich the resources in this branch of international law.[7]

Thus, in all our discussions in this chapter, special attention will be paid to the awards of the Iran-US Claims Tribunal.

Before embarking upon the subject, one must clarify the terminology. Authors often refer to this practice by terms such as 'indirect expropriation'[8],

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5 Sornarajah, op. cit., at 282-283 and 307-308. See also R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Hague *Recueil* (1982-II) 267 at 329.

6 Article II(I) of the Claims Settlement Declaration. For the text of the Declaration, see 1 Iran-United States Claims Tribunal Reports (hereinafter Iran-U.S. C.T.R.) (Grotius Publications, Cambridge) and 20 I.L.M. (1981) 224.

7 Piran, op. cit., at 243. See also G. H. Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal", 88 A.J.I.L. (1994) 585 at 586.

'creeping expropriation'[9], 'disguised expropriation'[10], 'constructive taking'[11], 'de facto expropriation'.[12] The same words have been employed in arbitral decisions.

Terms such as 'creeping', 'disguised' or 'constructive' expropriation, while providing a label for expropriations outside the obvious situation of formal expropriations of physical property, do little to help in the identification of indirect expropriations which will attract the application of international law on expropriation.[13] Likewise, these terms suggest a deliberate strategy on the part of the host State to deprive the alien, which could happen in some circumstances, but is not the case in all instances.[14] Thus, the term 'indirect expropriation' is preferred here. Although we must bear in mind the above-mentioned defects, it is important to consider the neutrality of the term, which is helpful in any analysis.

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[8] See, e.g., K. C. Kotecha, "Comparative Analysis of Nationalization Laws: Objectives and Techniques", 8 C.I.L.J.S.A. (1975) 87 at 92. Note that the author used the term 'indirect seizure'; Higgins, op. cit., at 322; S. C. Jain, *Nationalization of Foreign Property - A Study in North-South Dialogue*, Deep & Deep Publications, New Delhi (1983) at 34; Dolzer, op. cit., at 44; Sornarajah, op. cit., at 282, and Piran, op. cit., at 140.

[9] See, *inter alia*, B. H. Weston, "Constructive Takings under International Law: A Modest Foray into the Problem of Creeping Expropriation", 16 Virg. J.I.L. (1975-76) 103 and The ALI Third Restatement US Foreign Relations Law (1987), Vol. 2, Section 712, 196 at 200.

[10] The Separate Opinion of Judge Sir G. Fitzmaurice in the *Barcelona Traction Light and Power Company, Ltd.*, case, (*Belgium v. Spain*), I.C.J. Rep. (1970) 65 at 106; the case of *Elettronica Sigula S.P.A. (ELSI)*, (*United States of America v. Italy*), Award of 20 July 1989, I.C.J. Rep. (1989) 14 at 69, (para. 116), 70 (para. 118) and 71 (para. 119), and M. Akehurst, *A Modern Introduction to International Law* (6th ed.), Routledge, London (1987) at 95.

[11] Weston, op. cit., at 103; I. Seidl-Hohenveldern, *International Economic Law*, Martinus Nijhoff, Dordrecht (1992) at 155, and the latter writer's other literature, "Aliens, Property", Vol. 8, Encycl. P.I.L., 20 at 21.

[12] See e.g., N. R. Doman, "Post War Nationalization of Foreign Property in Europe", 48 Col.L.R. (1948) 1125 at 1129, and *Vernie R. Pointon et al. v. The Islamic Republic of Iran*, Award No. 516-322-1 (23 July 1991), *reprinted in* 27 Iran-U.S. C.T.R. 49 at 59, para. 32, and at 61, para. 36.

[13] Sornarajah, op. cit., at 282.

[14] Piran, op. cit., at 140, n. 1.

2. Definition of the Subject

Though the concept of 'indirect expropriation' is not a new phenomenon,[15] its definition is by no means settled. Put differently, there is no generally-agreed definition of the concept. It could be argued that any type of governmental interferences with deprivation of alien property which has not taken place as a result of direct legislation or executive action amounts to an indirect expropriation. To the same effect, it could be contended that all governmental interferences with the peaceful rights of use, enjoyment and control of property by aliens do not constitute expropriation incurring the responsibility of the host State, and hence do not attract the concern of international law. Thus, there are some problems in offering a precise definition which clearly identifies all governmental interferences. One commentator recognised the difficulty of delimiting the subject and observes that it is nearly impossible to define with precision the meaning of indirect expropriation.[16] It has been suggested that "the complexity of the situations and endless possibilities of State intervention in the property rights of private persons make it impossible to give a straightforward definition of the subject.[17]

To avoid the problem, Sornarajah[18] observes that in a sense expropriations may be divided into two categories, namely 'compensable expropriations' and 'regulatory expropriations'. It is more appropriate to identify the types of expropriations that are considered as 'compensable expropriations' than to devise a criterion for the category of interferences which do not amount to expropriation, and hence engage the responsibility of the State, referred to as 'regulatory expropriations'.

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[15] During the 1917 Mexican Agrarian Reforms, a United States' Note to Mexico stated that the US Government could not acquiesce in any direct and *indirect* confiscation of foreign-owned properties in Mexico. See further, Jain, op. cit., at 34.

[16] S. D. Metzger, "Multinational Conventions for the Protection of Private Foreign Investment", 9 J.P.L. (1960) 157.

[17] Piran, op. cit., at 143.

[18] Sornarajah, op. cit., at 283.

Nevertheless, some attempts have been made to define the concept of indirect expropriation. For example, in efforts at codification of international law relating to expropriation of alien property, attention has been paid to the issue of indirect deprivation or expropriation. Article 10(3)(a) of the 1961 Harvard Draft Convention on International Responsibility for Injuries to Aliens (sometimes referred to as the Sohn-Baxter Draft Convention) defines a taking of property as including:

> not only an outright taking of property, but also any such unreasonable interference with the use, enjoyment or disposal of property as to justify an interference that the owner will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.[19]

In their explanatory note to this article, Sohn and Baxter stressed that the duration of an interference with the use, enjoyment and disposal is the main factor in a determination of whether an expropriation has taken place or not, and the adjudicator of the claim possesses a considerable power in this respect.[20] The issue of indirect expropriation, entitled 'creeping expropriation', is also identified in the ALI Third Restatement. Section 712(1)(g) of its commentary reads:

> A state is responsible as for an expropriation of property ... when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory. Depriving an alien of control of his property, as by an order freezing his assets, might become a taking if it is long extended.[21]

As far as treaty law is concerned, Article 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property provides that "No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with."[22]

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19 *Reprinted in* 55 A.J.I.L. (1961) 545 at 553.

20 Ibid., at 559.

21 The ALI Third Restatement, op. cit., at 200-201.

22 Article 3(I) of the OECD Convention, *reprinted in* 7 I.L.M. (1968) 128. See also Abs-Shawcross Draft Convention (Article 3), *reprinted in* 9 J.P.L. (1960) 116.

Bilateral investment treaties also allocate some provisions to expropriation of investments, including the issue of indirect expropriation, although there is no general formula. In short, the terms used are varied, and they include: 'measures having effect equivalent to nationalisation', 'indirectly to nationalise' and the like. Thus, Article 5(1) of the India-United Kingdom Treaty stipulates that:

> Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation.[23]

A similar formula emerges in the World Bank Guidelines on the treatment of Foreign Direct Investment. Article IV(1) thereof in part reads:

> A state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or make measures which have similar effects.[24]

Similarly, the North American Free Trade Agreement (between Canada, Mexico and the United States) explicitly referred to indirect expropriation. Article 1110 of the Agreement provides that:

> No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ...[25]

Another source in which the definition of indirect expropriation can be found is investment insurance contracts. Since investments in developing countries run risks of a non-commercial nature, for instance, civil war, nationalisation (either outright or indirect), etc., investors desire to obtain

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[23] Treaty signed on 14 March 1994, *reprinted in* 34 I.L.M. (1995) 935 at 941. For the same formula, see the 'Agreement for the Promotion and Reciprocal Protection of Investments' between Korea and Russia, which was signed on 14 December 1990, *reprinted in* 30 I.L.M. (1991) 762.

[24] *Reprinted in* 31 I. L. M. (1992) 1366 at 1382.

[25] *Reprinted in* 32 I.L.M. (1993) 605 at 641. A similar formula emerges in the 1985 Turkey-United States Treaty, where Article III(1) provides: "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ...", *reprinted in* 25 I.L.M. (1986) 85 at 92.

insurance covering these risks.[26] The major capital-exporting countries have introduced schemes to grant such insurance. The provisions of these insurance schemes also contain definitions of the concept of indirect expropriation. Here, as in the case of bilateral investment agreements there is no general formula. In addition, to cover against outright expropriation, the German standard contract, for example, insures against actions by which:

> such a large part of the commercial value of the enterprise, the establishment or the plant is transferred or destroyed so as to make it impossible to continue the operation of the enterprise, the establishment or the plant in the long run without economic loss and consequently the participation to the capital involved must be deemed as lost or the claim resulting from the participation, the claim resulting from the participation-like credit or the claim relating to the profits wholly or in part be recovered or enforced.[27]

Moreover, the American insurance agency, the Overseas Private Investment Corporation (OPIC) and its British counterpart, the Export Credits Guarantee Department, offer a definition of indirect expropriation in their policies.[28]

Authors have also expressed views on this issue, and some of them specifically have suggested definitions. Explaining the meaning of indirect measures, Jain[29] has offered several criteria to test any given situation. They include: (1) character of the State interference; (2) nature of the object of rights or property affected; (3) extent of the gain to the State and/or loss to the affected person; (4) the link between the State's action and person's loss; (5) loss of control and/or ownership; and (6) duration of interference or control.

According to Fatouros, indirect measures of expropriation "would presumably include regulatory government action which affects foreign investors but falls short of an outright taking."[30] In his recent penetrating and thoughtful

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26 I. Seidl-Hohenveldern, *International Economic Law*, Martinus Nijhoff, Dordrecht (1992) at 155.

27 Quoted by Dolzer, op. cit., at 56.

28 Ibid., at 56-57.

29 Jain, op. cit., at 39-40.

30 Quoted by Jain, at 38-39.

article on indirect expropriation in the jurisprudence of the Iran-US Claims Tribunal, Piran has suggested a definition, whereby indirect expropriation means:

> Any *unreasonable* and *intentional* interference by a government towards a particular property, with the use, enjoyment or disposal of such property for a long time, so that it could reasonably be inferred that the owner is *perpetually* deprived of the use, enjoyment or disposal of his property (emphasis added).[31]

As indicated above, considerable efforts have been made to define and delimit the subject under discussion. On the one hand, as the possibilities of State interference with the property rights of private persons are endless, the above definitions can cover only some aspects of the concept. On the other hand, it is a well established rule that a definition must cover the relevant aspects and exclude the irrelevant ones. Having these in mind, if one intends to give a definition of the concept of indirect expropriation, it cannot be a precise one. Therefore, it seems appropriate to suggest a test or a combination of tests, as shown below, which might be useful for this purpose:

(1) Attribution of an action or omission to the State.

(2) The State's intention to interfere with alien property.

(3) Character of the State interference, for example, unreasonableness of the interference.

(4) Duration of State interference.

(5) Extent of the gain to the State and/or loss to the affected person.

Having examined the terminology and the definition of the subject, it is timely now to consider the crucial questions of attributability and intention.

3. The Question of Attribution

Article 3 of the International Law Commission Draft Articles on State Responsibility provides that:

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[31] Piran, op. cit., at 146.

> There is an internationally wrongful act of a State when (a) conduct consisting of an action or omission is attributable to the State under international law.[32]

Unlike direct expropriation, in an indirect expropriation the attributability test plays a significant role in establishing State responsibility. Put in technical terms, unless the conduct is directly or indirectly attributable to the State, the expropriation cannot involve the State in responsibility. International tribunals have paid due attention to the significance of the issue, and it has been treated as a vital condition for a taking. For example, in the *Amco* case,[33] a dispute between Indonesia and a foreign investor over the expropriation of investment and the withdrawal of an investment licence, the tribunal, under the auspices of International Centre for the Settlement of Investment Disputes ('ICSID') held that:

> As a *conditio sine qua non* there shall exist a taking of private property and that such taking shall have been executed or instigated by a government, on behalf of a government or by an act which otherwise is *attributable to a government* (emphasis added).[34]

Furthermore, having examined the record, the tribunal reached the conclusion that the take-over in question was affected by the Indonesian army, and this act was therefore attributable to the Government of Indonesia.[35] It follows that where the armed forces of a State are involved in an expropriation of property the attribution of the act to the State concerned is clear, provided that they act on behalf of the government.

The Iran-US Claims Tribunal also dealt with the question of attribution. The latter test has been considered as an essential prerequisite for any indirect expropriation. In the *Otis Elevator* case, for instance, the Tribunal stated that:

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32 2 Y.B.I.L.C. (1980) part 2, at 30.

33 *Amco Asia Corporation et al v. The Republic of Indonesia* (Award of the merits), Award of 9 December 1983, *reprinted in* 24 I.L.M. (1985) 1022.

34 Ibid., at 1025, para. 158.

35 Ibid., at 1027, para. 172.

> The Tribunal must ... examine the acts of interference Otis complains of and determine whether any or all are *attributable to the Government of Iran* and whether any or all, by themselves or collectively, constitute a sufficient degree of interference to warrant a finding that a deprivation of property has occurred (emphasis added).[36]

The same Tribunal, in the *Petrolane* case,[37] held that although the claimant lost control of its equipment, office and fixed assets, it was not established that such a loss was attributable to the Government of Iran. Likewise, the United States Foreign Claims Commission, in the processing of the Iranian claims, followed the same principle. The Commission, in a case before it, ruled that a claim for expropriation of property would be admissible only if there was enough evidence showing that an individual or individuals or an entity acting for the government have expropriated the property.[38]

The relevant norms of international law on attributability draw a distinction between public and private acts.[39] A State has no responsibility for the acts of private individuals, except in special circumstances. It is, however, liable for its own acts and omissions; in this context, the State is identified with its governmental apparatus. It includes the legislature and the judiciary, as well as the executive.[40]

The legislative arm of a State may cause liability for the State. According to Brownlie, the affected alien "must establish damage consequent on the implementation of legislation or the omission to legislate."[41] The judicial organs,

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[36] *Otis Elevator Company v. The Islamic Republic of Iran and Bank Mellat*, Award No. 304-282-2 (29 April 1987), *reprinted in* 14 Iran-U.S. C.T.R. 283 at 293, para. 29.

[37] *Petrolane Inc. et al. v. The Islamic Republic of Iran et al.*, Award No. 518-131-2 (14 August, 1991), *reprinted in* 27 Iran-U.S. C.T.R. 64 at 92, para. 83. The Tribunal, in *Pointon* Award, op. cit. (note 12), held that "In order to meet their burden of proof the Claimants must establish two distinct elements ... second, that an expropriation or other measures affecting their property rights, attributable to Iran, took place." Ibid., at 59, para. 30.

[38] See Piran, op. cit., at 157, n. 53.

[39] See Chapter II entitled 'The Act of the State under International Law' of the ILC Draft Articles on State Responsibility (http://www.un.org/law/ilc/reports/1996/96repfra.htm).

[40] Akehurst, op. cit., at 89.

[41] I. Brownlie, *Principles of Public International Law* (5th ed.), Clarendon Press, Oxford (1998) at 452.

i.e. courts of justice of a State, may also bring about responsibility for the State through their judgments. The Iran-US Claims Tribunal, in the *Oil Field of Texas* case, confirmed that the decision of a court may amount to expropriation. It was held that:

> It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is *attributable to the State of the court* (emphasis added).[42]

After the Revolution in Iran, as far as the executive branch of a State is concerned, several institutions, including the Revolutionary Guards, the Revolutionary Committees and the Workers' Councils were created, in addition to the traditional organs, such as army and police. Since their real legal status was unclear, the Iran-US Claims Tribunal was faced with the establishment of a link between the acts of those institutions and the newly emerged Government.

As to the Revolutionary Guards and Committees, the Tribunal considered them as State organs whose acts are imputable to the Government of Iran, and the latter is liable for their actions. In the *William Pereira* case,[43] for instance, the claimant alleged that his assets were expropriated by the Revolutionary Guards, and as a result Iran was liable for them. After examining the case, the Tribunal held that the Government of Iran was responsible for the acts of the Revolutionary Guards. In the same vein, the Tribunal in the *Sola Tiles* case ruled that "it is well-settled that the Revolutionary Committees are among those organs whose acts are attributable to the Government of Iran, which is responsible for them as a matter of law."[44]

In some indirect expropriation cases presented to the same Tribunal, claimants contended that their properties were expropriated by the Government

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[42] *Oil Field of Texas inc. v. The Islamic Republic of Iran and National Iranian Oil Company*, Award No. 285-43-1 (8 October 1986), *reprinted in* 12 Iran-U.S. C.T.R. 308 at 318, para. 42.

[43] *William L. Pereira Associates, Iran v. The Islamic Republic of Iran*, Award No. 116-1-3 (17 March 1984), *reprinted in* 5 Iran-U.S. C.T.R. 198 at 226-227.

[44] *Sola Tiles Inc. v. The Islamic Republic of Iran*, Award No. 298-317-1 (22 April 1987), *reprinted in* 14 Iran-U.S. C.T.R. 223 at 233, para. 40.

of Iran through the Workers' Councils. For example, in the *Schering* case, the claimant alleged that the property belonging to its subsidiary was expropriated by the Workers' Council of the company. In examining whether such a council could be characterised as a State organ and its actions could be attributable to Iran, the Tribunal held that:

> The Constitutional and regulatory framework for the creation of Workers' Councils do not indicate that the Councils were to have other duties than basically representing the workers' interests ... That the formation of the Councils was initiated by the State does not itself imply that the Councils were to function as part of the State machinery.[45]

With regard to this statement, the Tribunal held no liability for the Government of Iran for the actions of the Council, and hence dismissed the case. It is worth noting that Aldrich, the American arbitrator to the Tribunal, lends support to the Tribunal's finding on the issue. In his comment on the award in this context, he observes that "it seems clear that the Tribunal correctly held that the acts of workers and workers' councils by themselves were not attributable to the Government of Iran."[46]

The last point about the question of attribution, in the practice of the Iran-US Claims Tribunal, relates to State owned commercial entities which possess separate legal personality, for instance, banks. The question raised is whether the actions of such entities are attributable to the Government of Iran and whether Iran is liable. In the *International Technical Products* case,[47] the issue was alleged expropriation of a building belonging to the claimant by Bank Tejarat, a government-owned bank, for which the Government of Iran was responsible.

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[45] *Schering Corporation v. The Islamic Republic of Iran*, Award No. 122-38-3 (16 April 184), *reprinted in* 5 Iran-U.S. C.T.R. 361 at 370. See also the Tribunal's Awards in the *Eastman Kodak Company et al v. The Islamic Republic of Iran et al.*, Award No. 329-227/12384-3 (11 November 1987), *reprinted in* 17 Iran-U.S. C.T.R. 153, and the *Otis Elevator* Award, op. cit., at 294, para. 33.

[46] Aldrich, op. cit., at 602-603.

[47] *International Technical Products Corporation et al. v. The Islamic Republic of Iran et al.*, Award No. 196-302-3 (24 October 1985), *reprinted in* 9 Iran-U.S. C.T.R. 206. See also the Tribunal's award in *Flexi-Van Leasing Inc. v. The Islamic Republic of Iran*, Award No. 259-36-1 (13 October 1986), *reprinted in* 12 ibid., 335.

The Tribunal ruled that in becoming the owner of the claimant's building the Bank acted in its commercial capacity, not as a governmental organ. The action, therefore, was not attributable to the Government of Iran. It was also held that the mere fact of State control over a commercial entity is not sufficient to hold the State concerned liable for the acts of such entities. Rather it would be required to establish that the acts are clearly attributable to the government.

The above survey of the case law of the Iran-US Claims Tribunal and others indicates that for the purpose of State responsibility, the test of attribution is of decisive importance. Also, for attribution, the status of the organ to whose direct acts deprivatory events can be ascribed plays a significant role.

4. The Question of Intent

In the previous section we have seen that, in order to establish liability for expropriation, it is necessary that the acts or omissions which resulted in depriving the alien of his property should be attributed to the State. We now come to the question of whether the intention of a government is also relevant in establishing its responsibility for an indirect expropriation. Jurists are divided on the issue. Some deny that such an intention is a necessary factor in establishing State responsibility. Among them, Aldrich, Pellonpää and Fitzmaurice may be recalled. Having surveyed the Iran-US Claims Tribunal's case law in this regard, Aldrich concludes that "Liability is not affected by the intent or absence of intent attributable to the state."[48] Pellonpää and Fitzmaurice, writers on this Tribunal, qualify their position, however, by stating that:

> This ... does not preclude the possibility of intention being a condition for responsibility in the sense of primary rules of conduct defining specific cause of action (e.g. taking), as distinct from general rules of State responsibility.[49]

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[48] Aldrich, op. cit., at 609.

[49] M. Pellonpää and M. Fitzmaurice, "Taking of Property in the Practice of the Iran-United States Claims Tribunal", 19 N.Y.I.L. (1988) 53 at 80.

Others, such as Piran,[50] after studying the issue in the practice of the same Tribunal, maintain that the element of intention plays an important role in determining whether an indirect expropriation has occurred. He has drawn a distinction between two types of intentions. First, the intention to expropriate property through indirect methods. Second, the intention in acts and interferences which when combined and continued over time would potentially turn into a situation in which the occurrence of an expropriation can be assumed. With regard to the former, the same writer observes that the intention of the government is not a prerequisite for liability for indirect expropriation, since normally either there is no such intention at first, or if there were, it could be denied before the judge. As to the latter, Piran states that the acts and interferences must be deliberate before one can conclude that an indirect expropriation has taken place. He further noted that it seems unreasonable if one assumes that a government is liable for a deprivation in which no deliberate act is attributed to it. To him, this assumption:

> would mean that the only criterion for finding of expropriation is the deprivation of the owner in a State's domain, no matter whether the State has done anything on purpose or that what happened to the property was accidental or the like.[51]

The same author points out that "total disregard of intention would lead to absolute responsibility, which is prescribed only in exceptional circumstances as for some ultra hazardous activity."[52]

The European Court of Human Rights, in the *Sporrong and Lonnroth* case (an oft-quoted case in this context) endorsed the significance of intention. Thus, the Court held that "the expropriation permits were not intended to limit or control such use."[53]

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50 Piran, op. cit., at 172-174.

51 Ibid., at 174.

52 Ibid.

53 *Sporrong and Lonnroth v. The Government of Sweden*, Judgment of 23 September 1982, E.C.H.R. (1982), Series A, No. 52, 7 at 25, para. 65.

The question of intent was also discussed in several cases of the Iran-US Claims Tribunal. It appears that the Tribunal has in some cases denied that intention to expropriate is a condition for liability. In the *Starrett* case, for example, it was held that:

> It is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them.[54]

The most explicit statement on the issue can be found in the *Tippetts* case. There the Tribunal stated that:

> The intent of the government is less important than the effects of the measures on the owner, and the form of the measure of control or interference is less important than the reality of their impact. [55]

The Tribunal, in the *Sea-Land* case, however, confirmed that a finding of expropriation requires a finding that the State concerned intended to expropriate the property. The Tribunal ruled that:

> A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was *deliberate governmental interference* with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment (emphasis added). [56]

For some,[57] there was contradiction between the Tribunal's findings in the *Tippetts* case and in the *Sea-Land* case, particularly between the above-quoted statements. Piran[58] has also noticed the confusion and suggested a solution. He referred to the distinction correctly made, as discussed above, between the

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[54] *Starrett Housing Corporation et al. v. The Islamic Republic of Iran et al.*, Award No. Interlocutory 32-24-1 (19 December 1983), *reprinted in* 4 Iran-U.S. C.T.R. 122 at 154.

[55] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran et al.*, Award No. 141-7-2 (29 June 1984), *reprinted in* 6 Iran-U.S. C.T.R. 219 at 225.

[56] *Sea-Land Services Inc. v. The Islamic Republic of Iran et al.*, Award No. 135-33-1 (20 June 1984), *reprinted in* 6 Iran-U.S. C.T.R. 149 at 166.

[57] Pellonpää and Fitzmaurice, op. cit., at 80-85.

[58] Piran, op. cit., at 176.

intention to expropriate and the intention in acts and interferences which lead to the conclusion of an indirect expropriation. The same writer further noted that the Tribunal's holding in the *Tippetts* case, that the intention of the government is less important than the effects of the measures on the owner, refers to the initial intention to expropriate. In the *Sea-land* case, however, the reference to the requirement of deliberate action by the government concerns the interferences and actions which could amount to a conclusion of an indirect expropriation. Piran goes on to say:

> No need to say that the Tribunal in the *Tippetts* Award states that the intention of the government is less important; it does not say that it is not important.[59]

It would be incautious of us to assume that the Tribunal's jurisprudence indicates that intention is a necessary element of the primary rule defining an expropriation. Bearing in mind Piran's proposition, however, which seems logical, one can say that intention at least plays a significant role in determining whether an indirect expropriation occurred.

5. What Acts of the State Constitute Indirect Expropriation?

Having examined questions of attributability and intention, we have, in fact, studied the subjective aspect of State responsibility regarding an indirect expropriation. Now we must assess the objective aspect of this matter.[60] Put in technical terms, the issue under discussion in this section is whether the encroachment, imputable to the State, in the property rights of an alien is sufficient to be characterised as an indirect expropriation. The types of acts and interferences which amount to expropriation and which attract the concern of international law, are by no means settled. The reasons, as shown above, go back to the very diverse possibilities of State intervention in the property rights of private persons, and hence the absence of generally recognised criteria for indirect expropriation.

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[59] Ibid.

[60] Note that the discussion on the objective and/or subjective theories of State responsibility is not our concern in this thesis.

Despite this fact, some commentators have taken a general approach to the subject. Among older legal writings, Doman's article is worth noting. He has treated the issue in these terms:

> The nationalization acts, being *de jure* expropriations, have made conspicuous the gaps in the existing categories and devices of international law. Exorbitant taxation, interference with corporate powers, expulsion of managers delegated by stockholders, are examples of *de facto* expropriations against which the arsenal of international law has not yet found defenses.[61]

Writing in 1962, Christie, in his well-known analysis of the state of international law on this question, observes that although interference with an alien's property may constitute expropriation, legal title to the property remains with the owner. He continues:

> ... even though the respondent State may specifically disclaim any such intention. But, while the principle may be clear, its application to particular situations of fact is not. There will, of course, be some easy cases, but there will be many difficult cases as well.[62]

Schwarzenberger[63] is of the opinion that interference with foreign property, through measures such as taxation or devaluation of the national currency, normally does not constitute an expropriation. Under particular circumstances, however, such action, as well as other forms of interference, may amount to creeping nationalisation. Akehurst[64] took a similar view and referred to additional governmental acts, including exchange controls, restrictions on the remittance of profits, refusal to issue export licences and so on. He further states that these measures are normally permitted by international law, provided that they are not done for an improper motive. Having examined the issue, one commentator concludes that "Liability does not arise from actions that are non-discriminatory and are within the commonly accepted taxation and police powers

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61 Doman, op. cit., at 1129.

62 G. C. Christie, "What Constitutes a Taking of Property under International Law", 38 B.Y.I.L. (1962) 305 at 309.

63 G. Schwarzenberger, *Foreign Investments and International Law*, Stevens & Sons, London (1969) at 4.

64 Akehurst, op. cit., at 96.

of states."[65] Writing in 1994, Sornarajah has also noticed the difficulty of formulating a single principle that identifies all types of governmental interferences which could amount to expropriation and which could incur the responsibility of the host State. In his words:

> Though it is clear that there are categories of takings outside the outright acts of nationalisation, the problem lies in formulating a single general principle that identifies all these takings. If one general criteria is to be attempted, it will have to involve some broad notion of governmental interference with the peaceful enjoyment of the rights, enjoyment and control of the property by the alien. But it is clear that not all such interferences amount to taking which attracts the concern of international law.[66]

One author observes that although actions short of direct possession of the property may be accepted as an expropriation, "only a total and permanent deprivation of the owner may cause a claim for expropriation."[67] Piran further noted that "State actions which might have a partial, ephemeral or diminishing effect on the property and its value is not considered expropriation."[68] A similar thought has been expressed in the writings of other scholars, such as Weston,[69] Higgins,[70] Jain,[71] Dolzer[72] and Shaw.[73]

National and regional courts, foreign claims commissions and international courts and tribunals have also touched upon the issue. Their decisions and awards suggest criteria which may be useful for identification of indirect expropriation.

On the national level, an award of an American tribunal in the *Revere* case[74] is significant in this context. The dispute was over the interpretation of an

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65 Aldrich, op. cit., at 609.
66 Sornarajah, op. cit., at 282.
67 Piran, op. cit., at 148.
68 Ibid.
69 Weston, op. cit. (note 9).
70 Higgins, op. cit. (note 5).
71 Jain, op. cit. (note 8).
72 R. Dolzer, "Expropriation and Nationalization", in Vol. 8, Encycl. P.I.L., 214.
73 M. N. Shaw, *International Law* (4th ed.), Cambridge University Press (1997) at 573.
74 *Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation* (OPIC), Arbitral Award of August 24, 1978, *reprinted in* 56 I.L.R. 258

investment insurance contract. The claimant had entered into a 25 year concession agreement for the mining of bauxite with the Jamaican Government in 1967. The agreement contained a stabilisation clause that taxes and royalties would remain fixed for the agreed duration. A few years later, the Government of Jamaica increased the royalties on the ground of changed circumstances. The claimant company closed down its plants and claimed compensation under its insurance contract. It is obvious that there was no direct expropriation by Jamaica. The tribunal, in a two to three award, held that the conduct of the Jamaican Government constituted a taking. It ruled that:

> In our view the effects of the Jamaican Government's actions in repudiating its long-term commitments ... have substantially the same impact on effective control over use and operation ...[75]

Dissenting Arbitrator Bergan, however, observes that "by any reasonable standard the bauxite levy which Revere treats as expropriatory is within the range of the proper taxing power of the Jamaican nation."[76] The authority of the award was denied on the ground that the tribunal was a domestic one.[77]

The judgment of the European Court of Human rights in the *Sporrong and Lonnroth* case is highly relevant to the question. In this case, the claimants contended that through long-term expropriation permits and prohibitions on construction over their real property by the Stockholm authorities, they were effectively deprived of the enjoyment and disposition of their property. They further claimed that by this action the Swedish Government in fact expropriated their property for which indemnification was due. Since the legal title of the property still remained in the hands of the claimants, the Court did not find that the measures in question were expropriatory in nature. Thus, it was held that:

> In the Court's opinion, all the effects complained of ... stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right, which right had become precarious, and from the

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75 Ibid., at 291.
76 Bergan's Dissenting Opinion (the Minority Opinion), in ibid., 312 at 320.
77 Sornarajah, op. cit., at 301.

> consequences of those limitations on the value of the premises. However, although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions. The Court observes in this connection that the applicants could continue to utilize their possessions and that, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibition on construction, the possibility of selling subsisted ...[78]

The United States Claims Commission, in the processing of Czechoslovakian claims, was asked whether the placing of property, real or personal, under 'national administration' constituted a taking of property. The Commission expressed the view that it did not, unless the administrator was specifically appointed to liquidate the property in question. Its view was based on the fact that the decree in question states that the action was only a temporary measure. In the case of substantial interference with personal property, such as the refusal to grant an export license for jewellery or to permit the transfer of funds abroad, as well as the suspension of payment of interest upon bonds, the same Commission also found that these acts did not amount to an expropriation which involves the responsibility of the State concerned.[79]

Among older international judicial decisions and arbitral awards, three cases are more relevant to the present context. The first is the *Chorzow Factory* case,[80] in which the PCIJ rendered one of its most celebrated judgments. The decision is often cited for its statement concerning rules of compensation, but it also contains remarks on indirect expropriation. The Court in this case ruled that by seizing the factory and its machinery, Poland also expropriated the patents and contract rights of the management company, even though the Polish Government did not intend to expropriate these particular items of property.

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78 *Sporrong and Lonnroth* Decision, op. cit., at 24-25, para. 63.

79 Christie, op. cit., at 316 and 318.

80 *Case Concerning the Factory at Chorzow* (*Germany v. Poland*), Judgment No. 7 (25 May, 1926), P.C.I.J. Series A, No. 7.

The second case is the *Norwegian Shipowners' Claims* case[81] in which there was a similar situation to the previously-mentioned case. Apart from considering the context of the award, i.e. compensation, it also dealt with the issue in hand. In essence, the case arose from the requisition by the United States Government of partially constructed ships which belonged to Norwegians. The tribunal found that the United States, by requisitioning the partially constructed ships, had, in fact, expropriated the shipbuilding contracts themselves.

The third case to have touched on the issue, the *Oscar Chinn* case,[82] was also decided by the PCIJ. The case related to the loss caused to Oscar Chinn, a British national who operated transport services on the River Congo, by a measure of the Belgian Government, which controlled the Congo at that time. The measure was the reduction of the freight charges of the Unatra, a private firm in which the Government was a majority shareholder. This resulted in the creation of a monopoly in favour of the Unatra to the detriment of Chinn who, in fact, was the only other operator on the River. Chinn came to the conclusion that he could no longer compete, and he therefore, shut down the business. The United Kingdom took up the case and, on behalf of its national, brought proceedings in the PCIJ against Belgium. The British Government argued that the Belgian measure constituted an expropriation of Chinn's property rights for which Belgium was liable, based both on treaties between the two States and on customary international law. The Court, however, dismissed the British argument and ruled that the Belgian measure did not amount to an expropriation.

Moreover, a fairly old case which may be relevant to our discussion is the *Sapphire* case.[83] In 1958, a concession agreement was entered into between Sapphire, a Canadian corporation, and the National Iranian Oil Company (NIOC - a State entity). The latter was constantly interfering with the operations of the

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81 *The Norwegian Shipowners' Claims* case (*Norway v. United States*), Award of 13 October, 1922, 1 R.I.A.A. (1922) 307.

82 *Oscar Chinn* case (*United Kingdom v. Belgium*), Judgment of 12 December 1934, P.C.I.J. Series A/B, No. 63, 65.

83 *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, Award of March 15, 1963, I.L.R. (1967) 136.

former. While the claimant, resorting to the agreement, contended that it had the 'full exclusive and effective management and control' of the operation, the respondent claimed that under the contract, their consent was required for the operations. The respondent insisted on the right of veto over all aspects of the operation. The dispute over the interpretation of the agreement was referred to arbitration. The NIOC actions were considered to constitute an expropriation by Sole Arbitrator Cavin. Commenting on the award, however, Sornarajah observes:

> But in the changed structure of the petroleum industry in modern times, control of operations by the state oil corporation have become so commonplace that such interference can hardly be said to be a taking if the foreign oil company packs up and leaves as the oil company in the *Sapphire Arbitration* did.[84]

As to recent international decisions, several awards including in particular the Iran-US Claims Tribunal's, are highly relevant in the present context, and will be dealt with in the remainder of this chapter. In the *Barcelona Traction* case the question of indirect expropriation was also raised, but the International Court of Justice (hereinafter the 'ICJ') did not examine it.[85]

The types of governmental acts and interferences which could amount to indirect expropriations and which involve the host State's responsibility, have been identified in legal writings and in judicial decisions and arbitral awards. For convenience of discussion they may be grouped as follows:

(1) physical seizure of property;

(2) forced sale of property;

(3) indigenisation measures;

(4) refusal to return property and failure to assist its export;

(5) exercising management control over property; and

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[84] Sornarajah, op. cit., at 301.

[85] However, see the Separate Opinions of Judge Sir G. Fitzmaurice at 106, and Judge A. Gros at 256 in the *Barcelona Traction* case, op. cit. (note 10).

(6) expropriation and regulation;

(6.1) regulatory measures to prohibit repatriation of funds;

(6.2) withdrawal of permits and licenses;

(6.3) confiscatory taxation.

5.1 Physical Seizure of Property

Under this heading, cases involving seizure of tangible property and real property will be considered. In principle, where property is physically seized, two tests, namely attribution and intention, must be applied. Thus, the mere physical seizure of property with no intention to confiscate it, is not sufficient for establishing the responsibility of the offending State for its wrongful act.[86] It may be that private property is seized by the State temporarily, for various reasons, but whether it ripens into indirect expropriation depends upon the State's subsequent attitudes towards the property in question.[87]

As to cases involving physical seizure of tangible property, the awards of the Iran-US Claims Tribunal are relevant to the issue. In the *Computer Sciences* case,[88] the claimant contended that office equipment and furniture belonging to its Tehran subsidiary were expropriated by the representatives of the Revolutionary Committee who entered the office and ordered all employees to leave and remove nothing. The Tribunal, after examining the claimant's affidavit, held that:

> This evidence has not been rebutted, and the Tribunal is satisfied that CSCSI [the Claimant's subsidiary] was thus denied the use of its office equipment and that it was thereafter denied access to the equipment.[89]

In another similar case, the *Dames and Moore* case, the Tribunal ruled that:

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[86] Piran, op. cit., at 177.
[87] Christie, op. cit., at 322.
[88] *Computer Sciences Corporation v. The Islamic Republic of Iran et al.*, Award No. 221-65-1 (16 April 1986), *reprinted in* 10 Iran-U.S. C.T.R. 269.
[89] Ibid., at 303.

> The unilateral taking of possession of property and the denial of its use to the rightful owners may amount to an expropriation even without a formal decree regarding title to the property.[90]

Besides office equipment and the like, cash and personal items, such as watches were also the subject-matter of claimants' contentions before this Tribunal.[91]

Regarding real property, a very useful analysis of some cases is given by Christie in his valuable article.[92] In the *Jonas King* case,[93] the Government of Greece interfered with the claimant's two tracts of land. Though the ownership of land remained with King, he was deprived of the free use of it. The dispute was settled through negotiation, and the claimant was paid compensation. In the *De Sabla* case,[94] in pursuance of land reforms, the Panamanian Government transferred portions of the claimant's land, a United States citizen, to its nationals. The case was decided by a United States-Panama Commission. Panama argued that as the claimant did not intervene in the required proceedings to protect her title, she, in fact, waived her rights in this regard. The Commission dismissed Panama's argument and stated that the Panamanian authorities had knowledge of her title. It therefore held that the portion of her land over which there was conflicting registered titles must be treated as taken.

A similar case was the *Jeno Hartmann* case[95] which was decided by the United States Foreign Claims Commission. There the claimant's land was taken by the Hungarian Government. The latter argued that title to the land did not convey State ownership. The Commission nevertheless ruled that the claimant's

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[90] *Dames and Moore v. The Islamic Republic of Iran et al.*, Award No. 97-54-3 (20 December 1983), *reprinted in* 4 Iran-U.S. C.T.R. 212 at 223.

[91] See, for example, the Tribunal's Awards in (*The United States on behalf of) Kenneth P. Yeager v. The Islamic Republic of Iran*, Award No. 324-10199-1 (2 November 1987), *reprinted in* 17 Iran-U.S. C.T.R. 92 (*The United States on behalf of) Leonard and Mavis Daley v. The Islamic Republic of Iran*, Award No. 360-10514-1 (20 April 1988), *reprinted in* 18 ibid., 232.

[92] Christie, op. cit., at 312-316.

[93] See *Moore's Digest of International Law*, Vol. 6, Government Printing Office, Washington D.C. (1906) at 262-264.

[94] The *De Sabla* case (*United States v. Panama*), Award of 29 June, 1933, 6 R.I.A.A. 358, *reprinted* also *in* 28 A.J.I.L. (1934) 602.

[95] Christie, op. cit., at 313-314.

property had been expropriated. Its finding was based on the fact that the "claimant could not use or enjoy the property as he saw fit, nor could he alienate it."[96]

The last case mentioned by Christie was the *Albert Bela Reet* case.[97] It involved the alleged expropriation of the claimant's property by the Hungarian Government, through several measures, namely the prohibition of sale, the placing of liens upon, or the occupancy of a house in which the claimant had an interest. The same Commission held that "the claimant was precluded from the free and unrestricted use of his property"[98] and the fact that the title remained with the Claimant was of little moment.

Likewise, in cases before the Iran-US Claims Tribunal, the issue was also raised. It should be noted that under Iranian laws and regulations, aliens may not own immovable property in Iran. US nationals were not exempted from this rule, therefore there is no claim by them for expropriation of real property. Individuals, however, who possess dual nationality of Iran and the United States could bring such claims before the Tribunal.[99]

5.2 Forced Sale of Property

The general view on the phenomenon is that an 'involuntary sale' is a compensatable event if there is an inadequate or unrealistic purchase price. This proposition was endorsed by Weston, in his more extensive article on indirect expropriation. He comments:

> What has just been said in connection with transfers made under threat of 'expropriation' ... should apply to 'involuntary sales' generally. Assuming they are price-deficient, 'involuntary sales' of foreign wealth should be considered the functional equivalent of deprivation giving rise to compensatory responsibility.[100]

Commenting on the cases in this context, Professor Higgins observes:

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96 Ibid., at 314.
97 Ibid.
98 Ibid.
99 See further Piran, op. cit., at 213-218.
100 Weston, op. cit., at 148.

> They do not seem to affirm that forced sales at unrealistic values properly give rise to claims that there has been a property deprivation, for which a claim for reparation is appropriate.[101]

Likewise, having examined the concept of indirect expropriation, Christie concludes that:

> Where a State compels an alien to sell his property for less than its true value either to the State or to a third party, a compensatable claim arises.[102]

Explaining the meaning of inadequate or unrealistic purchase price, the same writer states that "the price received must have been such a mere pittance that it would shock the minds of reasonable men."[103] Burden of proof rests on a claimant who alleges that he sold his property for a ridiculously low price.

Sornarajah[104] points out that the host State is not responsible if, during civil unrest, the alien has to flee the State and is forced to sell off his property cheaply. This is the case if the property is abandoned by the alien. However, the State would be liable when it had itself brought about the circumstances that led to aliens, as a class, leaving the State in a hurry. His statement regarding the abandonment of the property has been explicitly confirmed by the Iran-US Claims Tribunal. The latter, in the *Painting* case,[105] held that a State is not responsible if the property had been abandoned by the alien unless there is some contractual obligation on the part of the State to protect the property. If, however, the forced sales of the alien's property are accompanied by threats to his physical security through the State's agents, there is an expropriation by the State for which it is liable.[106]

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101 Higgins, op. cit., at 326.
102 Christie, op. cit., at 338.
103 Ibid., at 328.
104 Sornarajah, op. cit. (note 1), at 285.
105 (*The United States on behalf of) United Painting Company Inc. v. The Islamic Republic of Iran*, Award No. 458-11286-3 (20 December 1989), *reprinted in* 23 Iran-U.S. C.T.R. 351 at 366-370.
106 Christie, op. cit., at 329.

There are many cases in this context in Weston's article. It seems useful to discuss them briefly. In a very old case, *Gowen and Copeland*,[107] (1854) two US nationals, Gowen and Copeland, discovered guano deposits in the islands near the Venezuelan coast. In the following year they were ordered by the Venezuelan Government to leave the islands. They refused to do so, however, on the grounds that Venezuela had failed to give prior notice of its claim over the islands. Meanwhile, the Philadelphia Guano Company, a private company, obtained a lease on the islands from the Venezuelan Government. The machinery, buildings and materials belonging to Gowen and Copeland were seized by Venezuelan soldiers. Eventually, the claimants entered into a contract with the Philadelphia Company. Under the contract, they were permitted to continue the work for a specific period of time, provided the claimants' installations were to be transferred to the Philadelphia Company. This was characterised by the Commission as being "in the nature of a forced sale, which under the circumstances was a substantial appropriation of the property."[108]

There is a similarity in the *Ellermann* case.[109] In 1921 the claimant Ellermann, a German subject, was notified by the Polish authorities that his land was placed under liquidation and that he had to sell it within three months. He received no offers acceptable to him. In 1923 when he was ordered to leave the country, his receiver-agent (the person he appointed to administer the land sales) was expelled. The case was decided by a mixed tribunal, which held that the claimant was effectively deprived of his land as of the date when his receiver-agent was expelled from Poland.

Moreover, there are several forced sale cases which arose out of World War II. This is why some writers[110] are of the opinion that much of the authority in this context originates from situations where there had been racial discrimination. Thus, the expropriation would have been an international wrong

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107 Weston, op. cit., at 134-135.
108 Ibid., at 135.
109 Ibid., at 136.
110 Sornarajah, op. cit., at 285.

independently of the forced nature of the sale. Put briefly, this category of cases involved claims arising from expulsion motivated by racism.[111]

A fairly recent case which may be relevant to the issue in hand is the *ELSI* case.[112] The dispute arose out of the requisition by the Italian Government of the plant and related assets of Elettronica Sicula S.P.A. (hereinafter 'ELSI'), an Italian company, wholly-owned by two United States corporations. The company went bankrupt. Under Italian law, where a company is facing bankruptcy, it should be dissolved. Similarly, the facts of the case demonstrated that the failure of the company had affected employment in an already economically depressed part of Italy, i.e. Sicily, and led to unrest. These situations resulted in interference by the Italian Government with the company's affairs; it was dissolved and its assets sold. The forced dissolution of ELSI and the sales of its assets were not considered expropriation by the ICJ for which the Italian Government bore responsibility.

The question of involuntary sales was also considered, albeit in a very few cases, by the Iran-US Claims Tribunal. In the *American Bell International* case,[113] the claimant, American Bell International Inc. (ABII), left some money in the Rail, the Iranian currency, in a bank for the settlement of its outstanding obligations. After the settlement, ABII requested the release of the balance of the funds. Instead, the Telecommunications Company of Iran (TCI), a State entity and the Respondent, demanded the transfer of the balance of the funds to its account. The ABII's representative reported that he was informed that:

> Non-compliance with the payment request would have serious personal consequences for [him] and would in any case not stop TCI obtaining access to ABII's funds.[114]

Given the facts of the case, the Tribunal was able to conclude that:

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[111] See further ibid., and Christie, op. cit., at 326-327.

[112] *ELSI* Judgment, op. cit. (note 10).

[113] *American Bell International In. v. The Islamic Republic of Iran et al.*, Award No. 255-48-3 (19 September 1986), *reprinted in* 12 Iran-U.S. C.T.R. 170.

[114] Ibid., at 214, para. 148.

> Where, as here, both the *purpose and effect of the acts are totally to deprive one of funds without one's voluntarily given consent*, the finding of a compensable taking or appropriation under any applicable law - international or domestic - is inevitable, unless there is clear justification for the seizure (emphasis added).[115]

In the *International Technical Products* case, the Tribunal also addressed the issue. The dispute, as indicated earlier in this chapter,[116] was over the allegation of the forced sale of the claimant's building in Iran. After examining the case, the Tribunal arrived at the conclusion that the loss of property did not happen before 19 January, 1981 - the Tribunal's jurisdictional deadline. In the circumstances of this case there was no need to discuss the question of forced sale. In reaching the conclusion, however, it briefly dealt with the issue. In essence, the Tribunal was divided on the question. While the majority were not persuaded that the sale was forced, Arbitrator Brower[117] took a different view and accepted the claimant's contention that the sale was forced. In their comment on the award, it seems that Pellonpää and Fitzmaurice[118] lent support to the majority view.

Writing on the subject, Sornarajah referred to forced sale of shares.[119] He raised the question of whether, under international law, there is direct protection for the shareholders of a company whose shares have been destroyed as a result of State intervention. Having examined the judgment of the *Barcelona Traction* case, the same author concludes that:

> In the two decades that have passed since the judgment there has been no evolution of international law which entitles the shareholders in a foreign company incorporated in a third state to receive protection directly from the state of which they are nationals except through treaty laws.

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115 Ibid., para. 150.
116 *International Technical Products* case, op. cit. (note 47).
117 The Concurring and Dissenting Opinion of Judge C. N. Brower in ibid., at 243-247.
118 Pellonpää and Fitzmaurice, op. cit., at 90.
119 Sornarajah, op. cit., at 286-290.

5.3 Indigenisation Measures

A similar technique to the forced sale of property may be said to be indigenisation measures.[120] The measures involve "a progressive transfer of ownership from foreign interests into the hands of the local shareholders."[121] A number of Latin American as well as many newly independent African and Asian countries, seeking to ensure that the termination of political control also meant the termination of economic control, resorted to these measures.[122] As previously indicated, in formal or direct expropriation, the expropriating State takes over a foreign company and runs it itself or through the State entity. Put briefly, title of a foreign company is transferred to the State. Although in both direct expropriation and indigenisation measures (albeit progressively in the latter) the ownership of a foreign company is transferred to the State, they differ from each other.

Two factors have been mentioned to distinguish such measures from direct expropriation.[123] Firstly, there is no vesting of any property in the hands of the State or the State organ. In other words, there is no direct or even indirect enrichment of the government as a result of the measures. However, some writers took the view that there may be property deprivation without any taking by the State.[124] Secondly, there may be no change in management control effected by indigenisation measures. Unlike direct expropriation in which management control of the business in question normally transfers to the State or the State agent, the control may remain in the hands of the foreign investor. It

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[120] Since the transfer of the title is involuntary and the timing of the transfer of the shares in the foreign-owned company is not left to its owner, there is a resemblance to forced sale in indigenisation measures. Ibid., at 292.

[121] Ibid., at 291.

[122] For the Nigerian case, see T. J. Biersteker, "*Multinationals, the State and Control of the Nigerian Economy*", Princeton University Press, New Jersey (1987).

[123] Ibid., at 291-292.

[124] B. H. Weston, "The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Reflections upon the Contemporary International Law Debate", in R. B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, Charlottesville, University Press of Virginia (1983) 89.

may also be desired that the foreign investor's management run the company, due to the lack of skills of the local shareholders, particularly in the initial stages.

Sornarajah further noted that when, eventually, foreign managers are replaced by local shareholders, the replacement will be carried out under "the corporate laws of the host State and not through any governmental fiat."[125]

Unlike forced sale, which may be, if there is an attributable unrealistic purchase price to the State, judged as an indirect expropriation, indigenisation measures do not constitute an expropriation for which the State would be liable. As Sornarajah puts it:

> As such, it falls within the regulatory controls [that] a state takes in pursuance of its sovereign rights over economic matters rather than into the category of taking for which the state had to pay compensation.[126]

The question of indigenisation was raised in the *Barcelona Traction* case. In this case there was an allegation that the intention of Spain in interfering with the company's affairs was to transfer the shares into the hands of the local shareholders. Judge Tanaka, who ruled in favour of Belgium, spoke of 'hispanicisation' of the Barcelona Traction company. In his words:

> The Belgian Government also contends that individual judicial and administrative measures which constitute separate subjects of complaint, were combined into an integral whole to bring about the 'hispanicization' of a prosperous foreign enterprise.[127]

Nonetheless, he did not think that the technique employed by Spain was a clear violation of international law.

There was a similar situation in the *ELSI* case.[128] In this case, as previously indicated, as a result of the sale in bankruptcy, the shares of ELSI, an American-owned company, were transferred into the hands of Italian

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[125] Sornarajah, op. cit., at 292.
[126] Ibid., at 293.
[127] The Separate Opinion of Judge K. Tanaka in the *Barcelona Traction* case, op. cit., 115 at 151.
[128] *ELSI* Judgment, op. cit. (note 10).

shareholders. The United States Government objected to the process by which the transfer of shares was carried out. It argued that the requisition of ELSI by the Italian Government led to the bankruptcy, and subsequent sale of the company. The ICJ, however, did not hold that the requisition of the company constituted indirect expropriation. The Court relied on the fact that "ELSI, if not already insolvent in Italian law before the requisition, was in so precarious a state that bankruptcy was inevitable."[129]

5.4 Refusal to Return Property or Failure to Assist its Export

The preceding sub-sections have been concerned with cases involving involuntary transfer of the property from its lawful owner or possessor. Here we deal with situations in which property is either temporarily under the control of the State or a State agency, (for example through a lease contract), but is not returned to its owner on the agreed date, or there is a failure on the part of the party concerned to assist in its export. There is some authority for the view that there could be an indirect expropriation in such situations.[130]

The Iran-US Claims Tribunal had the opportunity to address these questions. To the best knowledge of the present author, the Tribunal's awards may constitute the only source on the issue. In the *Oil Field of Texas* case, the claimant contended that certain oil production equipment which had been leased to the National Iranian Oil Company (NIOC - a government-owned company) was not returned to it by the latter. Additionally, under an Iranian court order, NIOC was prevented from either paying rental or returning the equipment to the claimant. Thus, the Tribunal held that there was an indirect expropriation for which the Government of Iran bore responsibility.[131]

Another case which may be relevant to the issue was case *No. B1(4)*.[132] There the claimant, the Government of Iran, requested the release of its military

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[129] Ibid., at 71, para. 119.

[130] See, *inter alia*, Pellonpää and Fitzmaurice, op. cit., at 90; Aldrich, op. cit., at 600-601 and Piran, op. cit., at 184.

[131] *Oil Field* Award, op. cit., at 319, para. 43.

[132] *The Islamic Republic of Iran v. The United States of America*, Partial Award No. 382-B1-FT (31 August 1988), *reprinted in* 19 Iran-U.S. C.T.R. 273.

assets held by the United States after the Revolution in Iran. While the respondent, the United States, relied on the President's decree to the effect that defence articles were not exportable to Iran, the Tribunal, having concluded that the United States' refusal to release the assets amounted to a complete deprivation of their use, went on to say that:

> Even if the United States never expressed its intention to appropriate this property and never attempted to dispose of it without Iran's authorization ... Such deprivation, undoubtedly, entails for Iran prejudicial consequences similar to those which would have been the result of an expropriation. Under international law the State responsible for such deprivation is liable to compensate ...[133]

As regards failure to assist in the export of property, the Tribunal has taken a similar view. In the *Sedco* case,[134] the claimant contended that six of its drilling rigs were left with the Respondent, the National Iranian Oil Company, after the Revolution. The claimant further alleged that, despite its demand to the Respondent to assist in exportation of the rigs from Iran, it failed to do so. The Tribunal ruled that the equipment was unreasonably held and NIOC should pay compensation.

However, in another case against the National Iranian Oil Company, the *Houston* case,[135] the Tribunal stated that the claimant failed to prove that the Revolutionary Committee, a State organ, refused to permit the export from Iran of the equipment owned by the claimant.

In the *Seismograph* case,[136] the imposition of unwarranted and unreasonable conditions by the Iranian authorities upon the export of the claimant's property was not found to be an expropriation. The Tribunal relied for its finding on the fact that although the claimant was unable to exercise one of its

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[133] Ibid., at 295, para. 70.

[134] *Sedco Inc. et al. v. National Iranian Oil Company et al.*, Award No. 309-129-3 (7 July 1987), *reprinted in* 15 Iran-U.S. C.T.R. 23.

[135] *Houston Contracting Company v. National Iranian Oil Company et al.*, Award No. 378-173-3 (22 July 1988), *reprinted in* 20 Iran-U.S. C.T.R. 3.

[136] *Seismograph Services Corporation v. The Islamic Republic of Iran et al.*, Award No. 420-443-3 (3 March 1989), *reprinted in* 22 Iran-U.S. C.T.R. 3.

contractual options regarding the disposal of its property, it remained able to sell the equipment in Iran.[137]

5.5 Exercising Management Control over Property

The discussion relating to this sub-section begins with the proposition that an owner is entitled to control and manage his property as he wishes. Any interference, therefore, with the control and management of the property, usually a proprietary interest in a company, constitutes an indirect expropriation.[138] This general rule, however, is qualified, or even undermined, by the view that, under particular circumstances, a State may interfere with the control and management of private property, without incurring international responsibility. As in the national context, in international law the regulatory power of a sovereign State could include taking over the management of property, including that of foreigners. It is well established that, in situations of crisis, governments enjoy broader powers to regulate the economic life of individuals and corporations.[139] An explicit statement to this effect was voiced by Sornarajah. In his view, the State's interference:

> With management rights of foreigners in order to protect its own economic interests is exercising a purely regulatory function for which the State need not pay compensation.[140]

Having examined the cases on this issue, Christie reached the conclusion that the right which seems to be least subject to successful interference is the right of the owner to manage his enterprise. At the same time, however, he observes:

> And yet, here *one cannot be dogmatic*. The fact that an alien employer is suddenly forced to take nationals of the local State on to his board of directors would not seem, by itself, to amount to

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[137] Ibid., at 79, para. 301.

[138] However, Sornarajah, op. cit., at 306, took the view that:
The statement that an interference with management and control of a foreign-controlled company is a taking is only a generalisation that provides a starting point for discussion and is nothing more.

[139] R. Khan, *The Iran-United States Claims Tribunal - Controversies, Cases and Contribution*, Martinus Nijhoff, Dordrecht (1990) at 180-181.

[140] Sornarajah, op. cit., at 309.

> expropriation. Nor would it seem to be expropriation if the alien owner were forced to take representatives of his labour force on to his board. There might even be circumstances where operating control over the enterprise might be *completely taken from the alien owner without rendering the State liable even for 'damages' for use* (emphasis added).[141]

Christie goes on to say that:

> Suppose a State took over certain foreign enterprises and operated them prudently, paying a fair return, perhaps the actual profits of the enterprise, to the owners. Presumably after a sufficient passage of time such action would amount to an expropriation, but how long this period might be one would not wish to hazard a guess. *If the State announced in advance that the taking would be for the duration of the 'present economic emergency'* but 'in no event' longer than, say, 'five years', it would seem doubtful whether an alien could complain that this property had been expropriated (emphasis added).[142]

After a close examination of the issue, Weston reached a similar conclusion:

> One is left to conclude that the 'State administration' of private wealth is by itself to be regarded not as a compensable event but as a temporary custodial action not amounting to a 'constructive taking'.[143]

He further noted that "genuinely conservatory 'State administrations' are not to be regarded as deprivations such as will engage international responsibility."[144]

The question of State administration of private foreign property was also examined by claims commissions and international tribunals. Thus, the United States Foreign Claims Settlement Commission, as indicated before,[145] took the view that the appointment of a 'national administration' by Czechoslovakia did not constitute an expropriation, since it was a temporary measure to be

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141 Christie, op. cit., at 333-334.
142 Ibid., at 334.
143 Weston, op. cit., at 165.
144 Ibid., at 169.
145 See our discussion in this chapter, at 213.

terminated after the Government had ascertained whether such property should be returned to the original owner or confiscated, nationalised, or disposed of in some other manner. The Commission, however, held that where a 'national administration' was specifically appointed to liquidate the business, then the placing of such property under public administration would be considered to be an expropriation.

A more relevant case in this context, is the ICJ's judgment in the *ELSI* case. Broadly speaking, there was a dispute over the extent of the regulatory power of the host State and the rights of the foreign company. The host State maintained that it had interests to protect as far as the operation of the company was concerned. As previously shown, ELSI,[146] the American-owned company in Italy which was the subject of a dispute between the United States and Italy went bankrupt and its property was sold. Due to the dismissal of some 800 workers, and to ensure that the dismissals did not affect employment in the already economically depressed area in which the company operated, the Italian Government sought to intervene in the affairs of the company.[147] Put briefly, the need for the protection of such interests entitled Italy to interfere with the management control of ELSI. The dispute was addressed by a Chamber of the ICJ. The interference with the management control of the company by the Italian Government was held to be justifiable, and hence it did not constitute an indirect expropriation. Given the facts of the case, the Court was able to conclude that:

> It is simply not possible to say that the ultimate result was the consequence of the acts or omissions of the Italian authorities, yet at the same time to ignore the most important factor, namely ELSI's *financial situation* ... the municipal courts considered that ELSI, if not already insolvent in Italian law before the requisition, *was in so precarious a state that bankruptcy was inevitable* ... even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then, if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation ... Furthermore, this

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146 *ELSI* Judgment, op. cit. (note 10).

147 Ibid., at 65, para. 108.

> requisition ... being by its terms for *a limited period*, and *liable to be overturned by administrative appeal*, could not, in the Chamber's view, amount to a 'taking'(emphasis added).[148]

This statement was explicitly endorsed by Sornarajah. The latter made a distinction between interference with a failing company or a company deserted by its manager in the course of revolutionary unrest, and a successful company. In the former, interference may seem justified by the economic interests of the host State. In the latter, however, interference could cause the State to incur responsibility, unless it can demonstrate a clear and overwhelming regulatory interest.[149] Commenting on the *ELSI* case, Sornarajah[150] observes that "The state [Italy] had a compelling interest in ensuring that the impact on its economy of the failure of the company was reduced or eliminated." In his view, the measures used by the State to "achieve this objective cannot be considered to be such an interference with the foreign investor's management rights as to amount to a compensable taking."

Similarly, in several cases before it, the Iran-US Claims Tribunal dealt with this issue. These cases involved the taking over of companies whose managers abandoned their positions and fled the country as a result of the revolutionary events in Iran. Thus, the latter enacted laws to deal with companies that were left without effective management.[151] The laws permitted the appointment of managers to companies whose managerial staff had fled the country. Under these laws, as under the pre-Revolutionary code, the Government of Iran had then appointed managers for such companies in order to meet an economic emergency which was created by mass disruptions in business life during the 1979 Revolution. The Iranian Government's arguments in these cases may be summarised as follows: (1) to avoid total collapse of the projects in question and to prevent the shut-down of such companies and financial disaster; (2) the above-

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148 Ibid., at 71, para. 119.
149 See further Sornarajah, op. cit., at 310.
150 Ibid., at 307.
151 On the issue, see Khan, op. cit., at 189-193; Piran, op. cit., at 153-155 and at 186-187, and Aldrich, op. cit., at 588, n. 14.

mentioned laws were not expropriatory in nature; and (3) the appointment of managers was 'provisional' in character and in some cases, such as *Starrett* and *Motorola*, as will be shown in this sub-section, the original managements were even invited to resume the projects in question.

In some cases, including *Starrett*, *Sedco*, *Tippetts* and *Phelps Dodge*, the Tribunal considered the appointment of managers by Iran as an expropriation. In others, such as *Otis Elevator*, *Motorola* and *Eastman Kodak*, however, the Tribunal did not find that the alleged expropriation had actually taken place. Put in technical terms, the appointment of managers in these cases was not construed as an expropriation. Let us begin with the first category.

In the *Starrett* case,[152] the claimant, which was engaged in housing projects in Tehran, contended, *inter alia*, that the Government of Iran by appointing a temporary manager for its Iranian subsidiary on 31 January 1980, in fact expropriated the company. It was also alleged that some events, which were attributable to the Government of Iran, had the cumulative effect of depriving the claimant of its property interests so as to amount to an expropriation. These events included: harassment of Starrett's personnel and consequently reduction of the work force, strikes and shortages of goods, the collapse of the banking system and the freezing of its bank accounts. However, the Tribunal stated that such events, though they led to loss of control by the claimant, were not expropriatory in nature. It held that:

> Investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lockouts, disturbances ... and even revolution. That any of these risks materialized, does not necessarily mean that property rights affected by such events can be deemed to have been taken. A revolution as such does not entitle investors to compensation under international law.[153]

Regarding the appointment of the temporary manager argument, the Tribunal did recognise that:

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[152] *Starrett* Award, op. cit. (note 54).
[153] Ibid., at 156.

> Assumption of control over property does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law.[154]

It did also concede that Starrett was invited to return to Iran to resume the Project. Nonetheless, the Tribunal took the position that the appointment of the temporary manager for Starrett's subsidiary by the Government of Iran rendered its property rights "so useless that they must be deemed to have been taken."[155]

Rejecting Starrett's argument that prior revolutionary events justified an earlier date, the Tribunal construed the date of the appointment of the temporary manager as the date of the expropriation.

This statement of the Tribunal has been criticised by some commentators. Thus, Piran[156] suggests that the reasoning of the Tribunal in this respect is not convincing. Referring to the fact that the manager was appointed temporarily and in a time of crisis, when the original managers abandoned their positions, he states that it is hard to understand how the Tribunal construed this act as an expropriation of property rights. The same author reminded the authorities of these facts, and the Tribunal's award in the case at hand in particular, which stated explicitly that the appointment of a government manager by itself is not considered as expropriation, unless such assumption of control turns into a permanent deprivation. He goes on to say that:

> In this case, the Tribunal ... takes notice that Starrett was invited to return and assume the Project. The fact that because of the Revolution certain of its managers could not return to Iran is also noted by the Tribunal as commercial risk. In such a situation, holding a government responsible for the expropriation seems unjustified and without legal ground.[157]

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154 Ibid., at 155.
155 Ibid.
156 Piran, op. cit., at 190-192. See also Khan, op. cit., at 195.
157 Ibid., at 192.

In view of the facts discussed above and the weight of the authority in this respect, as well as Piran's comment, one may conclude that the Tribunal's finding on the date of expropriation in this case is untenable.

In the *Sedco* case,[158] the Tribunal reached a similar conclusion to that of *Starrett*. The claimant, which was involved in oil drilling, claimed that the Government of Iran, by appointing temporary managers for its Iranian subsidiary, Sediran, on 22 November 1979, expropriated its shareholding interests, for which Iran bore responsibility. By virtue of the above-mentioned law, which authorised the nationalisation of companies whose debts to banks exceeded their net assets, the title to Sediran was transferred to the Government of Iran on 2 August 1980. The Tribunal construed this action of the respondent, Iran, as a taking.[159] As in the case of *Starrett*, in this case the Tribunal designated the date of the appointment of the temporary managers, i.e. 22 November 1979, as the date of taking.

Piran[160] correctly observes that the Tribunal's reasoning and finding of the expropriation in the present case seems confusing. In fact, by means of two different methods, the Tribunal came to the conclusion that Sediran, Starrett's subsidiary, was expropriated. It was taken through the transfer of its title to the Government of Iran on 2 August 1980. As indicated above, the appointment of managers, which took place on 22 November 1979, was also construed as an expropriation. To Piran, if the appointment of managers means expropriation, there was no need for the Tribunal to discuss the law, whereby the title to Sediran was transferred to the Respondent. He further states the view that if the application of the law in question was the ground for the finding of expropriation, the date of its application and transfer of title should logically be considered as the date of taking.

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158 *Sedco Inc. et al. v. National Iranian Oil Company et al.*, Interlocutory Award No. 55-129-3 (October 28, 1985), *reprinted in* 9 Iran-U.S. C.T.R. 248.

159 Ibid., at 275.

160 Piran, op. cit., at 197.

Another case in which the Tribunal construed the appointment of managers by the Iranian Government as an expropriation was the *Tippetts* case.[161] The issue was the alleged expropriation of the claimant's 50% shares in an engineering and architectural consulting partnership. The contention was based on the fact that the Government's appointment of a manager resulted in the deprivation of the claimant's enjoyment of the benefits of its shares, for which compensation was due. On 24 July 1979, the Government of Iran appointed a temporary manager to run the affairs of the partnership. The appointed manager had the power to sign cheques and make personnel and other decisions without consulting the partnership. The Tribunal held that the claimant was deprived of its property rights in its partnership and that the Government of Iran was responsible for that deprivation.[162]

Contrary to the two preceding cases, *Starrett* and *Sedco*, in this case the Tribunal did not consider the date of the appointment of the manager as the date of expropriation. Until November 1979 - the date of the seizure of the American Embassy in Tehran - the manager was co-operating with the partnership. However, without any explanation, 1 March 1980 was designated as the date of expropriation by the Tribunal.

Likewise, the Tribunal, in the *Tippetts* case, articulated a wide proposition as to what amounts to an expropriation, which was reiterated several times in subsequent awards, in the following terms:

> A deprivation or taking of property may occur under international law through interferences by a State in the use of that property or with the enjoyment of its benefits, even where the legal control over property is not affected. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner and the

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161 *Tippetts* Award, op. cit. (note 55).

162 Ibid., at 225.

> form of the measures of control or interference is less important than the reality of their impact.[163]

The last case of those in which the Iran-US Claims Tribunal construed the appointment of government managers as an expropriation was the *Phelps Dodge* case.[164] There the claimant, Phelps Dodge, owned some 20% of the shares in an Iranian firm, Sicab, which was engaged in the manufacturing and selling of wire and cable products. By virtue of a pre-Revolutionary law, designed to prevent the closure of insolvent factories, ensuring payments due to the workers and protecting any debts owed to the Government, Sicab's management was transferred to two governmental entities on 15 November 1980. The Tribunal considered this action as an expropriation and designated the last-mentioned date as the date of expropriation. Having enumerated the features of the said law, the Tribunal conceded that it "fully understands the reasons why the Respondent" resorted to this action. Also, it "understands the financial, economic and social concerns that inspired the law" in question.[165] At the same time, however, the Tribunal held that:

> But those reasons and concerns cannot relieve the Respondent [the Government of Iran] of the obligation to compensate Phelps Dodge for its loss.[166]

To some, "it is hard to reconcile this understanding of a government's action and the financial situation of a company for which a government is forced to act, and the condemning [of] the same government to pay compensation to former owners." In support of his statement, Piran[167] referred to the situation in the *ELSI* case, previously discussed, in which the American-owned company was in a similar situation to that of Phelps Dodge. The host State's interference with

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[163] Ibid., at 225-226.

[164] *Phelps Dodge Corporation and Private Investment Corporation (OPIC) v. The Islamic Republic of Iran*, Award No. 217-99-2 (19 March 1986), *reprinted in* 10 Iran-U.S. C.T.R. 121.

[165] Ibid., at 130, para. 22.

[166] Ibid. See also the Tribunal's Awards, such as *James M. Saghi et al. v. The Islamic Republic of Iran*, Award No. 544-298-2 (22 January 1993) (*unprinted*), and *Harold Birnbaum v. The Islamic Republic of Iran*, Award No. 549-967-2 (6 July 1994) (*unprinted*).

[167] Piran, op. cit., at 201.

the management control of the company in question, however, was held to be justifiable by the World Court.

Having examined cases in which the appointment of government managers meant an expropriation, it is timely now to consider cases in which the Tribunal did not construe the appointment of managers by the Government of Iran as a taking. In the *Otis Elevator* case,[168] the claimant held ownership interest in two companies in Iran, namely Otis Iran and Iran Elevator - 60% in the former company and 40% in the latter. It should be noted that the Iran Elevator company never became active. The claimant alleged that, because of the appointment of a financial supervisor for both companies by the Iranian Government, it was deprived of its property rights in Iran Elevator for which Iran bore responsibility. In dismissing the claim, the Tribunal held that two factors distinguished this case from the others in which such appointments were considered an expropriation of property. First, the managing director, who was appointed by the shareholders, asked the Government to appoint a supervisor. Second, there was not sufficient evidence that the appointed supervisor assumed real control of Iran Elevator's operations. On the balance of evidence before it, the Tribunal ruled that:

> A multiplicity of factors affected the Claimant's enjoyment of its property rights in Iran Elevator, among them its position as a minority shareholder in an inactive company and the changed circumstances of the Iranian elevator market (emphasis added).[169]

Another case in which the Iran-US Claims Tribunal did not find an expropriation even though a temporary manager was appointed, was the *Motorola* case.[170] The claimant, Motorola, in order to create a market in Iran, established a branch office (called 'Milcom'). The latter's employees left the country in the wake of the Revolution and its local manager, an Iranian, was arrested by Iranian agents. In April 1979, the Revolutionary Attorney General of the Islamic Republic appointed a temporary manager for Milcom. The claimant

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168 *Otis Elevator* Award, op. cit. (note 45).

169 Ibid., at 299, para. 47.

170 *Motorola Inc. v. The Islamic Republic of Iran et al.*, Award No. 373-481-3 (28 June 1988), *reprinted in* 19 Iran-U.S. C.T.R. 73.

asserted that such action in fact resulted in the expropriation of the company's branch in Iran. The Tribunal, however, held that the appointment of the temporary manager did not constitute an expropriation. The Tribunal relied on the fact that Motorola, as in Starrett, was invited to return to Iran and had even been requested by Iran to appoint a new external manager.[171]

Moreover, in the *Eastman Kodak* case, [172] the appointment of a government manager did not result in the expropriation of the company in question. There, the claimant, Kodak, alleged that the Government of Iran, by appointing a supervisor in December 1979 for its wholly-owned Iranian subsidiary, Rangiran, in fact expropriated the company. The Tribunal, after examining the case, did not find any evidence to that effect. Therefore, the expropriation claim was dismissed. The Tribunal relied on the fact that the role of the appointed supervisor "was minor and temporary"[173], and that Kodak was able to take necessary steps to liquidate Rangiran.[174]

The *Foremost* case[175] contemplates another category of management control where, through expropriation, a government became the holder of a majority share in a company, but its assumption of control did not amount to an expropriation. In this case the claimants group, Foremost, held ownership interest of 31% in an Iranian dairy company. As a result of the expropriation of various private Iranian shareholdings, several government-controlled entities obtained a majority of shares in the dairy. The claimant contended that by this

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[171] Ibid., at 85, para. 59.

[172] *Eastman Kodak Company et al v. The Islamic Republic of Iran et al.*, Award No. 514-227-3 (1 July 1991), *reprinted in* 27 Iran-U.S. C.T.R. 3.

[173] Ibid., at 13, para. 30. To the same effect, see the Partial Award of this case, op. cit. (note 45), at 168, para. 42.

[174] Ibid., at 15, para. 37. See also the Partial Award, op. cit., at 168, para. 58. Note that although the Tribunal did not construe the appointment of temporary manager as an expropriation, it found that the governmental interference with the claimant's property rights caused damages to it. Thus, the Tribunal awarded compensation based on Article II(1) (... expropriations or other measures affecting property rights) of the Claims Settlement Declaration.

[175] *Foremost Tehran et al. v. The Islamic Republic of Iran et al.*, Award No. 220-37/23-1 (10 April 1986) *reprinted in* 10 Iran-U.S. C.T.R. 228. See also the Tribunal's Awards in the *Golpira* case: "Golpira as a small expatriate shareholder, never had any role in the management or direction of the company." *Attaollah Golpira v. The Islamic Republic of Iran*, Award No. 32-211-2 (29 March 1983), *reprinted in* 2 ibid., 171 at 176, and in *Merrill Lynch & Co. Inc. et al. v. The Islamic Republic of Iran*, Award No. 519-394-1 (19 August 1991), *reprinted in* 2 ibid., 122.

action the Government in fact expropriated its shareholdings. In denying such a claim, the Tribunal held that Foremost, as a minority shareholder, was not entitled to play a dominant role in the management of the company.[176]

After surveying the Iran-US Claims Tribunal's case law on the subject and having a close examination of the authorities[177] invoked by the Tribunal, Khan concludes that none of them supported the Tribunal's ruling that the appointment of managers amounted to an expropriation. He further noted that "in light of this authority, one wonders how the Tribunal could take the position that appointment of managers led to taking."[178]

One observer on the Tribunal reached the same conclusion that the appointment of the temporary managers was "given more weight than it really deserves." In support of his statement, Piran[179] referred to the fact that none of the companies for which temporary managers were appointed were in a good financial situation, and that the only consideration in the appointment of such managers was to prevent the companies from total collapse. In his view, the Tribunal's holding in some cases that the appointment of managers immediately means an indirect expropriation, "is an over-simplification of the issue."

Aldrich, however, came to a different conclusion, in which he states that provisional or temporary assumption of control of private foreign property by State action gives rise to its responsibility, unless the deprivation is merely 'ephemeral'.[180] 'Ephemerality' has been considered as an important element that distinguishes permissible interferences from compensable expropriations. As Sornarajah puts it:

> *Ephemerality* and *specificity of economic and public interest objectives* are the hallmarks that distinguish such regulatory interferences from compensable takings (emphasis added).[181]

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176 *Foremost* Award in ibid., at 247.

177 The authorities include: an often-cited excerpt from Christie, op. cit., at 333-334, and the Judgment of the *Sporrong and Lonnroth* case, op. cit. (note 53).

178 Khan, op. cit., at 197-202.

179 Piran, op. cit., at 243.

180 Aldrich, op. cit., at 609.

181 Sornarajah, op. cit., at 310.

In this sub-section we have dealt with the main subject, i.e. interference through managerial control. The date of expropriation, as an ancillary subject, has been touched upon briefly as well. Since the determination of the date of expropriation, for various reasons, is more relevant to the question of indirect expropriation, it therefore deserves an extensive discussion. Hence, a digression into the date of expropriation here seems appropriate.

5.5.1 The Date of Expropriation

As alluded to earlier, in direct expropriation the measure is applied through the legislation or decree, and in such a situation the determination of the date of taking raises no particular legal problem, as the date of the legislation or decree should be used as the date of expropriation. In contrast with direct expropriation, an indirect expropriation occurs and evolves over a period of time. In these circumstances, when a series of measures are cited as cumulatively constituting expropriation, the determination of the actual date of expropriation will become as important as the finding of an expropriation. Its significance lies in the fact that the valuation of the expropriated property and the computation of interest are based on that date. Thus, when an alleged indirect expropriation is at stake, the adjudicator must decide when the actual expropriation has taken place, and whether the date of expropriation is the date on which the initial interference with the property commenced or the date on which those interferences ultimately ripened into a total and permanent deprivation.

On the doctrinal standpoint, most writers are of the opinion that in these circumstances the date of expropriation should commence as of the date the interferences are determined to have ripened into a taking. Thus, Christie remarks:

> When a seizure which is not originally deemed to be an expropriation ripens into one, the date of taking should not be held to go back to the time when the property was initially seized but the taking should

> rather date from the time at which it is determined that there was no reasonable prospect that the property would be returned.[182]

Weston took a somewhat different approach. In response to the question of when the temporary administration of property becomes an expropriation, he suggests that:

> As for the date upon which a taking might be found to transpire in any of these specific cases and from which compensation therefore would be calculated, deference should be given to the original intent of the administrating government and, thus, to the broad regulatory competence that States traditionally have enjoyed under international law. If the State administration measure is one that originally was conceived as only temporary ... then *the diacritical date should commence as of the time the measure is determined to have ripened into a taking*. If, however, the State administration measure is one that originally was conceived as but a first step toward liquidation ... then the key date should be at least presumed to commence as of the time the measure was instituted (emphasis added).[183]

One commentator held a totally different approach. Holtzmann,[184] the American Arbitrator to the Iran-US Claims Tribunal, for instance, maintains that should a series of events, as in the *Starrett* case, be involved in the shaping of an expropriation, the date of taking should be fixed at the commencement of the events in question. Interestingly, those events enumerated by the Arbitrator were correctly construed by the Tribunal as inherent risks of foreign investment, except for the appointment of a temporary manager which has already been discussed.

The Iran-US Claims Tribunal's practice indicates that in most of the cases where the Tribunal found expropriation, the issue regarding the date of expropriation became a bone of contention, especially for the American arbitrators. Besides those cases in which the Tribunal found expropriation based on the appointment of temporary managers, as studied previously, the Tribunal

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[182] Christie, op. cit., at 337 and 324. To some, Christie's statement is a well-established principle. See, e.g. Piran, op. cit., at 220, n. 246.

[183] Weston, op. cit., at 170.

[184] The Concurring Opinion of Judge H. M. Holtzmann in the *Starrett* Award, op. cit., (note 54) at 159-182.

took a similar approach on the question. An explicit statement in this regard was expressed for the first time, in the *International Technical Products* case. The Tribunal held that:

> A claim for a taking is outstanding on the day of the taking of property. Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events.[185]

Seven years later, in the *Malek* case[186] concerning alleged expropriation of real property through a cumulation of acts, the Tribunal confirmed this position and reiterated exactly the same words that were expressed in the last-mentioned case.

In appreciating the authority of the Tribunal's jurisprudence on the issue, Pellonpää and Fitzmaurice observe that since the legal situation in this regard is somewhat unclear, "the Tribunal's case law means a significant clarification."[187]

In the practice of the Iran-US Claims Tribunal there were several cases where the Tribunal did not find expropriation, though there was substantial encroachment on the owner's rights. Those cases failed, not because the interferences did not ripen into total deprivation, or for lack of proof, but for another reason. Under the mandate of the Algiers Declarations, the Tribunal is not authorised to examine events which occurred after 19 January 1981, the Tribunal's jurisdictional deadline.[188] Among those cases, the *International Technical Products* case[189] will be recalled, in which there was an allegation of expropriation through a series of events. The Tribunal finally reached the conclusion that loss of property did not occur until after 19 January 1981, and

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[185] *International Technical Products Corporation* Award, op. cit. (note 47) at 15.

[186] *Reza Said Malek v. The Islamic Republic of Iran*, Award No. 534-193-3 (11 August 1992), *reprinted in* 28 Iran-U.S. C.T.R. 246, para. 114.

[187] Pellonpää and Fitzmaurice, op. cit., at 101.

[188] Article II(I) of the Claims Settlement Declaration, op. cit. (note 6).

[189] *International Technical Products Corporation* Award, op. cit. (note 47). See also the *Foremost Tehran Inc.* case, op. cit. (note 175); *Norman Gabay (ANA Noorollah) v. The Islamic Republic of Iran*, Award No. 515-771-2 (10 July 1991), *reprinted in* 27 Iran-U.S. C.T.R. 40.

hence the Tribunal lacked jurisdiction.[190] Thus, the claim of expropriation was dismissed.

6. Expropriation and Regulation

6.1 General Remarks

There is a principle in international law that for the purpose of economic and financial regulation, interferences with property are possible without the regulating State incurring responsibility. Thus, Christie is of the opinion that the exercise of a State's police power normally will not create a right to compensation.[191] In her comprehensive analysis of indirect expropriation, Professor Higgins observes that "interferences with property for economic and financial regulatory purposes are tolerated to a significant degree."[192]

Pellonpää and Fitzmaurice take a similar view on the issue and state that:

> For the purpose of economic and financial regulation, rather heavy interferences with the owner's right to utilize his property have been tolerated without making the regulating State liable under international law.[193]

While accepting that the regulatory measures could interfere with the property rights, Sornarajah points out that they "are a feature of modern government and their legality, both in municipal and international law cannot be doubted."[194] This recognition of *bona fide* economic regulation is in harmony with judicial precedents. In the *Emanuel Too* case, for example, where the claimant sought compensation for the expropriation of his liquor license by the US Internal Revenue Service, the Court held that:

> A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other

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190 Ibid., at 241.
191 Christie, op. cit., at 335 and 338.
192 Higgins, op. cit., at 331.
193 Pellonpää and Fitzmaurice, op. cit., at 91.
194 Sornarajah, op. cit., at 312.

> action that is commonly accepted as within the police power of States ...[195]

On an international level, the Iran-US Claims Tribunal has recognised the principle. The Tribunal, in the *Sedco* case, ruled that:

> It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide regulation within the accepted police power of States.[196]

Moreover, Article 2(2)(b) of the 1974 Charter of Economic Rights and Duties of States provides that each State has the right to regulate and supervise the activities of transnational corporations within its jurisdiction. However, unlike nationalisation, expropriation or transfer of ownership of foreign property, in which provision for appropriate compensation has been made, there is no indication that supervision or regulation of foreign property is tantamount to a taking for which the State concerned should compensate the foreign investor.

6.2 Regulatory Measures to Prohibit Repatriation of Funds

In one of the preceding sub-sections we have dealt with the imposition of restrictions upon the export of goods by foreigners. Under this heading, the imposition of restrictions upon repatriation of funds will be considered. It is universally recognised that matters pertaining to currency are inherently within the jurisdiction of the State. The PCIJ, in the *Serbian* and *Brazilian Loans* cases, ruled that "It is indeed a generally accepted principle that a State is entitled to regulate its own currency."[197] Referring to the Court's statement, Mann comments:

> Money, like tariffs ... is one of those matters which prima facie must be considered as falling essentially within the domestic jurisdiction of States ... It follows that, subject to such exceptions as customary international law or treaties have grafted upon the rule, the municipal

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[195] *Emanuel Too v. The United States et al.*, Award No. 460-880-2 (29 December 1989), *reprinted in* 23 Iran-U.S. C.T.R. 378, para. 26. See also the ALI Third Restatement, op. cit., Section 712, Comment (g), at 201.

[196] *Sedco* Award, op. cit. (note 158) at 275.

[197] *France v. Kingdom of Serbs, Croats and Slovenes*, and *France v. Brazil*, P.C.I.J. (1929), Series A, Nos. 20/21, at 44.

> legislator is free to define the currency of his country ... to impose exchange control ... affecting monetary relations. Customary international law does not normally fetter the municipal legislator's discretion in these matters or characterize his measures as an international wrong for which he could be held responsible.[198]

Thus, exchange controls and similar restrictions fall within the police power of the State. The imposition of these restrictions upon the repatriation of funds is tolerated to a significant degree. As Wortley puts it:

> When currency control is a defensive measure to protect the national currency, it operates like taxation and may be treated as such, and although it may cause considerable indirect loss, it will not, if made bona fide, be unlawful in international law.[199]

In the same vein, Mann observes:

> Since exchange control is designed to protect a State's exchange resources, the mere refusal to allow the transfer of funds abroad can hardly ever be such misuse of discretion as to be unfair and inequitable.[200]

Piran took a similar view and states that principally the right of a State to prohibit the transfer abroad of money or goods is undisputed.[201] Dolzer reached the conclusion that:

> Export restrictions are acceptable for good cause and will have to be qualified as indirect expropriations when taken as arbitrary measures. This would seem to be in accordance ... with the broad scheme contained in the Articles of Agreement of the International Monetary Fund.[202]

This approach has been followed by international commissions and tribunals. Thus, the United States Foreign Claims Commission, in the processing of the Czechoslovakian claims, stated that:

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198 F. A. Mann, *The Legal Aspect of Money* (5th ed.), Clarendon Press, Oxford (1992) at 461.

199 B. A. Wortley, *Expropriation in Public International Law*, Cambridge University Press, Cambridge (1959) at 49.

200 Mann, op. cit., at 477.

201 Piran, op. cit., at 203.

202 Dolzer, op. cit. (note 3), at 64.

> The record in this claim discloses that [the] claimant attempted to import the jewellery in question from Czechoslovakia to the United States. However, the Government of Czechoslovakia refused to grant an export license pursuant to the foreign exchange regulations in effect in that country.[203]

The Commission then found that:

> The enactment of such regulations and the refusal by the Government ... to grant an export license for the shipment of gold and silver jewelry does not constitute nationalization or taking of property since it is generally accepted that a state has the sovereign right to impose such restrictions.[204]

Having examined the same Commission's practice, Christie concludes that:

> The refusal to give permission in advance for the transfer abroad of operating profits, or other funds, does not by itself amount to expropriation.[205]

In the *Anton and Frances Tabar* case, the expropriation allegedly took place through the refusal of the Government of (the former) Yugoslavia to permit the repatriation of the claimants' bank deposits to the United States. The US Foreign Claims Commission rejected the contention and held that:

> Exchange controls usually follow a general pattern whereby residents, nationals as well as non-nationals, must surrender their foreign exchange, gold and foreign securities; foreign currency must not be exported, and domestic currency must not be exported or imported; non-resident creditors cannot have the sum owed transferred, irrespective of the currency involved; and rates for foreign exchange and gold are fixed by government decree ... International law and the usual commercial treaties are no bar to exchange restrictions. So long as the control measures are not discriminatory, no principle of international law is violated.[206]

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[203] Quoted by M. M. Whiteman, *Digest of International Law*, Vol. 8, Department of State Publication, Washington D.C. (1967) at 988.

[204] Ibid., See also Christie, op. cit., at 318.

[205] Christie, op. cit., at 337.

[206] Quoted by Whiteman, op. cit., at 989.

The Iran-US Claims Tribunal has also dealt with the issue. Taken as a whole, the jurisprudence of the Tribunal is in accord with the pattern described above. In several cases before the Tribunal, the American claimants asserted that through the application of exchange controls by the Government of Iran they were unable to withdraw and repatriate money from their accounts in Iranian banks. They contended that this action amounted to expropriation of their deposits for which they were entitled to indemnification.

It is worthy of mention that in some of those cases the Tribunal had to examine the Iranian exchange control regulations and their conformity with the Articles of Agreement of the International Monetary Fund (hereinafter 'IMF'). However, the Tribunal attempted, as far as possible, to avoid this examination,[207] since the burden of proof is normally on the claimant and the benefit of doubt is given to the regulating State.

In the *Sea-Land* case, the expropriation allegedly occurred through the refusal of the Iranian Central Bank to give permission to convert a Rial account into dollars and transfer them out of Iran. While accepting that several attempts were made by Sea-Land to transfer its Rial account into dollars, the Tribunal denied the claim, based on the fact that "the account remains in existence and available, in Rials, at Sea-Land's disposal."[208]

The next case under examination is the *Hood* case, where the Iranian exchange controls and their conformity with the IMF requirements were raised. There the claimant contended that it was unable to repatriate its funds, because of the exchange controls imposed by the Government of Iran after the Revolution. The claimant further asserted that such measures were in violation of the Iranian Foreign Investments Law then in force and the IMF Agreement, and it also amounted to an expropriation for which compensation was due.[209] As to the said

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[207] In the *Schering* case, for example, the question was raised, but the majority of the Chamber avoided discussing it. *Schering* Award, op. cit., at 367.

[208] *Sea-Land* Award, op. cit., at 167.

[209] *Hood Corporation v. The Islamic Republic of Iran et al.*, Award No. 142-100-3 (13 July 1984), *reprinted in* 7 Iran-U.S. C.T.R. 36 at 40.

law, the Tribunal was not satisfied that the claimant was entitled to transfer its deposits by virtue of the Foreign Investments Law. The Tribunal examined the Iranian foreign exchange regulations and their conformity with the rules of the IMF, and found that those regulations were in harmony with the rules of the IMF Agreement. In principle, the latter agreement gives member States freedom to exercise exchange controls with regard to so called 'capital transfers' which are distinct from 'current transfers'. Put briefly, under Article VI (Section 3) of the Agreement, member States are allowed to impose restrictions upon 'capital transfers' to a significant degree. The Tribunal found that the transfer in question was for the transfer of capital, and hence the refusal of the Iranian Central Bank to transfer was not also contrary to the IMF Agreement.[210]

In the *Dallal* case, where the claimant sought compensation for the dishonour of two cheques, the Tribunal also reached the conclusion that the transaction in question was for the transfer of capital. It held that:

> The two cheques must be assumed to have been issued as part of a capital transfer, intended merely to exchange Rials for Dollars and to transfer the dollar amount to the United States.[211]

Thus, the Tribunal was able to reject the claim. After examining the Tribunal's case law in this context, Pellonpää and Fitzmaurice conclude that:

> Taken as a whole, the practice of the Tribunal can thus be described as being *along traditional lines* as regards regulation of the type represented by exchange controls (emphasis added).[212]

Piran[213] also came to the conclusion that the Tribunal followed the traditional lines on the issue and its approach was in accord with the past precedent and legal writings. In his view, the Iranian Government "had a right to impose exchange control regulations." He further noted that "in the absence of

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210 Ibid., at 44-46.

211 *Dallal v. Iran and Bank Mellat*, Award No. 53-149-1 (10 June 1983), *reprinted in* 3 Iran-U.S. C.T.R. 10 at 17.

212 Pellonpää and Fitzmaurice, op. cit., at 93-94.

213 Piran, op. cit., at 207-208.

an explicit international commitment to the contrary, such action could not cause responsibility for the Government."

In view of the weight of the authority and legal precedent on the issue of exchange control regulations discussed above, it is submitted that undoubtedly these measures fall within the police power of States. In principle, States enjoy far-reaching freedom to exercise these measures. As regards the Iran-US Claims Tribunal's approach to the matter, given the post-revolutionary situation of Iran, the Tribunal correctly adopted the view that Iran as a sovereign State had a right to impose such restrictions. Additionally, since the measures in question did not apply in a discriminatory manner, as the records indicated, the Government of Iran was not held liable.

6.3 Withdrawal of Permits and Licenses

The preceding sub-sections have been concerned with cases involving the refusal of the host State to give license or permission for the transfer of goods or funds. Here we deal with situations in which a license or permission which has already been granted to the foreign investor is cancelled, and hence his ability to conduct business is affected. The question which arises here is whether cancellation may amount to an indirect expropriation and therefore could render the State concerned responsible.

It may be argued that the cancellation of permits or licenses constitutes expropriation even if it does not affect the ability of the foreign investor to continue with the activity, or in any way affect the title of the property of the foreign investor.[214] At the same level, one may contend that since measures regarding licenses and permits are normally associated with economic regulation, the withdrawal of such measures must be subject to the same consideration as measures involving economic regulation.[215] Proponents of the latter approach observe that, technically, granting a license involves the conferment of a privilege

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[214] *Murphyores Ltd. v. The Commonwealth of Australia*, 136 Commonwealth Law Review (1977) 1 at 9.

[215] Sornarajah, op. cit., at 311.

and it does not entail vesting of any right in the foreign investor. In the case where the privilege is revoked, the State is not benefited in any sense. They further stated the view that "it is difficult to say that there had been a taking by the state in situations where there is a withdrawal of a license."[216]

However, in the *Amco* case,[217] in which there was a cancellation of license of the foreign investor, the host State was held liable for its action. In 1968 the claimants, the Amco group, American nationals, entered into an agreement with the Government of Indonesia for the construction and management of a hotel complex. Amco, in order to perform the agreement, was granted an investment license for a period of thirty years. The claimants contended that in 1980 the Indonesian army seized the hotel and their investment license was unjustifiably revoked. The Government of Indonesia argued that the revocation took place due to the failure on the part of the claimants to fulfil the commitments they had undertaken prior to entry. The dispute was considered by a tribunal, under the auspices of ICSID.

In this case, the tribunal did not enter into the argument of whether the revocation of the license constituted an expropriation. Instead, the award relied on the procedure before the revocation. The tribunal held that:

> Accordingly, the revocation has been decided definitively, and the investor has been definitively deprived of its right to operate and to exploit the enterprise that it had been authorized to set up ... The nature of its rights was changed against its will, and such change has been decided upon without its being granted due process, and the decision to withdraw the authorization cannot be remedied by the arbitral procedure.[218]

The Tribunal went on to say that:

> These acquired rights could not be withdrawn by the Republic (Indonesia), except by observing the legal requisites of procedural conditions established by law ... In fact, the Republic did withdraw

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216 Ibid.
217 *Amco* Award, op. cit. (note 33).
218 Ibid., at 1032, para. 202.

> such rights, not observing the legal requisites of procedure, and for reasons which ... did not justify the said withdrawal.[219]

The lack of procedural safeguards were construed as a denial of justice, and hence the Government of Indonesia was held responsible.

Commenting on the award, Sornarajah[220] raised several relevant points. The first one is that there could be interference with property rights of a foreign investor in accordance with the law of the host State, particularly in circumstances where the foreign investor had undertaken commitments prior to entry, but did not fulfil them. While accepting that minimum procedural safeguards must be followed before finding a non-satisfaction of the commitments, the same author observes that the cancellation of the license was in the nature of a sanction against breaking commitments. The rationale of this proposition was that the foreign investor had committed a transgression which could have been avoided by honouring its commitments.

The second point is that though violation of property rights are generally expected to be preceded by hearings, "the situation may well be different where there is a rescission of a license for non-satisfaction of a condition. This is because in these circumstances no right could have arisen without the satisfaction of the condition." The questions that arise here are: could a lesser type of procedural safeguard be sufficient in these circumstances? Could procedural safeguards be dispensed with where there is a clear failure to satisfy the condition? In Sornarajah's view, the *Amco* award enveloped the whole area of procedural safeguards in the formula of 'denial of justice' which is unsatisfactory. In support of his suggestion, he referred to Judge Tanaka's statement in the *Barcelona Traction* case, to the effect that "It is an extremely serious matter to make a charge of denial of justice *vis-à-vis* a state."[221] The same writer further noted that whether the concept of denial of justice could be

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219 Ibid., at 1032-1034, para. 248.

220 Sornarajah, op. cit., at 304-305.

221 The Separate Opinion of Judge K. Tanaka in the *Barcelona Traction* case, op. cit. (note 10) 115 at 160.

satisfactorily extended to the subject in hand, the administrative measures, is doubtful.

The last point is that in certain circumstances, the sanctions which are imposed on the foreign investor for non-satisfaction of conditions are punitive in nature, and:

> It is well established that the imposition of punitive sanctions *do not amount to a taking* by a state. *The cancellation of a license* for non-satisfaction of a condition *does*, arguably, *have the necessary punitive element* (emphasis added).[222]

As indicated above, the ICSID tribunal avoided entering into the argument of whether the revocation of the license could constitute an expropriation, as it seemed to realise that on that basis it would not be able to render a convincing award. Therefore, the tribunal relied on the concept of denial of justice which, keeping in mind the facts of the case and Sornarajah's comment, was untenable.

The *Murphyores* case[223] contemplates another category of the cancellation of the license. Where the regulatory measures are carried out on environmental grounds, the measures in question, the withdrawal of the license, do not amount to an indirect expropriation. In this case, the claimants, two American companies, were granted mining licenses by the State of Queensland to explore and develop Fraser Island, for mineral sands. Zircon and rutile were produced for which the principal markets were overseas. In essence, there was not a local market for the minerals and they had to be exported. Under the 1974 Environmental Protection Act, the Minister concerned ordered an inquiry into the export of minerals from Fraser Island. The inquiry demonstrated that the sandmining was threatening the ecological environment of the Island. Thus, the Government of Australia refused to give export licenses for the export of the minerals. Since the business of the claimants depended on their ability to export the minerals, as mentioned, the claimants had to shut down their activities as a result of this action of the Australian Government. The dispute was referred to

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222 Sornarajah, op. cit., at 305.
223 *Murphyores* Award, op. cit., at 1-27.

the Australian High Court. The latter did not find that an indirect expropriation had taken place.[224] Therefore, the claim for compensation was dismissed.

6.4 Confiscatory Taxation

The question for consideration here is whether taxation could amount to an indirect expropriation, and may incur the responsibility of the regulating State. Taxation, like currency, is within the sovereign power of a State. Put briefly, the State can levy tax on subjects which are in its territory, including aliens. This right was characterised as a general rule by Albrecht. In his words:

> According to the doctrine of the sovereign right of taxation, and in the absence of special treaty provisions, there would seem to be no basis in international law for objections to the exercise by a State of its right to tax where there is no discrimination against aliens.[225]

To some, "In principle, taxation is a matter within the exclusive jurisdiction of any sovereign State."[226] In this context, Mann had this to say:

> Taxation ... is one of those matters which prima facie must be considered as falling essentially within the domestic jurisdiction of States.[227]

A similar view was expressed by the European Commission on Human Rights:

> It is undoubtedly within the sovereign power of a State to enact legislation for the purpose of imposing taxes or other contributions the proceeds of which are to be appropriated to public purposes.[228]

The above account suggests, in principle, that taxation cannot be construed as an expropriation calling for compensation. As Schwarzenberger puts it:

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[224] For a contrary view, see Higgins, op. cit., at 339-340.

[225] A. R. Albrecht, "The Taxation of Aliens under International Law", 29 B.Y.I.L. (1952) 145 at 172.

[226] Schwarzenberger, op. cit., at 92. Doman, op. cit., at 1129, is of the opinion that "Taxation is one of the principal attributes of the sovereign state."

[227] Mann, op. cit., at 461.

[228] *Gudmundsson v. Iceland* (Application No. 511/59), Decision of 20 December 1960, Yearbook of the European Convention on Human Rights, Martinus Nijhoff, the Hague (1960) 394 at 422 (30 I.L.R. 253 at 265).

> Interference with foreign property by taxation ... on a footing of *de facto* and *de jure* equality, does not constitute an interference amounting to expropriation and calling for compensation.[229]

In the same vein, Kaeckenbeek comments:

> ... it is clear that what in most civilized systems of municipal law is not deemed to require compensation, such as the exercise by the State of its police taxation power whatever sacrifice it may impose on individuals, requires no compensation according to the international law standard.[230]

Professor Brownlie took a similar view.[231]

International case law also indicates that taxation is not in itself capable of being expropriation. In the *Kügele* case,[232] for instance, the claimant owned a brewery in Polish Upper Silesia. As a result of a series of license fees imposed by the Government of Poland, he was forced to close the business. In rejecting the claim, the Upper Silesian Arbitral Tribunal argued that:

> The increase of the license fee was not in itself capable of taking away or impairing the rights of the plaintiff ... The increase of the tax cannot be regarded as a taking away or impairment of the right to engage in a trade, for such taxation may render the trade less remunerative or altogether unremunerative. However, there is an essential difference between the maintenance of a certain rate of profit in an undertaking and the legal and factual possibility of continuing the undertaking. The trader may feel compelled to close his business because of the new tax ... But this does not mean that he has lost the right to engage in the trade. For had he paid the tax, he would be entitled to go on with his business.[233]

Similarly, in the *Revere* case, dissenting Arbitrator Bergan reached the conclusion that the introduction of a new tax by the Jamaican Government did not cause a loss of effective control of the company in question. In his

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[229] Schwarzenberger, op. cit., at 4. See also Wortley, op. cit., at 49 and Akehurst, op. cit., at 94.

[230] G. Kaeckenbeeck, "The Protection of Vested Rights in International Law", 17 B.Y.I.L. (1936) 1 at 16.

[231] Brownlie, op. cit., at 535.

[232] *Kügele v. The Government of Poland*, 6 Annual Digest and Reports of Public International Law Cases (ed. by H. Lauterpacht), (hereinafter referred to as A.D.) (1931-32) 69.

[233] Ibid., at 69.

Dissenting Opinion, the Arbitrator referred to United States and European Community case law that tax measures do not amount to expropriation.[234]

Although there is no rule in international law that limits the power of a State to impose taxes within its jurisdiction, excessive and exorbitant tax measures may have a confiscatory effect and could constitute indirect expropriation.[235] In this regard, Albrecht remarks:

> Nevertheless, an exception must be made in the case of confiscatory taxation, for it is a rule of international law that confiscation or expropriation without compensation, is illegal.[236] There is little difference in the practical effects of confiscation and confiscatory taxation ... A State may tax aliens without unfair discrimination under international law only so long as the taxation is not confiscatory. When taxation becomes confiscatory, it becomes illegal.[237]

In the same manner, Article 10(5) of the Harvard Draft Convention on Responsibility of States provides, in part:

> An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws ... or is otherwise incident to the normal operation of the laws of the State shall not be considered as wrongful, provided:
>
> (a) ... (b) ... (c) ... and (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.[238]
>
> Additionally, the comment on this paragraph states that:
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> This sub-paragraph 5(d) would preclude taxes raised to confiscatory levels from being used as a means of securing the property of an alien without paying him for it.[239]

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234 *Revere* Award, op. cit. (note 74) at 312-327.

235 Sornarajah, op. cit., at 314.

236 As shown above, the payment of compensation is not the legal condition for an expropriation. See our discussion on the issue in chapter 2 of this thesis, at 108-114.

237 Albrecht, op. cit., at 172-173.

238 55 A.J.I.L. (1961) at 553-554.

239 Ibid., at 562.

The issue is referred to in the World Bank Guidelines. Article 38 thereof reads in part as follows:

> The provisions in the bilateral investment treaties and multilateral instruments also often explicitly cover not only outright expropriations but also measures, such as excessive and repetitive tax or regulatory measures, that have a *de facto* confiscatory effect ...[240]

Not only can the State levy tax on the subjects which are in its territory, but also it has the power to increase the level of tax whenever it wishes. A uniform increase in taxation by itself cannot have a confiscatory effect. It has been observed, however, that where aliens are singled out and subjected to heavy taxation, a clear situation of expropriation can be said to exist.[241] Nevertheless, an exception may be made where sufficient justification for different treatment exists. In the *Ptasysnki* case,[242] for example, taxation of the oil industry for windfall profits resulting from a sharp price rise, without constituting an expropriation, was recognised. In 1979, then US President Carter announced a new oil programme, whereby price controls on domestic oil were removed. The President realised that deregulating oil prices would produce substantial windfall gains for some producers. The sharp rise in oil prices on the world market had strengthened this anticipation. Accordingly, the President proposed that Congress place an excise tax on the additional revenues resulting from decontrol. Congress enacted the Crude Oil Windfall Profit Tax Act of 1980. The Act divided domestic crude oil into various classes and gave more favourable treatment to some of them. Several months later, independent oil producers and royalty owners instituted proceedings in the Wyoming District Court, seeking a refund for taxes paid under the Act. The Court held that the Act violated the Uniformity Clause concerned. However, on appeal, the US Supreme Court adopted a different view.

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[240] World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, *reprinted in* 31 I.L.M. (1992) 1363 at 1375.

[241] Sornarajah, op. cit., at 315.

[242] *The United States v. Harry Ptasysnki et al.*, Decision of 6 June 1983, 462 US Supreme Court Reports, Vol. 74, 427.

The question arises as to what level of tax constitutes confiscatory or excessive taxation. There is no precise level of taxation which can be said to be excessive. Thus, reference to decisions taken in this context may be useful at this point. In the *Corn Products Refining* claim,[243] the Government of (the former) Yugoslavia imposed two mortgages upon the claimant company's land. One of them, for 39,000,000 dinars, was imposed for war profits taxes. The United States Foreign Claims Commission considered the case. The Commission held that:

> With respect to the mortgage of 39,000,000 dinars for taxes for war profits, this encumbrance clearly represents a confiscatory measure adopted by the Government ... prior to the nationalization of the enterprise ... It is not necessary to point out that the amount of 39,000,000 dinars is out of any proportion with respect to the alleged war profits, because the aforestated figures disclose that the plant had an average earning of not more than 3,000,000 dinars per year. However, should we assume that the profits were much higher during the war, we never would arrive at the amount of 39,000,000 dinars, because this amount represents approximately three times the prewar value of the plant and a taxation of such an extent is nothing else but a total confiscation of the entire property.[244]

In the *Gudmundsson* case,[245] the claimant asserted that the imposition of certain taxes by the Government of Iceland was contrary to the provision in Article 1 of the First Protocol to the European Convention on Human Rights.[246] In considering the case, the European Commission on Human Rights only dealt with the compatibility of taxes in relation to the Convention, and did not enter into the issue from the perspective of international law.

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[243] 22 I.L.R. (1955) 333.

[244] Ibid., at 334. See also the same Commission's decisions, in the processing of the Czechoslovakian and Hungarian claims, under section (5) and sub-section (5.1) of this chapter, respectively.

[245] *Gudmundsson* Award, op. cit. (note 228). The European Court was not prepared to admit a 25% tax as confiscatory.

[246] Article 1 reads in part:
No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The Supreme Court of Argentina in the *In re Bunge* case, held that a succession surtax of 50% upon the property of a non-resident alien was confiscatory.[247]

In 1964, following the imposition of taxation by the Burmese Government upon some British companies, a question was raised in the House of Commons on the effective percentage rates of such taxation. The British Financial Secretary to the Treasury replied that such profits were taxed up to 99% on profits exceeding £22,500. The Secretary was of the opinion that such taxation was excessive and amounted to *de facto* confiscation.[248]

7. Conclusion

From the above survey of the phenomenon of indirect expropriation, these conclusions may be drawn:

1) Due to the endless possibilities of State interference with the property rights of private persons, it is very difficult to give a definition of the subject which covers all governmental interferences. Therefore, we can say that in a sense expropriations may be divided into two categories, namely 'compensable expropriations' and 'regulatory expropriations'. It is more convenient to identify the types of expropriations that are considered as 'compensable expropriations' than to devise a criterion for the category of interferences which do not amount to expropriation. Nonetheless, a test or a combination of tests, as enumerated above, which might be useful for this purpose, are suggested. They include: (I) attribution of an action or omission to the State; (II) the State's intention to interfere with alien property; (III) character of the State interference, for example, unreasonableness of the interference; (IV) duration of State interference; and (V) extent of the gain to the State and/or loss to the affected person.

2) The awards of the Iran-US Claims Tribunal regarding the two tests of attribution and intention are generally tenable. While the Tribunal's

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[247] A.D. (1938-40) at 380. In another case, *In re Gallino*, a tax of 34.25% was held confiscatory. Ibid., at 382.

[248] House of Commons Debates (1964), Vol. 704, column. 1036.

jurisprudence does not suggest that intention is a necessary element of the primary rule defining an expropriation, it indicates that the test of attribution is decisive. Moreover, for attribution the status of the organ to whose direct acts deprivatory events can be ascribed plays an important role.

3) Some of the awards of this Tribunal concerning the issue of the appointment of temporary managers are not without difficulty. There, the Tribunal ruled that the appointment of such managers by the Government of Iran amounted to an indirect expropriation. However, to some authors, it was "given more weight than it really deserves."[249] Although an owner is entitled to control and manage his property as he wishes, under particular circumstances a State may interfere with the control and management of private property, including that of foreigners, without incurring international responsibility. It is well established that, in situations of crisis, governments enjoy broader powers to regulate the economic life of individuals and corporations. Also, one should distinguish between interference with a failing company or a company deserted by its manager in the course of revolutionary unrest and a successful company. In the case of Iran, none of the companies for which temporary managers were appointed were in a good financial situation, and in some cases, the original managers were even invited to resume the projects in question.[250] In view of this authority, one wonders how the Tribunal could take the position that the appointment of managers led to an expropriation.

4) As in the national context, in international law the regulatory power of a sovereign State could include taxation, exchange controls, the cancellation of licenses and so forth. This conclusion comes close to what the Iran-US Claims Tribunal held, that: "It is also an accepted principle of international law that a

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[249] Piran, op. cit., at 243.

State is not liable for economic injury which is a consequence of bona fide regulation within the accepted police power of States."[251]

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[250] See, e.g., the *Starrett* case, and the *Motorola* case, op. cit. (note 54), and (note 170), respectively.

[251] *Sedco* Award, op. cit. (note 158), at 275.

CHAPTER FOUR

COMPENSATION

1. Introduction

As promised earlier, this chapter focuses solely on the issue of compensation, which is one of the most controversial areas in international law. Decision-makers, on both national and international levels, appreciate this point. The United States Court of Appeals for the Second Circuit, in its much cited opinion in the *Banco National* case, stated that there are several strongly held views on the standard of compensation, and that international law is far from clear.[1] In the *Aminoil* case, it was held that "The determination of an indemnification has always presented technical difficulties."[2] Similarly, the most explicit statement on this issue can be found in the Iran-US Claims Tribunal's celebrated award rendered by its Chamber Three, chaired by the late Professor Virally, in the *Amoco* case. The Tribunal acknowledged that:

> The rules of customary international law relating to the determination of the nature and amount of the compensation to be paid, as well as the conditions of its payment, are less well settled. They were and still are, *the object of heated controversies*, the outcome of which is rather confused (emphasis added).[3]

Legal scholars also shared this view. In his editorial comment, Professor Schachter, for example, observes that apart from the use of force, no subject of

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[1] *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 at 887-893 (2d Cir. 1981), *reprinted in* 66 I.L.R. 421.

[2] *Arbitration between Kuwait and the American Independent Oil Company* (*Aminoil*) Award of 24 March 1982, *reprinted in* 21 I.L.M. (1982) 967 at 1031, para. 138.

[3] *Amoco International Finance Corp. v. The* Government *of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Ltd.*, Award No. 310-56-3 (14 July 1987), *reprinted in* 15 Iran-United States Claims Tribunal Reports (hereinafter Iran-U.S. C.T.R.) (Grotius Publications, Cambridge) 189 at 223-224, para. 117.

international law seems to have aroused as much debate as the question of the standard of compensation.[4]

However, opinions on this issue are deeply divided. There are two main schools of thought. While adherents to the first school advocate 'full' or 'adequate' compensation, proponents of the second school believe that 'appropriate', ('equitable', 'just' or 'fair') compensation is the appropriate remedy in cases of expropriation under customary international law.

In the first section of this chapter an attempt will be made to show that, nowadays, indemnification of damages resulting from expropriation or nationalisation measures has been generally recognised. This will be followed by an investigation of the relevant theories, such as acquired rights, unjust enrichment, damage (loss) and human rights. Likewise, whether a different standard should be applied to lawful and unlawful expropriation will be considered. Then, this chapter will deal with the question of whether nationalisation, as a separate legal institution, requires different treatment from the viewpoint of the standard of compensation. We shall examine the standard of compensation in the relevant resolutions of the United Nations, State practice, decisions of international courts and tribunals and writings of legal scholars. We will determine which of the two previously discussed schools of thought is actually used by States in contemporary international law. At the end of this chapter, there will be a brief discussion of the valuation of nationalised property.

2. Legal Foundations for the Payment of Compensation

2.1 Duty to Compensate Aliens

This sub-section begins with the premise that there seems to be little room for doubt that under international law the State has a duty to compensate the

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[4] O. Schachter, "Compensation for Expropriation", 78 A.J.I.L. (1984) 121 at 121. See *inter alia*: D. J. Harris, *Cases and Materials on International Law* (5th ed.), Sweet & Maxwell, London (1998) 568; A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal*, Martinus Nijhoff, Dordrecht (1994) 294, and M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press (1994) at 357, 359 and 374.

dispossessed foreign owner.[5] Despite some attempts made to weaken or even negate the payment of compensation, one may conclude that most of the relevant resolutions of the General Assembly of the United Nations recognise the obligation to pay compensation in the case of expropriation or nationalisation. As shown in chapter 2, in the 1962 Declaration on Permanent Sovereignty, which obtained the overwhelming support of developed and developing countries, it was stipulated that "appropriate compensation" be paid "in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."[6] While Resolution 3171 spoke of "possible compensation"[7], under the 1974 Charter, to fix "appropriate compensation" the expropriating State will take "into account its relevant laws and regulations and all circumstances that the State considers pertinent."[8] However, the Declaration on the Establishment of a New International Economic Order[9] while recognising the right of States to nationalise natural resources in exercise of permanent sovereignty makes no mention of a corresponding duty to pay compensation.

The juristic literature also confirms that compensation is due in the event of expropriation or nationalisation. For some, as seen in chapter 2,[10] the payment of compensation is a condition of the legality of the measures concerned. To others,

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5 However, for some, property or interest which were acquired under colonial rule may be expropriated without paying compensation. See, for example, S. C. Jain, *Nationalization of Foreign Property - A Study in North-South Dialogue*, Deep & Deep Publications, New Delhi (1983) 164; N. Schrijver, *Sovereignty over Natural Resources*, Cambridge University Press (1997) at 358. Also, for the exceptions on the principle of compensation see: I. Brownlie, *Principles of Public International Law* (5th ed.), Clarendon Press, Oxford (1998) at 535, and A. Story, "Property in International Law: Need Cuba Compensate US Titleholders for Nationalising their Property?", J.Pol.Phil. (1998), Vol. 6 (No. 3) 306 at 325-327.

6 Paragraph 4 of the General Assembly Resolution No. 1803 (XVII), adopted on 14 December, 1962, *reprinted in* 2 I.L.M. (1963) 223, and I. Brownlie, *Basic Documents in International Law* (3rd ed.), Clarendon Press, Oxford (1991) 230.

7 Paragraph 3 of the General Assembly Resolution 3171 (XXVIII) of 17 December 1973, *reprinted in* 68 A.J.I.L. (1974) 381.

8 Article 2(2)(c) of the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX), *reprinted in* 14 I.L.M. (1975) 251, and Brownlie, *Basic Documents*, op. cit., at 235

9 General Assembly Resolution No. 3201 (S-VI) of 1 May 1974, *reprinted in* 13 I.L.M. (1974) 715.

10 See chapter 2 of this thesis, at 108-114.

including those who categorically advocate the above-mentioned resolutions,[11] it is required as a product of lawful expropriation and, *a fortiori*, of an unlawful expropriation. Thus, Fatouros observes that compensation is "a legal duty arising out of related measures, not as a condition precedent to the lawfulness of the measures."[12] Having examined the compensation agreements since World War II up to 1963, the late Judge Arechaga concluded that all the:

> 'en bloc' compensation agreements, taken together, constitute a recognition by the various legal systems of the civilized world that the State which nationalizes foreign-owned property has, under general international law, a duty to compensate the State of nationality of those foreign owners.[13]

Some 25 years later after evaluating the traditional principles governing expropriation of foreign property, Asante reached a similar conclusion. While noting that there is no consensus on the applicable standards, he observes that contemporary developments support the principle that "A State is required to pay compensation to the owner of the affected property."[14] Schrijver[15], writing in 1997, like Mouri[16] and Garcia-Amador[17], took the view that there is no doubt that obligation to pay compensation for expropriation or nationalisation is generally accepted.

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[11] See, e.g., E. J. de Arechaga, "The Duty to Compensate for the Nationalization of Foreign Property", 2 Y.B.I.L.C. (1963) 237 and the author's other literature, "State Responsibility for Nationalization of Foreign Owned Property", 11 N.Y.U.J.I.L.P. (1978) 179.

[12] A. A. Fatouros, *Government Guarantees to Foreign Investors*, Columbia University Press, New York (1962) at 314. In the same vein, one commentator remarks that in the light of the principle of unjust enrichment, it is possible "to reconcile the inherent legality of an act of nationalisation with its necessary consequences as to the payment of compensation." F. Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity", 24 I.C.L.Q. (1975) 255 at 272.

[13] Arechaga (1963: 240, para. 28).

[14] S. K. B. Asante, "International Law and Foreign Investment: A Reappraisal", 37 I.C.L.Q. (1988) 588 at 610.

[15] Schrijver, op. cit., at 292-297 and 350-359.

[16] Mouri, op. cit. at 310 and 332.

[17] F. V. Garcia-Amador, Fourth Report to the ILC on the subject of the "Responsibility of State for Injuries caused in its territory to the Persons or Property of Aliens", *reprinted in* 2 Y.B.I.L.C. (1959) 1 at 18, para. 70, and the same writer's other literature, *The Changing Law of International Claims*, Vol. 1, Oceana Publications, Inc., New York (1984) at 294.

As far as international jurisprudence and arbitral awards are concerned, reference can be made first to the Permanent Court of International Justice (hereinafter the 'PCIJ'), which recognised this obligation in some of its judgments.[18] Although so far, the International Court of Justice (hereinafter the 'ICJ') has not dealt with clear-cut nationalisation or compensation issues, it has declared the compensation obligation in the *Temple of Preah Vihear* case.[19] Likewise, an obligation to pay compensation can be found in the individual opinions of judges of the ICJ. In the *Barcelona Traction* case, for example, Judge Gros made the statement that "any nationalization of a regular kind would have been accompanied by compensation."[20] Earlier[21] and recent arbitral awards also confirm this obligation. The arbitral awards in the three Libyan oil nationalisation cases, *BP*,[22] *Texaco* [23] and *Liamco*,[24] as well as in the *Aminoil* case explicitly endorsed it. Additionally, the case law of the Iran-US Claims Tribunal suggests that compensation is due in the cases concerned. In its first award on a compensation case, *American International Group Inc.*, the Tribunal recognised that:

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[18] See, e.g., *Case Concerning Mavrommattis Jerusalem Concessions*, in P.C.I.J. Series A, No. 5 (1925) 51; The *German Interests in Polish Upper Silesia* case, P.C.I.J. Series A, No. 7 (1926) 32 and *Case Concerning the Factory at Chorzow*, (claim for indemnity) (merits), *Germany v. Poland*, (1928), P.C.I.J. Series A, No. 17, 1 at 42.

[19] *Case Concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), I.C.J. Rep. (1962) 6 at 36-37. Similarly, the World Court, in its fairly recent judgment in the *ELSI* case, dealt with some aspects of compensation. See the case *concerning Elettronica Sigula S.P.A. (ELSI)*, (*United States of America v. Italy*), Judgment of 20 July 1989, I.C.J. Rep. (1989) 14.

[20] The Separate Opinion of Judge A. Gros in the *Barcelona Traction Light and Power Company, Ltd.*, case (*Belgium v. Spain*), Judgment of 5 February, I.C.J. Rep. (1970) 268 at 274.

[21] See, e.g., the *Delagoa Bay* case, (*Britain and United States v. Portugal*), in M. M. Whiteman, *Damages in International Law*, Vol. 3, Government Printing Office, Washington D.C. (1943) at 1694-1703; The *Shufeldt* claim (*United States v. Guatemala*), 2 R.I.A.A. (1930) 1079, and the *Lena Goldfields* case (*Lena Goldfields Ltd. v. The Soviet Government*), Award of 3 September, 1930, 3 Annual Digest of Public International Law(edited by H. Lauterpacht) (hereinafter A.D.) (1929-30), Case No. 1 London (1935) at 3-4, *reprinted in* A. Nussbaum, "The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government", 36 Cornell L.Q. (1950) 31.

[22] *BP Exploration Company (Libya) Limited v. The Government of the Libyan Arab Republic*, Award of 10 October 1973, *reprinted in* 53 I.L.R. (1974) 297.

[23] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award of 19 January 1977, *reprinted in* 17 I.L.M. (1978) 1.

[24] *Libyan American Oil Company (Liamco) v. The Government of the Libyan Arab Republic*, Award of 12 April, 1977, *reprinted in* 20 I.L.M. (1981) 1.

> It is a principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation ...[25]

In its 1994 award in the *Ebrahimi* case, the same Tribunal reaffirmed that "international law undoubtedly sets forth an obligation to provide compensation for property taken."[26]

The ICC Guidelines,[27] the Draft UN Code of Conduct on TNCs,[28] the ILA Seoul Declaration,[29] the World Bank Guidelines[30] and the ALI Third Restatement[31] all require that compensation is paid in cases of expropriation and nationalisation.

Similarly, the recognition of this obligation may be found in foreign investment codes. In such codes, the State concerned promises to pay compensation in the event of nationalisation. The Indonesian code, for instance, recognises the State's right to nationalise, but promises to pay compensation "in accordance with the rules of international law."[32]

2.2 Theoretical Basis

In the preceding sub-section we have seen that there is a general obligation for the expropriating State to pay compensation to aliens whose property was taken. We now come to the crucial question: upon what legal foundations is the duty to compensate based? Four main theories have evolved in this area:

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[25] *American International Group Inc. et al. v. The Islamic Republic of Iran* (*Bimeh Markazi Iran*), Award No. 93-2-3, (19 December 1983), *reprinted in* 4 Iran-U.S. C.T.R. 105.

[26] *Shahin Shaine Ebrahimi et al. v.* The *Islamic Republic of Iran*, Award No. 560-44/46/47-3, para. 88 (12 October 1994) (*unprinted*).

[27] Section V(3)(iv) of the ICC Guidelines for International Investment (1972).

[28] Para. 55 of the Draft UN Code of Conduct on Transnational Corporations, see UN Doc. Economic and Social Council/1990/94, 12 June 1990.

[29] Article 5.5 of the 'Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order' was adopted in the 62nd Conference of the International Law Association which was held in Seoul (24-30 August, 1986) (hereinafter the ILA Seoul Declaration), *reprinted in* 33 N.I.L.R. (1986) 326.

[30] Section IV(1) of the World Bank Guidelines on the Treatment of Foreign Direct Investment, *reprinted in* 31 I.L.M. (1992) 1363 at 1382.

[31] The American Law Institute's Restatement (Third) on Foreign Relations Law of the United States (1987), Vol. 2, 196.

[32] Quoted by Sornarajah, op. cit., at 373-374.

acquired rights, unjust enrichment, human rights, and damage (loss). Each of these four theories will now be considered in turn.[33]

2.2.1 Acquired Rights

The doctrine of vested or acquired rights (*droits acquis)* has its origin in municipal law and, more precisely, intertemporal law and private international law. There it has been employed as a basis for solving conflicts of laws in respect of time. Put in technical terms, it is merely another aspect of the generally recognised principle that laws should not have a retroactive effect (i.e. the principle of non-retroactivity).[34]

The traditional view, which was that the doctrine or principle of acquired rights to constitute the basis for liability to pay compensation, is no longer tenable, has been seriously challenged in modern international law. Although the PCIJ in the *German Interests in Polish Upper Silesia* case,[35] (an oft-quoted case in this context) stated that the principle of respect for vested rights forms a part of general international law, Professor Francioni observes [36] that the case is strictly confined to a situation in which a treaty was involved. Commenting on the judgment of this case, White[37] points out that the principle of respect for acquired rights is limited only to cases of cession of territory. In her view, a more general rule of respect for vested rights is not applicable where no transfer is involved.

In his most recent article, Story reached the conclusion that "What emerges is the essential sophistry at the core of the notion of 'vested rights' either *as a legal* category or as a useful adjudicative starting point. For him, the concept "is less legal than political and sociological."[38] Having examined the doctrine in the Iran-US Claims Tribunal's practice, Mouri concludes that "What these

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[33] Two more theories, 'good faith' and 'abuse of rights', have also been mentioned by writers. See M. H. Arsanjani, *International Regulation of Internal Resources - A study of Law and Policy*, University Press of Virginia, Charlottesville (1981) 302, and Jain, op. cit., at 115.

[34] G. Kaeckenbeeck, "The Protection of Vested Rights in International Law", 17 B.Y.I.L. (1936) 1 at 2-4.

[35] The Decision of the *German Interests in Polish Upper Silesia* case, op. cit., at 42.

[36] Francioni, op. cit., at 260.

[37] G. White, *Nationalisation of Foreign Property,* Stevens & Sons Ltd., London (1961) at 10.

[38] Story, op. cit., at 316.

developments show is that such [acquired] rights are no longer given emphasis as a basis for States' liability to compensate" for the taking of foreign property.[39] In his memorandum to the ILC, Arechaga[40] observed that although respect for acquired rights was referred to in some arbitral awards and judicial decisions, they belong to the period when "liberal economy [*laissez faire*] was the only recognised economic system." Thus, in his view, the doctrine of acquired rights does not enjoy "the degree of generality required to constitute an international law rule." Elsewhere the same jurist stated that:

> The very basis of this traditional doctrine, which is predicated on the existence of an unlawful act, is removed once it is realized that the *acquired rights to private property*, in particular private ownership of the means of industrial production, *is no longer protected by contemporary international law* (emphasis added).[41]

Likewise, Sornarajah casts doubt as to whether the doctrine of acquired rights is a part of international law.[42] Friedman[43] also took the view that the doctrine has no authority in international law. To some, the principle provides no reliable guidance.[44]

Broadly speaking, the doctrine of acquired rights may be applied in three sets of situations: (1) when certain rights have been acquired by an alien under treaty provisions; (2) rights available to him under municipal law of the host State; and (3) in cases of State succession, i.e. rights obtained under a

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[39] Mouri, op. cit., at 311 and 314.

[40] Arechaga (1963: 241). In the same manner, Francioni points out that there is no doubt that the value of the doctrine of acquired rights "remains limited to a time when private ownership was the only conceivable postulate of socio-economic organisation." Francioni, op. cit., at 262.

[41] Arechaga (1978: 181). Professors D. P. O'Connell, *International Law* (2nd ed.),Vol. I, Stevens & Sons Ltd., London (1970), at 305, and R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Hague *Recueil* (1982-II) 259 at 288, however, took a contrary view. The latter author states that there "has been considerable support in the past for the view that *acquired rights* are specially protected by international law."

[42] Sornarajah, op. cit., at 367, and the writer's other literature: *The Pursuit of Nationalized Property*, Martinus Nijhoff, Dordrecht (1986) at 212-213, and "The Compensation for Expropriation: the Emergence of New Standards", 13 J.W.T.L. (1979) 108 at 120-121.

[43] S. Friedman, *Expropriation in International Law,* Stevens & Sons Ltd., London (1953) at 121.

[44] Brownlie (1998: 546), and the same jurist's other literature, "Legal Status of Natural Resources in International Law: Some Aspects", 162 Hague *Recueil* (1979-I) 253 at 270.

predecessor State but no longer recognised by the successor State. under the traditional view, the rights acquired in all three situations must be respected. Wortley is of the opinion, however, that a right acquired under a treaty is an "acquired right that is stronger than the ordinary right of property."[45] As regards acquired rights identified in categories (2) and (3), it is paradoxically "claimed that a State is not free to change or modify these rights under the same law without paying compensation."[46] As Professor Borchard observes:

> It becomes somewhat dangerous to be too dogmatic and to assert that a particular right is immune to restriction, because of some superior principle involving the protection of vested rights.[47]

Moreover, Francioni has aptly expressed the view that:

> A State, after having recognised through its law individual positions of interest as legal rights, is not bound to maintain them in existence in perpetuity ... Foreign property rights are not vested with a 'sanctity' and 'permanence' greater than that which may be enjoyed by nationals (emphasis added).[48]

Kaeckenbeeck goes further and points out that when a State admits aliens into its territory it "does not become their insurer against losses accruing to them on account of changes of policy or legislation."[49] In his view, the alleged principle of immunity of acquired rights against legislation has no place in international law. Therefore, he reached the conclusion that suppression of vested rights need not entail compensation in all cases. According to Jain, the doctrine of acquired rights is "totally inadequate and powerless to solve the problems of nationalization."[50]

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[45] B. A. Wortley, *Expropriation in Public International Law,* University Press, Cambridge (1959) at 35. In his view, however, treaties are the mere basis of international law. Ibid., at 36.

[46] Jain, op. cit., at 118.

[47] Quoted by Jain, ibid.

[48] Francioni, op. cit., at 260. One commentator took the view that rights which have been created under the municipal law of the host State should also to be revoked without reference to other legal systems. Sornarajah (1994: 367).

[49] Kaeckenbeeck, op. cit., at 6. See also I. Foighel, *Nationalization: A study in the Protection of Alien Property in International Law,* Stevens & Sons Ltd., Copenhagen (1957) at 52.

[50] Jain, op. cit., at 118.

Appreciation of the doctrine of acquired rights would be incomplete if we were to disregard the Iran-US Claims Tribunal's jurisprudence on this issue. The Tribunal, in the *Amoco* case, first reminds us that when the decision in the *German Interests in Polish Upper Silesia* case was rendered, "the principles of international law generally accepted some sixty years ago in regard to the treatment of foreigners recognized very few exceptions to the principle of respect for vested rights." However, it rightly acknowledges that:

> A very important evolution in the law has taken place since then with the progressive recognition of the right of States to nationalize foreign property ... This right is today unanimously accepted, even by States which reject the principle of permanent sovereignty over natural resources, considered by a majority of States as the legal foundation of such a right.[51]

The foregoing discussion indicates that the doctrine of acquired rights has now become outmoded, and thus, in modern international law, it cannot be a solid basis for compensating foreign owners in the event of nationalisation or expropriation.

2.2.2 Unjust Enrichment

Given the inadequacy of the doctrine of acquired rights to constitute the legal basis for the duty to compensate in case of expropriation, the weight of authority has shifted in favour of the application of the doctrine of unjust enrichment (*enrichissement sans cause*). The latter doctrine, whose origin can be traced back to Roman law, "is codified or juridically recognised in the great majority of the municipal legal systems of the world."[52] Article 301 of the Iranian Civil Code, for instance, provides that "Anyone who intentionally or inadvertently acquires goods to which he has no claim, is bound to deliver such goods to the actual owner."[53]

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[51] *Amoco* Award, op. cit., at 222, para. 113.

[52] Francioni, op. cit., at 273.

[53] Also, Article 303 of the same Code provides as follows:
Anyone who receives any property without any right is responsible for the actual property and for any profits that may accrue thereto, whether or not he is aware of his having no right to the

In general, two main questions are raised in the context of the doctrine of unjust enrichment. The first is whether this doctrine can be considered as a general principle of law. The second question, which forms our discussion in this sub-section, is whether it constitutes a legal foundation for States' liability to compensate foreign owners. As to the first question, the view is that this doctrine has been considered by a majority of authorities as a principle of general international law. Among them, McNair,[54] Wortley,[55] Friedmann,[56] Scheruer,[57] Francioni,[58] Arechaga,[59] Schachter,[60] and Mouri[61] may be recalled. As regards the second question, our finding will be shown at the end of this sub-section.

The doctrine of unjust enrichment has a clear meaning in both municipal and international law. Under the test of unjust enrichment, no person should become improperly enriched at the expense of another. As Mouri, in his recent thorough and studious work on the Iran-US Claims Tribunal's contribution to the development of international law, comments:

> There should be an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event."[62]

It has been argued that when a State expropriates alien property without paying compensation "it would enrich itself without justification at the expense

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property." English translation by M. A. R. Taleghani, Littleton, Colordeo, Fred B. Rothman & Co. (1995) at 34 and 44.

54 Lord McNair, "The Seizure of Property and Enterprises in Indonesia", 6 N.I.L.R. (1959) 218 at 239.

55 Wortley, op. cit., at 95.

56 W. Friedmann, *Law in a Changing Society*, Stevens & Sons, London (1959) at 456.

57 C. H. Scheruer, "Unjustified Enrichment in International Law", 22 A.J.C.L. (1974) 284 at 289.

58 Francioni, op. cit., at 276.

59 E. J. de Arechaga, "International Law in the Past Third of a Century", 159 Hague *Recueil* (1978-I) 1 at 299-300.

60 O. Schachter, "The Question of Expropriation/Compensation in the Light of Recent State Policy and Practice", Symposium on United Nations Code of Conduct on Transnational Corporations (Peace Palace, the Hague, the Netherlands, 15-16 September 1989) 1 at 26-27.

61 Mouri, op. cit., at 315.

62 Ibid., at 316. See also Z. A. Kronfol, *Protection of Foreign Investment - A Study In International Law*, Sijthoff, Leiden (1972) at 96-97.

of a foreign State - a distinct political, economic and social community." Arechaga further stated that:

> This principle signifies that it is not the elements of the loss suffered by the expropriated individual owner, but rather the enrichment, the beneficial gain which has been obtained by the nationalizing State, which must be taken into account. Any measure which results in a transfer of wealth in favor of the nationalizing State or one of its agencies gives rise to a duty to compensate (emphasis added).[63]

In the same vein, Professor Francioni observes:

> The principle of unjust enrichment postulates in itself that not the loss of the expropriated owner ... but the beneficial gain of the nationalising State must be taken into account to establish the measure of reparation.[64]

The above two statements clearly indicate that, under the doctrine of unjust enrichment, what is relevant, for assumption of liability and determining the quantum of compensation, is the very enrichment of the State concerned and not the deprivation of the affected party. Therefore, "if no actual benefit, or at least no actual use, is obtained by the State or its organs, no remedy should be available."[65] For example, if a State, for policy considerations, ends a detrimental or inconvenient industrial or commercial activity which belongs to an alien, there is no duty to pay compensation. Since in that case, nothing is gained by the State concerned, despite the loss suffered by the alien owner.[66]

Some jurists have noticed the relation between the principle of equity and the doctrine of unjust enrichment and its equitable character. Thus, Sornarajah points out that, where this doctrine is applied, because of its equitable character, it requires that "the whole course of the relationship between the parties must be taken into account in the determination"[67] of compensation. Friedmann took a

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63 Arechaga (1978: 182).

64 Francioni, op. cit., at 272. Mouri, op. cit., at 319, also concludes that "under unjust enrichment it is the enrichment of the State which counts and not the deprivation of the aggrieved party."

65 Mouri, op. cit., at 319.

66 The example was proposed by Arechaga (1978: 182).

67 Sornarajah (1994: 366). See also Story, op. cit., at 319-325.

similar view. In his opinion, "the history of the economic-political relations between the parties"[68] should be taken into account in considering the doctrine of unjust enrichment. In this connection, Francioni remarks:

> Only by going back to *the equitable root of the principle of unjust enrichment can we achieve a fruitful application of such a principle* in nationalisation situations.[69] To this effect, we need to take into account all the elements of the specific situation in which the nationalisation measure applies, as well as the concrete character of the bilateral relationships involved. The notion of equity which thereby has to be applied ... will have to provide a tool for balancing, over a reasonable period of time, the claims of the dispossessed owner with the profits and advantages that he enjoyed prior to nationalisation (emphasis added).[70]

Likewise, Garcia-Amador, former Special Rapporteur on the subject of State responsibility to the ILC, comments that the doctrine of unjust enrichment "permits the taking into consideration of equities in favour not only of the individual but also of the community."[71] Reference to the equitable character of the doctrine of unjust enrichment is made also by Latin American jurist, Arechaga, who expressed his view in the following terms:

> What makes the doctrine of unjust enrichment highly relevant to nationalization is its equitable foundation, which requires the taking into account of all the circumstances of each case specific situation and the balancing of the claims of the dispossessed alien with the undue advantage that he may have enjoyed prior to nationalization. Thus, the principle of unjust enrichment would take into account the undue enrichment gained by foreign companies during a period of monopoly or of highly privileged economic position, as, for instance, during a period of colonial domination.[72]

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[68] W. Friedmann, *The Changing Structure of International Law*, Stevens & Sons, London (1964) at 207.

[69] The same author believes that this doctrine is "logically admissible and also fruitful" in the case of nationalisation but not so in expropriation. Francioni, op. cit., at 278.

[70] Ibid.

[71] Garcia-Amador (1959: 5, para. 14).

[72] Arechaga (1978: 182-183). While accepting the need for an equitable corrective mechanism that accounts for current practice, Murphy casts doubt as to whether it can best be achieved by invoking the doctrine of unjust enrichment. J. Murphy "Compensation for Nationalization in International Law", 110 S.A.L.J. (1993) 79 at 86.

Reference to the principle of unjust enrichment has also been made in international arbitral awards. In the most well-known case in this connection, *Lena Goldfields Arbitration*,[73] which involved the nationalisation of a foreign mining company by a State, the arbitrators based their award specifically on the principle of unjust enrichment. Another case, in which the applicability of this doctrine in the field of international law has been accepted, is the *Spanish Zones of Morocco Claims*.[74] However, the United States-Mexican General Claims Commission, established under the General Claims Convention of 1923, in the *Dickson Car Wheel Company* case, took a different view. The Commission held that the theory of unjust enrichment "has not yet been transplanted to the field of international law."[75]

Reliance on the doctrine of unjust enrichment has contained in more recent arbitral awards. The Iran-US Claims Tribunal, in several of its awards on expropriation cases, discussed the relevance of the doctrine of unjust enrichment. After noting that this principle "is a specific application of the general principle of equity", the Tribunal, in the *Amoco* case, stated that the theory:

> Normally extends to cases where a physical or legal person benefits at the expense of another from enrichment which is the result of neither a legal right, nor of tort or breach of contract.[76]

Additionally, in contrast to what has been stated so far in this connection, the Tribunal, in the same case, in its discussion on the valuation of the nationalised property, has taken into account both "the measure of the enrichment of the nationalizing State" and "the deprivation of the expropriated owner." It goes further and ruled that "the theory of unjust enrichment is referred to in the writings of several authorities, as a *ratio legis* of the applicable rule rather than as the rule itself."[77] In another case, *B1 (Claim 4)*, the Tribunal noticed the United

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[73] *Lena Goldfields Arbitration* Award, op. cit., paras. 23 and 25.
[74] 2 R.I.A.A. (1925) 615 at 644.
[75] 4 R.I.A.A. (1931) 669 at 676.
[76] *Amoco* Award, op. cit., at 268, para. 258.
[77] Ibid., at 269, para. 259. However, Mouri took a contrary view, when he observes that "under the theory of unjust enrichment it is the enrichment of the State accounts and not the deprivation

States' explanation at the Hearing "that it was willing to pay compensation in order to avoid being 'unjustly enriched'."[78] After examining the Tribunal's approach on the issue, however, Mouri[79] reached the conclusion that only in the *Benjamin R. Isaiah* case[80] did the Tribunal specifically base its compensation award on the principle of unjust enrichment.

We are now able to respond to the second question which was raised earlier in this sub-section. It seems safe to assert that, because of its equitable foundation, the doctrine of unjust enrichment can be considered as the legal basis of States' liability to compensate aliens in cases of expropriation.

2.2.3 Human Rights

Human rights may be discussed in different fields. For the present purpose, it will be considered in the context of the responsibility of States for injuries to aliens. More precisely, the theories of human rights and their relation with expropriation and compensation will be dealt with. The argument is that the right to own property is a fundamental human right, and an encroachment of such a right entitles its owner, natural or juristic person, to indemnification. Since the end of World War II and the establishment of the United Nations, human rights theories were given a new lease of life. Thus, we have confined ourselves only to those human rights instruments which have been proclaimed from 1945 onwards, though several Declarations were previously acknowledged.

The right to property has been recognised by the Universal Declaration of Human Rights, of which Article 17(1) thereof provides that "Every one has the

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of the aggrieved party." The same author states that the Tribunal relied on this theory when it dealt with the methods of the valuation. Mouri, op. cit., at 319.

[78] *Islamic Republic of Iran v. United States of America*, Partial Award No. 382-B1 (Claim 4)-FT, (31 August 1988), *reprinted in* 19 Iran-U.S. C.T.R. 273 at 295, para. 68.

[79] Mouri, op. cit., at 317.

[80] *Benjamin R. Isaiah v. Bank Mellat*, Award No. 35-219-2 (30 March 1983), *reprinted in* 2 Iran-U.S. C.T.R. 232 at 236-237. See also *Sea-Land Service, Inc. v. Islamic Republic of Iran*, Award No. 135-33-1 (20 June 1984), *reprinted in* 6 ibid., 149 at 168-173 and *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran*, Award No. 259-39-1 (11 October 1986), *reprinted in* 12 ibid., 336 at 353.

right to own property alone as well as in association with others." Paragraph 2 of the same Article guarantees this right against arbitrary deprivations.[81]

In the spirit of Article 55 of the Charter of the United Nations,[82] Garcia-Amador attempted to give the principles declared in the Charter on human rights an international concern. As discussed in chapter 2,[83] in his reports to the ILC, he tried to resolve the long debate over the 'international minimum standard' and 'national treatment standard' through the law of human rights. Readers may recall that while adherents to the former standard believe that there exists under international law a minimum standard on the protection of the property of aliens, advocates of the latter standard feel that equality of treatment with nationals was all the alien could expect in this matter. Turning to our main point, Garcia-Amador based his draft on State responsibility upon human rights principles. Under the draft, aliens are entitled to enjoy the same rights and guarantees as nationals. In turn, the treatment of nationals, including the right to property, is determined by principles of human rights.[84] However, the approach was not welcomed by the International Law of Commission due to a number of difficulties.[85]

Neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights had private property protection clauses.[86] When the rights acknowledged in the Universal

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[81] Universal Declaration of Human Rights, UN General Assembly Resolution No. 217 (III), 10 December 1948. As to the Declaration's legal status, Higgins states that it "was not, of course, a binding instrument, even if subsequently it has assumed a legal significance beyond its status as mere declaration." Higgins, op. cit., at 356.

[82] Article 55 reads in part:
"(c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

[83] See chapter 2 of this thesis, at 77-78.

[84] 2 Y.B.I.L.C. (1957) 112.

[85] One of the difficulties mentioned by Lillich was that the approach was too advanced for its time. R. B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, University Press of Virginia, Charlottesville (1983) at 26-29. See also the same writer's other literature, "Duties of States regarding the Civil Rights of Aliens", 161 Hague *Recueil* (1978-III) 329 at 399-408; Brownlie (1998: 529-530). Interestingly, almost three decades later, even Garcia-Amador himself accepted that the approach was somewhat premature when he submitted his proposal to the ILC. Garcia-Amador (1984: 68).

[86] Higgins believes the reason that the protection of the right to own property was not incorporated in the Covenants, was that in the early 1960s, "the concept of permanent sovereignty

Declaration were put into effect in the Covenants, all other rights were incorporated except the right to property, which figured in Article 17 of the Universal Declaration.

However, to enumerate "the basic rights of the human person",[87] (including protection from slavery and racial discrimination), in whose protection "all States can be held to have a legal interest",[88] the right to own property was not mentioned by the world Court in the *Barcelona Traction* case.

At the regional level, the European Convention on Human Rights[89] also tried to put into effect the principles contained in the Universal Declaration. As Higgins observes, among various instruments on the issue, this Convention "is likely to provide the major focus for developments."[90] In the original Convention there was no reference to the right to property at all. However, the omission was corrected by the First Additional Protocol to the Convention, Article 1 of which deals with private property and its protection.[91] In the drafting committee of the

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over natural resources was emerging and being pressed as a legal obligation. To a significant degree it ran counter to the notions of property entitlement as a human right." Higgins, op. cit., at 356.

87 *Barcelona Traction* Judgment, op. cit., at 32, para. 34.

88 Ibid., para. 33.

89 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on November 1950, 213 U.N.T.S. at 221. In spite of the more homogeneous ideological climate of the Council of Europe, the Council was not able to reach an agreement on the protection of the human right to own property. Many European countries felt that the economic reorganisation of Europe after World War II would be prevented by the recognition of this right. W. Peukert, "Protection of Human Rights under the European Convention on Human Rights", 2 H.R.L.J. (1981) 37. Article 21 of the American Convention on Human Rights as well as Article 14 of the African Charter on Human and Peoples Rights guarantee the right to property but permit encroachment in the public interest. *Reprinted in*: 9 I.L.M. (1970) at 99, and 21 I.L.M. (1982) 58, respectively.

90 Higgins, op. cit., at 375.

91 Paragraph 1 of Article 1 reads:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law. In several cases, the European Court on Human Rights has had the opportunity to interpret this Article. See *inter alia*: the *Sporrong and Lonnroth* case, Judgment of 23 September, 1982, E.C.H.R. Series A, No. 52; the *James et al.* case (Case No. 3/1984/75/199) Judgment of 21 February, 1986, ibid., Series A, No. 98; the *Lithgow et al.* case (Case No. 2/1984/74/12-118) Judgment of 8 July, 1986, ibid., Series A, No. 102.

Protocol, there was considerable dispute as to whether compensation was due when property was expropriated for the public purpose.[92]

Although Garcia-Amador's approach did not receive wide approval from either State practice or authorities, since then many legal commentators have noticed the relevance of the concept of human rights in the context of private property. They may be divided into three main groups. The first group comprises those writers, such as the late Professor Lillich,[93] who have advocated the approach and suggested that the concept might offer a legal foundation for the law of State responsibility for injuries to aliens. For the second group, like Amerasinghe[94] and Professor Brownlie,[95] the approach is thought to extend the substantive protection of aliens much beyond what States can reasonably be expected to accept and to aggravate the problems of co-operation between States of differing degrees of socialisation. The last group took the view that the approach may weaken the traditional remedy for the protection of aliens before any effective new remedy is established in replacement. In the words of McDougal and his associates:

> The consequence is thus, Dr Garcia-Amador insisted, that continuing debate about the doctrines of the minimum international standard and equality of treatment has now become highly artificial; an international standard is now authoritatively prescribed for all human beings. It does not follow, however, that these new developments in substantive prescription about human rights have rendered obsolete the protection of individuals through the traditional procedures developed by the customary law of the State responsibility for injuries to aliens.[96]

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92 Higgins, op. cit., at 357-361.

93 Lillich (1983: 26).

94 C. F. Amerasinghe, *State Responsibility for Injuries to Aliens*, Clarendon Press, Oxford (1967) at 1-7 and particularly 278-281.

95 Brownlie (1998: 530), and the same writer's other literature, "General Course of Public International Law", 255 Hague *Recueil* (1995) 1 at 84.

96 M. S. McDougal, Harold D. Lasswell and Lung-chu Chen, "The Protection of Aliens from Discrimination and World Public Order: Responsibility of State conjoined with Human Rights", 70 A.J.I.L. (1976) 432 at 464, and the same authors' other literature, *Human Rights and World Public Order*, Yale University Press, New Haven (1980) at 765.

Besides these writers, those who have generally discussed the subject under discussion without taking any specific position as to Garcia-Amador's thesis include: Jessup,[97] Waldock,[98] Bishop,[99] Jennings,[100] Falk,[101] Murphy,[102] Mosler,[103] Higgins,[104] Verwey and Schrijver,[105] Seidl-Hohenveldern,[106] Sornarajah[107] and Shaw.[108] Moreover, having examined the philosophical basis of the right to property, Waldron reached the conclusion that "The slogan that property is a human right can be deployed only disingenuously to legitimise the massive inequality that we find in modern capitalist countries."[109] It should be noted that Garcia-Amador today still maintains his approach.[110] it is worthy of mention

The proposition that the principles of human rights may be used as a legal basis for the law of State responsibility for injuries to aliens is potentially relevant. However, there are a number of difficulties with the proposition. First, as Sornarajah has stated, there is doubt as to whether "multinational corporations, which usually make foreign investments, can benefit from any principle which

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[97] P. C. Jessup, *A Modern Law of Nations*, Mcmillan Publications, New York (1948) at 101-102.

[98] Sir H. Waldock, "Human Rights in Contemporary International Law and the significance of the European Convention", in: *The European Convention on Human Rights*, British Institute of International and Comparative Law, Series No. 5 (1965) 1 at 2-3.

[99] W. W. Bishop, "General Course of Public Law", 115 Hague *Recueil* (1965-II) 151 at 415.

[100] R. Y. Jennings, "General Course of Public International Law", 121 Hague *Recueil* (1967-II) 323 at 488.

[101] R. A. Falk, "The New States and International Legal Order", 118 Hague *Recueil* (1966-II) 1 at 94-96.

[102] C. F. Murphy, "State Responsibility for Injuries to Aliens", 41 N.Y.U.L.R. (1966) 125 at 128-130.

[103] M. Mosler, "The International Society as a Legal Community", 140 Hague *Recueil* (1974-IV) 1 at 72.

[104] Higgins, op. cit., at 355-375.

[105] W. D. Verwey and N. J. Schrijver, "The Taking of Foreign Property under International Law: A New Legal Perspective", 15 N.Y.I.L. (1984) 3 at 7-8.

[106] I. Seidl-Hohenveldern, *International Economic Law*, Martinus Nijhoff, Dordrecht (1992) at 130-135.

[107] Sornarajah (1994: 368-373).

[108] M. N. Shaw, *International Law* (4th ed.), Cambridge University Press (1997) at 570.

[109] J. Waldron, *The Right to Private Property*, Clarendon Press, Oxford (1988) at 3.

[110] Writing in 1984, he observes:

"The increasing awareness of the high degree of development which international law has achieved in the field of human rights suggests an audatious departure from the past. Therefore, to think in terms of synthesis of the two traditional standards should no longer be considered premature." Garcia-Amador (1984: 70).

protects the right of the individual to property."[111] Piran[112] views the first problem from another angle when he observes that "the law of human rights is essentially to protect the fundamental rights of individuals", and the letter, spirit and substance of all human rights instruments prove this assertion. He rightly goes on to say that, nowadays, multinational corporations are the subject of the majority of cases of the expropriation of foreign property, and "it is hard to conceive that the founders of the law of human rights, had the protection of such companies in mind." Second, for some,[113] what Garcia-Amador undertook was in fact attempting to innovate an international minimum standard with a new content in regard to the treatment of aliens. In effect, it is impossible to persuade States with widely differing ideological, political and economic systems to submit to any particular standard. Thus, it is submitted that the concept of human rights is still far from being an internationally recognised principle which would constitute the foundation of the law of State responsibility for injuries to aliens, *a fortiori*, of the basis for the duty to compensate.

2.2.4 Damage or Loss

As alluded to earlier, the International Court of Justice so far has not had the opportunity specifically to deal with nationalisation or compensation questions. However, the Court, in the *ELSI* case,[114] examined some aspects of the compensation issue. The case arose from the requisition of an Italian corporation wholly-owned by two American companies. Given the facts of the case, the interference with the management control of the company by the Italian Government, as shown in chapter 3, was held to be justifiable, and hence it did not constitute an indirect expropriation. It appears that the Chamber based its judgment on the theory of damage or loss, where it concluded that since the

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[111] Sornarajah (1994: 368).

[112] H. Piran, *Nationalization of Foreign Property in International Law and Iran-United States Claims Tribunal* (unpublished PhD thesis, University of Liverpool, 1992) at 327-328. The same writer observes:
"It is common knowledge that some of such corporations were, or are, behind regimes which were, or are, the subject of the most severe criticisms for their violations of the human rights." Ibid., at 328, n. 116.

[113] Brownlie (1998: 530).

[114] *Case concerning Elettronica Sigula S. P. A. (ELSI)*, op. cit. (note 19).

requisition did not cause or precipitate the bankruptcy of the company, the shareholders did not suffer damage from the requisition.[115]

The jurisprudence of the Iran-US Claims Tribunal has shed some light on the theory. Strictly speaking, none of the Tribunal's awards on expropriation or other measures affecting property rights was specifically based on the doctrines of acquired rights, unjust enrichment or human rights. The question which arises is: upon what legal basis has the Tribunal rendered its awards? After a studious examination of the Tribunal's case law, the Iranian scholar, Mouri[116] reached the conclusion that the Tribunal used the theory of damage or loss. The test for assumption of liability and awarding compensation, and for determining its quantum by application of this theory, is that some "pecuniary damages" should be suffered by the owner of the property or right. Put in technical terms, under the theory it is "the loss sustained by the expropriated person, i.e., his deprivation" which is pertinent.[117] To support his statement, Mouri observes that there are a number of cases in which the Tribunal denied compensation, despite its finding that expropriation occurred. The reason was that the claimants of those cases could not establish the pecuniary damages which they suffered with any precision, or because the property or right they lost was found to be worthless.

3. The Impact of Lawfulness, Large-Scale Expropriations and Dual Nationality Status on the Standard of Compensation

Having examined the legal foundations for the payment of compensation, defining the applicable standard of compensation under customary international law will be our next task. Before dealing with this issue, however, it is necessary to consider the possible effect of lawfulness, large-scale expropriation measures and dual-nationality status on the standard of compensation.

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[115] Ibid., at 71, para. 119.
[116] Mouri, op. cit., at 319-320.
[117] *Amoco* Award, op. cit., at 269, para. 259.

3.1 The impact of lawfulness: Lawful and Unlawful Expropriation

As shown in chapter 2,[118] it is a well-established principle in international law that a sovereign State has the right to expropriate or nationalise foreign property in furtherance of a public purpose. This right is a corollary of the State's permanent sovereignty over its natural wealth and resources. However, the right is not unlimited and international law lays down several conditions for lawful expropriation. Thus, the non-compliance of the expropriating State with those conditions may be construed as unlawful taking. The obvious instances of unlawful expropriation would be where the expropriation is in violation of a treaty commitment toward the home State of the foreign investor, or where there has been unreasonable discriminatory expropriation against foreigners. The public purpose requirement is of diminishing relevance, but it will help to establish unfair discriminatory taking.

The distinction between lawful and unlawful expropriation has two practical consequences.[119] The first effect falls within the ambit of private international law, which is not our concern in this work.[120] The second is in the sphere of public international law, to the effect that when an expropriation is found to be unlawful, the amount of compensation due to the deprived party is more than that due for lawful expropriation.

The distinction between lawful and unlawful expropriation and its effect on the determination of the quantum of compensation has been recognised by international jurisprudence and arbitral awards, and hence is now well settled in international law. The PCIJ, in its celebrated decision in the *Chorzow Factory* case,[121] established this principle. The first issue for the Court was whether the expropriation of the factory in question was lawful or unlawful. It held that the

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[118] See chapter 2 of this thesis, at 82-88.

[119] O. E. Bring, "Impact of Developing States on International Customary Law concerning Protection of Foreign Property", 24 Scandinavian Studies in Law (1980) 99 at 107.

[120] The consequence which is material to private international law: "an expropriation which is deemed unlawful may in foreign courts be considered as a nullity without any legal effects. The forum will tend not to recognize titles which are based on the unlawful taking." Ibid.

[121] *Chorzow Factory* Judgment, op. cit. (note 18).

Polish Government's action was a violation of the Geneva Convention of 1922 between Germany and Poland, that is, the expropriation was unlawful. The World Court had next to consider the amount of compensation payable by Poland. It ruled that the compensation to be paid in the case of unlawful expropriation should differ from that of lawful expropriation. At this point the practical relevance of the distinction between lawful and unlawful expropriations appeared. Thus, the Court applied the impact of this distinction on the determination of the quantum of compensation due to Germany. Relying on "international practice and in particular ... the decisions of arbitral tribunals", it held that unlawful expropriations required:

> Restitution, in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; [and] the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.[122]

More than five decades later, this principle was recognised by the arbitral award in *Aminoil*.[123] Additionally, the Iran-US Claims Tribunal, in several of its awards on expropriation cases, made a distinction between lawful and unlawful expropriation, and applied the impact of the distinction on the amount of compensation. Relying on the teachings of the *Chorzow Factory* case judgment and *Aminoil* award, in its award in the *Amoco* case, the Tribunal held that the first principle learned is that:

> A clear distinction must be made between lawful and unlawful expropriation, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking.[124]

Finding that the expropriation of the claimant company's fifty percent interest in its Iranian subsidiary was lawful, the Tribunal stated that "the compensation to be paid in [the] case of a lawful expropriation is limited to the

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[122] Ibid., at 47.
[123] *Aminoil* Award, op. cit., at 1032, para. 143. See also *Liamco* Award, op. cit., at 137.
[124] *Amoco* Award, op. cit., at 246, para. 192.

value of the undertaking at the moment of the dispossession, i.e., the just price of what was expropriated"[125] It is worth noting that the Tribunal, in this award, held that even in an unlawful expropriation, no punitive damages are payable.[126]

In its more recent award in the *Ebrahimi* case, the Tribunal reaffirmed the importance of the distinction between lawful and unlawful expropriation. Since the claimant in that case sought compensation for *damnum emergens* only, not for *lucrum cessans*, the Tribunal did not find it necessary "to examine the effect of the characterization of the taking as lawful or unlawful on the available compensation."[127] However, in the *Phillips Petroleum* case,[128] the same Tribunal took a somewhat different position. While endorsing the significance of such a distinction in international law, the Tribunal stated that it is irrelevant to the decision-making process of this Tribunal. This is because the 1955 Treaty of Amity, between Iran and the United States, provides a single standard of compensation which is applicable to both lawful and unlawful expropriations.[129]

Likewise, the distinction between lawful and unlawful expropriation and its practical consequences on the amount of compensation has been supported by most scholars in this field. For instance, one might consult Fatouros,[130] Kronfol,[131] Bring,[132] Jain,[133] Marks,[134] Piran,[135] Murphy,[136] Mouri[137] and Brownlie. Thus, the latter author observes:

> The practical distinctions between expropriation unlawful *sub modo*, i.e. only if no provision is made for compensation, and expropriation unlawful *per se*, would seem to be these: the former involves a duty

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125 Ibid., at 247, para. 196.
126 Ibid., at 248, para. 197.
127 *Ebrahimi* Award, op. cit., para. 96. See also *INA Corporation v. The Islamic Republic of Iran*, Award No. 184-161-1 (12 August 1985) *reprinted in* 8 Iran -U.S. C.T.R. 373 at 380.
128 *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, Award No. 425-39-2, (29 June 1989), *reprinted in* 21 Iran -U.S. C.T.R. 79.
129 Ibid., at 121-122, para. 109.
130 Fatouros, op. cit., at 315.
131 Kronfol, op. cit., at 95-100.
132 Bring, op. cit., at 106-107.
133 Jain, op. cit., at 163.
134 S. Marks, "Expropriation: Compensation and Asset Valuation", 48 C.L.J. (1989) 170.
135 Piran, op. cit., at 333-338.
136 Murphy, op. cit., at 91-96.
137 Mouri, op. cit., at 320-347.

> to pay compensation only for direct losses, i.e. the value of the property, the latter involves liability for consequential loss (*lucrum cessans*).[138]

Having surveyed the Iran-US Claims Tribunal's case law on the issue of compensation, Sornarajah concludes that:

> One merit of some of the awards made by the Iran-US Claims tribunals [sic] is to set the law straight by making *a meaningful distinction* between the two types of takings [lawful and unlawful] and also *rationalising the calculation of compensation* in respect of the two types of takings (emphasis added).[139]

Before drawing a conclusion on the issue, it is necessary to deal with an important question which arises here with respect to unlawful expropriation. What is the appropriate remedy for an unlawful expropriation under international law? Some argue that 'restitution' or 'specific performance' is the principal reparation of a material wrong, compensation being subsidiary in character, applicable only when restitution is not possible or not claimed. The clearest statement in this respect can be found in the PCIJ's celebrated dictum in the *Chorzow Factory* case, as quoted above. As regards the Court's statement, two situations may be assumed. Firstly, restitution is impossible because of purely material reasons (material impossibility). For example, in cases where the expropriated property has already passed into the hands of a third party, or is destroyed.[140] The impossibility may be for legal reasons (legal impossibility). In this case, "it is no simple matter from the point of view of domestic law to contemplate compelling a state to rescind a legislative measure or to set aside a decision pronounced by its courts."[141] Secondly, claimants mostly do not seek restitution, since they regard damages which represent a compensation more advantageous than restitution.[142] Kronfol[143] has advanced a third situation,

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138 Brownlie (1998: 541).
139 Sornarajah (1994: 396 and 408) and (1986: 167-188).
140 Higgins, op. cit., at 315-316. Harris, op. cit., at 573, also shares the view that restitution in the case of expropriation would be impossible.
141 Kronfol, op. cit., at 98.
142 Higgins, op. cit., at 316.
143 Kronfol, op. cit., at 99.

where he points out that restitution may not always "wipe out all the illegal act." For instance, the mere returning of the illegally expropriated property will not cover the lost profits occasioned by the expropriation. Interestingly, in the same case, the PCIJ describing payment of indemnity as "the most usual form of reparation", stated that "it is the form selected by Germany in this case and the admissibility of it has not been disputed." Thus, Kronfol rightly suggests that in any one of the three above-mentioned situations, "reparation takes the form of the payment of damages and it is pecuniary in nature because in Grotius' well known phrase, 'money is the common measure of valuable things.'"

In the light of these views, to order restitution as a principal remedy is not generally favoured by international tribunals. Thus, in the *BP* case, Arbitrator Lagergren ruled that restitution was not an available remedy and stated that the claimant was "entitled to damages arising from the wrongful act of the Respondent, to be assessed by this Tribunal in subsequent proceedings."[144] In the *Liamco* case, while Arbitrator Mahmassani spoke of the acceptance of restitution in Islamic law, he declined to grant this remedy in the case because of its impossibility of performance "in the international field."[145] However, in the third Libyan oil expropriation case, *Texaco*, Arbitrator Dupuy ordered *restiutio in integrum* of the expropriated oil concessions.[146]

Writers have also shared the view that, in practice, compensation constitutes the principal remedy, restitution being clearly an exceptional one.[147]

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[144] *BP* Award, op. cit., at 357. Note that almost a decade later, the same arbitrator restates the view that restitution, for practical reasons, is usually impossible of achievement. The Separate Opinion of Judge Lagergren in the *INA* Award, op. cit., 385 at 385.

[145] *Liamco* Award, op. cit., at 124. Note that the reluctance of Arbitrators Lagergren and Mahmassani to consider restitution on the ground that it would be difficult to enforce has been criticised. See, R. B. von Mehren and P. N. Kourides, "International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases", 75 A.J.I.L. (1981) 476 at 533-545.

[146] *Texaco* Award, op. cit., at 36, para. 109.

[147] See, *inter alia*:

- Higgins, op. cit., at 321: "I find very little evidence that restitution is perceived as a required remedy or that it is anticipated as being likely to be granted."

- Friedman, op. cit., at 214: "To impose an obligation to make integral restitution, however, constitutes an intolerable interference in the internal sovereignty of States." Gray took a similar approach. C. D. Gray, *Judicial Remedies in International Law*, Clarendon Press, Oxford (1990) at 16-17.

From the foregoing discussion, one may conclude that the distinction between lawful and unlawful expropriation is well established in international law. The significance of such a distinction has been noticed and applied to the amount of compensation by international decision-makers. In the case of lawful expropriation, compensation may be due, and it is limited to the value of the expropriated property at the moment of the expropriation (*damnum emergens*). With respect to unlawful expropriation, the appropriate remedy would be damages, which, in addition to the value of the expropriated property at the moment of the expropriation, may include lost profits (*lucrum cessans)*. The latter may be awarded according to what the claimant concerned reasonably expects. The conclusion was given the stamp of authority by Professor Bowett, when he observes that whilst loss of profits may be a legitimate head of damages for an unlawful act, is not an appropriate head of compensation for a lawful expropriation.[148] Thus, in view of the weight of authorities in international law, restitution is the appropriate remedy only in exceptional cases.

3.2 The impact of Large-Scale Expropriations

In chapter 1,[149] the differences, in nature, scope and effect, between individual or *ad hoc* expropriation and expropriation on a large-scale, namely nationalisation, were addressed. There, it was indicated that nationalisation is a separate legal concept, which has been defined as measures of general economic reform designed to achieve greater social justice. The discussion in this sub-section begins with the question of whether such measures merit a different treatment of the standard of compensation from that of other forms of takings.

- Jain, op. cit., at 164-165.
- Fatouros, op. cit., at 313: "Compensation constitutes the principal mode of reparation. Restitution is possible only in a limited number of special cases."
- Referring to the *Temple of Preah Vihear* case, Sornarajah (1994: 351, n. 83) states that "specific performance can be the only remedy in territorial disputes," and it is difficult to extend it to areas outside territorial disputes.

[148] D. W. Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach", 59 B.Y.I.L. (1988) 49 at 63.

[149] See our discussion in chapter 1 of this thesis, at 8-9.

Put in technical terms, is payment of 'partial' compensation justifiable where economic reform is the goal of the measures?

Generally speaking, there are two schools of thought in this connection.[150] First, from the viewpoint of 'unitarians', despite profound ascertainable disparities between nationalisation and other forms of takings, international law requires 'full' compensation for major and minor expropriations alike. Second, from the viewpoint of 'dualists', 'full' compensation should be paid in cases of minor takings, but only 'partial compensation' in the case of major expropriations. The 'unitarian' school is represented by Wortley, who comments:

> The first point I want to make is that nationalization, which is the seizure of a country's economy, does not differ in principle from other forms of expropriation, i.e., from confiscation without payment, from requisition in an emergency with payment after the events, or from classical expropriation after prior payment.[151]

The 'dualist' school was supported by the late Sir Hersch Lauterpacht. While accepting that a State is bound to respect the property of aliens, he made these meaningful remarks:

> A modification must be recognized in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases, neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation (emphasis added).[152]

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[150] D. R. Weigel and B. H. Weston, Valuation upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation under International Law", in R. B. Lillich (ed.), *The Valuation of Nationalized Property in International Law*, Vol. I, University Press of Virginia, Charlottesville (1972) 3 at 7.

[151] Quoted in ibid.

[152] H. Lauterpacht, *Oppenheim's International Law* (8th ed.), London (1955) at 352. Note that the above-mentioned passage is missing in the new edition (*Oppenheim's International Law* (9th ed.), Vol. 1, Longman, London (1996) edited by Sir Robert Jennings and Sir Arnold Watts). While this edition recognises the existence of much disagreement as to the standard of compensation, it is not partial to any view on the issue.. The new edition, at 921-922.

It has been stated that the origin of such a distinction can be traced back to the period between the two World Wars when both Romania, regarding its land reform, and Mexico, concerning its land reform and oil nationalisation, adopted such a position. In his words:

> A distinction was made between regular, individual expropriation of private property and expropriation of general, impersonal character, the latter being undertaken in the execution of economic and social reforms, such as an agrarian or land-reform. *Legal principles applicable to each type of expropriation*, under the new approach, *were no longer the same as have been traditionally applied to expropriations of the first type* (emphasis added).[153]

While publicists who advocate the 'unitarian' school are not alone,[154] the number of jurists who favour partial compensation in cases of nationalisation is rapidly increasing. Among earlier writers, one might consult Katzarov,[155] Dunn,[156] Kuhn,[157] Delson,[158] De Visscher,[159] Dawson and Weston,[160] Baade,[161] Foighel,[162] Friedman[163] Doman,[164] Bishop[165] and Fatouros.[166]

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[153] Garcia-Amador (1984: 307 and 330).

[154] See, e.g., Schwarzenberger, op. cit., at 41, and Lord McNair, op. cit., at 251.

[155] Katzarov suggests that compensation for claims arising from nationalisation be fixed by "new criteria." K. Katzarov, "The Validity of the Act of Nationalisation in International Law", 22 M.L.R. (1959) 639 at 647. Relying on State practice, many constitutional and legislative materials, he concludes that there is no place for 'full' compensation but only for 'suitable' or 'equitable' compensation. To him, equitable compensation comprises a number of elements involving a subjective appraisal. The same writer's other literature, *Theory of Nationalisation*, Martinus Nijhoff, the Hague (1964) at 349.

[156] F. S. Dunn, "International Law and Private Property Rights", 28 Col.L.R. (1928) 166 at 178.

[157] A. K. Kuhn, "Nationalization of Foreign-Owned Property in its Impact on International Law", 45 A.J.I.L. (1951) 709 at 711-712.

[158] R. Delson, "Nationalization of the Suez Canal Company: Issues of Public and Private International Law," 57 Col.L.R. (1957) 754 at 763-767.

[159] C. De Visscher, *Theory and Reality in Public International Law* (transl. by P. E. Corbett), Princeton University Press (1968) at 203.

[160] F. G. Dawson and B. H. Weston, "Prompt, Adequate and Effective: A Universal Standard of Compensation?", 30 For.L.R. (1961) 727 at 732-736.

[161] H. W. Baade, Indonesian Nationalization Measures before Foreign Courts - A Reply", 54 A.J.I.L. (1960) 801 at 804, n. 23.

[162] Foighel, op. cit., at 188.

[163] Friedman, op. cit., at 206-211.

[164] N. R. Doman, "Post-war Nationalization of Foreign Property in Europe", 48 Col.L.R. (1948) 1125 at 1128. In his view, the post-war nationalisation acts do not come under any traditional category of a legal system based on capitalist economy, and should be treated as *lex specialis*.

[165] Bishop, at 410.

[166] Fatouros, op. cit., at 327:

A considerable number of modern writers in this field also share the view. Thus, Professor Bowett[167] points out that there are three standards of compensation: (1) for an unlawful taking; (2) for a lawful *ad hoc* taking; and (3) for a lawful, general act of nationalization. In his view, "the third standard is the lowest, which would accord with State practice and the trend in General Assembly resolutions to move towards a concept of 'appropriate' or 'just' compensation." He based his opinion on a two-fold rationale. First, in the case of nationalisation, unlike *ad hoc* taking, owners of the nationalised property are not singled out, "and therefore the measure is akin to taxation: it is a form of redistribution of wealth and resources." As in the case of taxation, "the owners do suffer a partially confiscatory measure, losing part of their wealth to the State." (referred to as 'taxation analogy'). Second, it is "based on the view that nationalizations commonly affect either those natural resources regarded as subject to 'permanent sovereignty', or else industries which are crucial to the State's economic welfare." Bowett argues that:

> The resources and means of production are either already owned by the state, or can properly be brought into ownership. The exploiter who is nationalized is therefore entitled to full compensation for his assets, and has a right to recover what he has invested.

He continues:

> but he has no right to any expectation of profits, from the moment in time when the State takes over the actual exploitation of those resources or means of production. For profits produced after the State has taken over, are the fruit of the State's own efforts: they will not have been 'earned' by the previous owner, and therefore do not represent an element of compensation to which he is entitled.

In the same vein, Professor Brownlie observes:

> Where major natural resources are concerned, cogent considerations of principle reinforced by the Declaration of 1962 and the Charter of

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"The main argument in support of the practice [of partial compensation] is its economic necessity ... if full compensation had to be paid, the nationalizations would have been impossible or the nationalizing state would have been led into bankruptcy."

[167] Bowett, op. cit., at 73-74.

> Economic Rights and Duties of States, militate against the 'adequate, effective, and prompt' formula.[168]

Seidl-Hohenveldern believes that a duty to pay full, prompt and effective compensation in the case of nationalization would prevent a poor State from adopting any nationalization measures, which will be essential for its social reform.[169] Garcia-Amador took a similar view, when he comments:

> It would be unjust to deprive those less wealthy, developing countries of the power to directly exploit their natural resources and public services, industries, or other undertakings established in their territory, *just because of their inability to pay full compensation* (emphasis added).[170]

Piran reached the conclusion that in large-scale expropriations, if the expropriating State is not able to provide the compensation required, "partial compensation corresponding to the amount affordable by the State would be legal and acceptable."[171] For some, 'partial' compensation in the extensive wealth deprivation context "has become more the norm than the exception."[172] Professor Schachter[173] quotes Sohn and Baxter,[174] who wrote as early as in 1961 that less than full value would be just compensation when the State would otherwise have "an overwhelming financial burden."

Commenting on Weston's conclusion[175] on the practice of expropriating States to pay compensation, Professor Higgins observes that it is hard to disagree with his conclusion to the effect that:

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[168] Brownlie (1998: 547). In another passage the same author comments: "The principle of nationalization unsubordinated to a full-compensation rule may be supported by reference to principles of self-determination, independence, sovereignty, and equality." Ibid., at 539.

[169] Seidl-Hohenveldern, op. cit., at 139.

[170] Garcia-Amador (1984: 332-333).

[171] Piran, op. cit., at 342 and 391-392.

[172] Dawson and Weston, op. cit., at 738.

[173] O. Schachter, "Compensation Cases - Leading and Misleading", 79 A.J.I.L. (1985) 420 at 420, and the same author's other literature: (1984: 124), (1989: 16-19), and *International Law in Theory and Practice*, Martinus Nijhoff, Dordrecht (1991) at 321-324.

[174] L. B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", 55 A.J.I.L. (1961) 545 at 560.

[175] B. H. Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Property", 75 A.J.I.L. (1981) 437 at 453-454.

> ... one finds in the great majority of cases the depriving countries ultimately have granted compensation in an amount and form *not inconsistent with the 'partial' compensation and valuation standards prevalent since World War II* ... (emphasis added).[176]

Writing in 1997, Schrijver concludes that:

> It is accepted in most cases involving *large-scale nationalisations of the natural-resource sector* that *only 'partial' compensation has to be paid.* This is because the impact of 'full' compensation on the financial resources and the development plans of the nationalizing country would in practice nullify the effect of the nationalization (emphasis added).[177]

The European Court of Human Rights has also expressed a similar view on the issue. In its judgment in the *James* case, which involved the application of Article 1 of Protocol No. 1 to the European Convention on Human Rights, the Court held that:

> Article 1 does not ... guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as [those] pursued in measures of economic reform or measures designed to achieve greater social justice, may call for *less than reimbursement of full market value* (emphasis added).[178]

Similar expressions were used by the Court in the *Lithgow* case, involving the nationalisation of the property of British nationals by their own government. Striking a balance between the demands of the general interests of the community and the private property interests of the individual,[179] the Court ruled that "the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property."[180]

In presenting arguments to the Court in the same case, the counsel for the European Commission made the following comment on the issue:

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[176] Higgins, op. cit., at 294.
[177] Schrijver, op. cit., at 293-294.
[178] *James* Judgment, op. cit. (note 91), at 36, para. 54.
[179] See also *Sporrong and Lonnroth v. The Government of Sweden*, Judgment of 23 September 1982, E.C.H.R. (1982), Series A, No. 52, 7, at 26, para. 69.
[180] *Lithgow* Judgment op. cit. (note 91), at 51, para. 121.

> I am not aware of one single case where, for nationalization of whole industries, full compensation was paid by the nationalizing state to the foreign owners ... In most cases of nationalization, lump-sum agreements were reached clearly below the value of the assets taken. *At least for large-scale nationalization, the notion of sovereignty over natural resources and freedom of decision over the economic order may easily come into conflict with [the] claim of full compensation* (emphasis added).[181]

Commenting on the *Lithgow* judgment, Schachter enumerated three points concerning the significance of the judgment, including "it draws a distinction between nationalization and eminent domain takings."[182]

Reference to the view that the standard of compensation required in the case of nationalisation is different from that required in regard to an individual expropriation, may also be made to the Iran-US Claims Tribunal. The latter dealt with the issue in two of its awards, *INA* and *Sedco*.[183]. In the first award, the Tribunal characterised the nationalisations in question as "a classic example of a formal and systematic nationalization by decree of an entire category of commercial enterprises considered of fundamental importance to the nations' economy."[184] It clearly regarded such nationalisations as falling into a special category. However, the Tribunal did not apply the consequences of such a distinction in its awards, and held full compensation. After noting that "no award of the Tribunal has invoked the far-reaching or reformative aspects of the measure for the purpose of awarding a lesser standard of compensation", Mouri comments:

> Rather ... those awards which referred to large-scale expropriations did so only to justify their own application to the 'full' standard and/or to circumvent the requirement of lesser compensation by

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[181] Quoted by Sornarajah (1994: 370-371).

[182] Schachter (1989: 17).

[183] *Sedco Inc. v. National Iranian Oil Company & The Islamic Republic of Iran*, Interlocutory Award No. 55-129-3 (24 October 1985), *reprinted in* 9 Iran-U.S. C.T.R. 248.

[184] *INA* Award, op. cit., at 378.

considering the particular case at hand not an instance of large-scale nationalization.[185]

The World Bank Guidelines also recognise that, from the viewpoint of the standard of compensation, large-scale expropriations warrant different treatment.[186]

In the light of the foregoing, there seems to be little room for doubt that large-scale expropriations or nationalisations merit a different standard of compensation from that of individual expropriations. It is not solely the financial capacity of the nationalising State that calls for such treatment,[187] but also, perhaps primarily, the conflict between the permanent sovereignty of States over their natural resources and the claim for full compensation. Thus, in the case of nationalisation 'partial' compensation would be the appropriate compensation.

The area in which the practice of 'partial' compensation is more evident than elsewhere is in the settlements of compensation disputes through lump-sum agreements. This will be considered later in this chapter.

3.3 The Impact of Dual Nationality

Under this heading, the possible impact of dual nationality on the amount of compensation will be addressed. To the present author's best knowledge, this issue has been raised for the first time in the recent awards of the Iran-US Claims Tribunal. Under the pertinent provisions of the Algerian Declarations,[188] the

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[185] Mouri, op. cit., at 348. See also Sornarajah (1994: 387-391), and M. Pellonpää and M. Fitzmaurice, "Taking of Property in the Practice of the Iran-United States Claims Tribunal", 19 N.Y.I.L. (1988) 53 at 114-120.

[186] The World Bank Guidelines, Section IV(10), op. cit. (note 30), at 1383, reads in part: "In the case of comprehensive ... nationalizations effected in the process of large scale social reforms ... the compensation may be determined through negotiations between the host State and the investor's home State.

[187] See also:

- C. F. Amerasinghe, *State Responsibility for Injuries to Aliens*, Clarendon Press, Oxford (1967) at 129, and the author's other literature, "The Quantum of Compensation for Nationalized Property", in R. B. Lillich (ed.), *The Valuation of Nationalized Property in International Law*, Vol. III, University Press of Virginia, Charlottesville (1975) 91 at 124-125; and
- Piran, op. cit., at 392.

[188] The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the Islamic Republic of Iran and the

Tribunal's constituent instruments, the Tribunal has jurisdiction to adjudicate claims between the two States, Iran and the United States, as well as their nationals' claims against the other State. However, the Algerian Declarations are silent on the issue of whether a dual Iran-United States national may bring a claim before this Tribunal. Thus, in case *No. A18*,[189] the Full Tribunal decided that the Tribunal has jurisdiction over claims by dual Iran-United States nationals with dominant and effective United States nationality against the Government of Iran and vice versa. To this conclusion, however, the Tribunal added an important caveat:

> In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.[190]

Following this decision, many cases were filed with the Tribunal by dual Iran-United States nationals whose dominant and effective nationality was that of the United States. In those cases, claimants asserted that their properties, including real estate, were expropriated by the Government of Iran directly or indirectly, and hence it incurs the responsibility of Iran. Whatever arguments were presented by the claimants, the Government of Iran's arguments, as respondent,[191]: are highly relevant to our present purposes. Iran based its arguments on: the *A18* caveat, a number of international principles and several pieces of Iranian legislation. They may be summarised as follows

1) since claimants brought claims before the Tribunal as United States nationals and because their claims involve benefits limited by Iranian law to sole Iranian nationals, their claims are barred by the *A18* caveat;

2) the mere ownership by a dual national of *real property* in Iran in itself bars the claim from compensation by the Tribunal, and thus the caveat filters out

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Government of the United States (signed on January 19, 1981), *reprinted in* 1 Iran-U.S. C.T.R. 3; 75 A.J.I.L. (1981) 418, and 20 I.L.M. (1981) 224.

[189] *The Islamic Republic of Iran v. The United States of America*, Decision No. 32-A18-FT (6 April 1984), *reprinted in* 5 Iran-U.S. C.T.R. 251 at 265.

[190] Ibid., at 265-266.

[191] See the respondent's Evidence and Brief in Rebuttal, Vol. 2, Filed 30th August 1994 (Document 113), Exhibit 16 in *Kamran Hakim v. The Islamic Republic of Iran*, Case No. 953.

claims incapable of proceeding to the stage of consideration of the substance. This occurs through the application of such principles as: abuse of rights, good faith, clean hands, misrepresentation, concealment of material facts, estoppel and State responsibility; and

3) Iranian law, especially Articles 988 and 989 of the Civil Code, prohibits foreigners from owning real estate in Iran, save certain exceptions irrelevant to those cases.

In the awards of those cases, the meaning and the scope of the *A18 caveat* have been explicitly defined and determined by the three Chambers of the Tribunal. Here is one example in which Chamber Two of the Tribunal, after having a thorough review of all the earlier pronouncements on the issue, concluded that:

> The caveat is evidently intended to apply to claims by dual nationals for benefits limited by relevant and applicable Iranian law to persons who were nationals solely of Iran. However, ... the equitable principle expressed by this rule can, in principle, have a broader application. Even when a dual national's claim relates to benefits not limited by law to Iranian nationals, the Tribunal may still apply the caveat when the evidence compels the conclusion that the dual national has abused his dual nationality in such a way that he should not be allowed to recover on his claim.[192]

However, there is no consensus among the Chambers of the Tribunal on the issue. Thus, three categories of awards may be identified. The first category consists of awards in which the Tribunal applied the caveat, and hence the claimants concerned were denied compensation. In the *Saghi* case, one of the claimants, Allan Saghi, had renounced his Iranian nationality at the age of 18, but re-applied for and acquired the said nationality solely for the purpose of purchasing certain shares that he believed could only be owned by Iranian

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[192] *James M. Saghi et al. v. The Islamic Republic of Iran*, Award No. 544-298-2, para. 54 (22 January 1993) (*unprinted*). Note that the Tribunal's statement on the issue is not without precedent in the literature of international law. Thus, the ICJ, in the *Nottebohm* case, concerning the nationality of individuals for the purpose of diplomatic protection in international law, ruled that the right of diplomatic protection arises only when there is a 'genuine link (connection)' between the claimant State and its nationals. See .I.C.J. Rep. (1955) 4. Regarding the nationality of corporations, see *Barcelona Traction* case, I.C.J. Rep. (1970) 3.

nationals. Having applied the caveat to the facts of the case, the Tribunal held that:

> Fundamental considerations of equity require that Allan Saghi - a dual national with dominant and effective U.S. nationality - *should not be permitted to recover against Iran*, even if the related benefits ... he acquired with the use of his Iranian nationality, were not limited to Iranians by Iranian law. *To rule otherwise would be to permit an abuse of right* (emphasis added).[193]

The Tribunal therefore dismissed "those part of his claim where the equitable considerations giving rise to the application of the caveat are present."[194]

To the same effect is the Tribunal's 1996 decided case of *Karubian*,[195] in which the claimant, a dual Iran-United States national living in the United States, purchased real estate after he had acquired American nationality, that is after he had became a dual national. After reviewing all pertinent laws of Iran, the Tribunal unanimously concluded that apart from certain exceptions irrelevant to the present case, the right to acquire real property in Iran is reserved for Iranian nationals only.[196] As in the *Saghi* case, the Tribunal held that if it were to allow the claimant to recover against the Government of Iran in those circumstances, it would be permitting an abuse of right.[197] Consequently, it found that:

> The A18 caveat bars the claimant ... from recovering against the Respondent for interference with property rights that, under Iranian law, he could have acquired only as an Iranian national.[198]

In the next category of awards, the Tribunal held that the *A18* caveat was not applicable. In its view, there was no evidence that the claimants concerned concealed or otherwise abused their Iranian nationality when they acquired property rights or that they obtained any benefit available by law only to Iranian

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193 Ibid., para. 59.
194 Ibid., para. 60.
195 *Rouhollah Karubian v. The Islamic Republic of Iran*, Award No. 566-419-2 (6 March 1996) (*unprinted*).
196 Ibid., para. 159.
197 Ibid., para. 161.
198 Ibid., para. 162.

nationals. Accordingly, the Tribunal concluded that claimants' claims were not barred by the caveat.[199]

The third category comprises awards in which the Tribunal adopted a position somewhere in between the other two categories. A more recent reference to this category will be found in the *Aryeh* case.[200] There, what was before the Tribunal was an assertion by a dual Iran-United States national, whose dominant and effective nationality was that of the United States, that 16 pieces of land in Iran, purchased by him after his naturalisation in 1966, were expropriated by Iran. While accepting that Iranian law was generally averse to the ownership of real estate by foreign nationals, the Tribunal reached the conclusion that the said law does not prohibit foreigners or dual nationals from owning real property in Iran.[201] It noted that Article 989 of the Iranian Civil Code is the controlling statute in this case, and that its pertinent part reads as follows:

> In case any Iranian subject acquired foreign nationality after solar year 1280 (1901-1902) without observance of the provisions of law, his foreign nationality will be considered null and void and he will be regarded as an Iranian subject. Nevertheless, all his landed properties will be sold under the supervision of the local public prosecutor and the proceeds will be paid to him after the deduction of the expenses of the sale ...[202]

After noting that "the Claimant's actions do not rise to the level of an abuse of nationality", it concluded that this is a case in which the caveat in case *No. A18* should be applied.[203] The tribunal, however, held that "it would not be equitable to apply the *caveat* in a way that would place the Claimant in a worse

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[199] See *inter alia*: *Faith L. Khosrowshahi et al. v. The Islamic Republic of Iran* et al., Award No. 558-178-2 (30 June 1994); *Feredoon Ghaffari v. The Islamic Republic of Iran*, Award No. 565-968-2 (7 July 1995); *Edgar Protiva v. The Islamic Republic of Iran*, Award No. 566-316-2 (14 July 1995); *Jahangir Mohtadi et al. v. The Islamic Republic of Iran*, Award No. 573-271-3 (2 December 1996), and *George E. Davidson* (*Homayounjah*) *v. The Islamic Republic of Iran*, Award No. 585-457-1 (5 March 1998). Note that all these awards are *unprinted*.

[200] *Moussa Aryeh v. The Islamic Republic of Iran*, Award No. 583-266-3 (25 September 1997) (*unprinted*).

[201] Ibid., paras. 75-76.

[202] Quoted in the award.

[203] Ibid., para. 79.

position than Iranian law itself would have done under similar circumstances." And then:

> To do so under the rubric of a principle grounded in equity ... would not only work an injustice upon the Claimant but would also confer an unwarranted advantage upon the Respondent, which would be unjustly enriched thereby ... *it would also be unfair to award the Claimant the full market value of his property* in the present situation *since he would have received less than full compensation under Iranian law* ... had he purchased the property before acquiring United States nationality (emphasis added).[204]

This statement tries to reconcile the barring of the entire claim and the norm of full compensation. Thus, it suggests a discount to the full market value of the property in question. As for how much discount may be applied to the value of the property, the Tribunal, having regard to general principles of commercial practice, held that:

> The average difference between the full market value of a property and the price obtained for that property in a forced or juridical sale ranges between 10% and 15% ... Article 989 provides that compensation paid to a dual national former landowner should be comprised of the proceeds from a forced sale 'after the deduction of the expenses of the sale.' The costs associated with such a sale would, on average, reduce the amount of compensation by a further 10% to 15%. Accordingly, in order to approximate most closely the effects of an application of Article 989 of the Iranian Civil Code, *the Tribunal concludes that a discount of 25% should be applied to the value of the property* (emphasis added).[205]

However, the Iranian Arbitrator to the Tribunal, Aghahosseni,[206] in his thorough and valuable Dissenting Opinion took a contrary view. In his view, the award in this case has introduced "a novel application" for the *A18* caveat of which no trace is to be found in international precedent. Having surveyed the law of this Tribunal as well as international law on the issue, and applied it to the

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[204] Ibid., para. 84.
[205] Ibid., para. 86.
[206] The Dissenting Opinion of Arbitrator M. Aghahosseni in the *Aryeh* case. See also his Dissenting Opinion in the *Mohtadi* case. Note that both opinions are *unprinted*.

case at hand, the Arbitrator maintains that the claimant's claim should be barred by the caveat.

In view of the foregoing considerations, we may conclude that dual nationality status would have a negative effect on the amount of compensation. In the case where a dual national acquires rights in immovable property, or continues to enjoy benefits not available to him through his dominant nationality, and such rights are expropriated by the original State, if one cannot say that such claims should be barred, then at least the deprived dual national should receive some compensation, but not full compensation.

4. The Standard of Compensation

Having examined the impact of three factors, namely lawfulness, large-scale expropriation and dual-nationality on the amount of compensation, we now come to the core of our study on compensation, i.e. the standard of compensation. What is the current state of international law regarding the standard of compensation? In order to give a proper answer to this question, a brief review of the evolution of the compensation issue is necessary.

4.1 Was 'Full' Compensation the Pre-World War II Standard?

There are opinions that consider that prior to World War II, 'full' or 'adequate'[207] compensation was the standard of compensation in any case of expropriation of foreign property.[208] No definition of full compensation has been suggested, but it is taken as encompassing the present market value of the property as well as its lost profits.

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[207] The terms 'full' and 'adequate' are often used interchangeably. As Schwarzenberger, op. cit., at 10, puts it: "the difference between the terms 'full' and 'adequate' compensation is merely one between synonyms." See also *INA* Award, op. cit., at 378; Seidl-Hohenveldern, op. cit., at 144, and Sornarajah (1994: 359).

[208] In the words of the Iran-US Claims Tribunal, e.g.:
"The overwhelming practice and the prevailing legal opinion before World War II supported the view that customary international law required compensation equivalent to the full value of the property taken." *Sedco Inc. v. National Iranian Oil Company & The Islamic Republic of Iran*, Interlocutory Award No. 59-129-3 (27 March 1986) *reprinted in* 10 Iran-U.S. C.T.R. 180 at 184 (footnote omitted).

There are a considerable number of international court decisions and tribunal awards which are used to support the norm of full compensation. One may first refer to the award of the Permanent Court of Arbitration in *Norwegian Shipowners' Claims*.[209] The case dealt with the requisitioning of alien property by the United States for war-time purposes. The tribunal decided that "just compensation" should be determined by "fair actual value at the time and place ... in view of all surrounding circumstances."[210] Proponents of full compensation argue that the tribunal "treated 'just,' 'full,' and 'fair' as virtually interchangeable notions so far as compensation was concerned." Whether or not the award supports the Hull formula will be discussed later in this sub-section, but "it certainly does not support the view that 'fair' compensation can be less than full."[211]

However, Professor Schachter took a contrary view.[212] Similarly, although the United States' action in this award was found to be legal (the exercise of the right of eminent domain), the case itself was concerned "with specific war-time circumstances."[213] Thus, it is safe to say that its value for the present purpose would be limited.

An early and often quoted source is the PCIJ's seminal judgment in the *Chorzow Factory* case.[214] One committed advocate of full compensation contends that under the principles set forth in this judgment, as intimated above, "the *minimum* pecuniary obligation in all cases [both lawful and unlawful expropriations] was the payment of full value of the property taken."[215]

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209 *Norwegian Shipowners' Claims* (*Norway v. United States*) Permanent Court of International Arbitration, Award of 13 October, 1922, 2 R.I.A.A. (1948) at 307-346 (also *reprinted in* 17 A.J.I.L. (1923) at 362-399).

210 Ibid., at 339-341.

211 M. H. Mendelson, "What Price Expropriation? Compensation for Expropriation: The Case Law", 79 A.J.I.L. (1985) 414 at 416. See also P. M. Norton, "A Law of the Future or a Law of the Past? Modern Tribunals and International Law of Expropriation", 85 A.J.I.L. (1991) 474.

212 Schachter (1984: 123), and the author's other literature, "Compensation Cases - Leading and Misleading", op. cit. (note 173), at 420.

213 Schrijver, op. cit., at 354-355.

214 *Chorzow Factory* Judgment, op. cit., at 47.

215 Mendelson, op. cit., at 416.

However, the utilisation of the judgment in such a manner has been criticised by some scholars. For them, since the aforesaid case itself was concerned with an unlawful expropriation,[216] its use to support the norm of full compensation in all cases of expropriations is unjustified. In this connection, Sornarajah comments:

> The manner in which the case has been utilised in subsequent times is a sad commentary on the international law academe. Faced with a paucity of authority that supports full compensation, the case has been utilised improperly by the proponents of full compensation to support their claim. It should be obvious on any reading of the judgment of the Court that the Court did not seek to support full compensation as applicable to all instances, such as those in breach of a treaty ...[217]

Schachter maintains that the *Chorzow Factory* case judgment does not support full compensation, it "refers only to a duty to payment of fair [meaning less than full] compensation."[218] This case, like the *Norwegian Shipowners' Claims*, was concerned "with specific war-time circumstances."[219]

Likewise, there are other pre-World War II awards in which international tribunals held full compensation for the expropriation of private property owned by foreigners. Thus, in the *Delagoa Bay* case, which involved a breach of a railway construction contract between the home State and foreign concessionaire, the tribunal awarded damages "according to the universally accepted rules of law, the *damnum emergens* and the *lucrum cessans*: the damages that has been sustained and the profit that has been missed."[220] Commenting on the award, Sornarajah[221] points out that, due to the facts of this case, in which the foreign party provided the capital and expertise, the tribunal's finding "is fully justified."

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[216] E. Lauterpacht, "Issues of Compensation and Nationality in the Taking of Energy Investments", 8 J.E.N.R.L. (1990) 241 at 243:
"It [the *Chorzow Factory* case] was not concerned with the question of the level of compensation payable in the case of a lawful taking, such as the exercise of the undenied and undeniable right of any State to nationalise or expropriate foreign private property within its jurisdiction."

[217] Sornarajah (1994: 379 and 396).

[218] Schachter (1984: 123).

[219] Schrijver, op. cit., at 354-355.

[220] Quoted by Whiteman, *Damages in International Law*, op. cit., 1694-1703 at 1697.

[221] Sornarajah (1994: 381).

Additionally, in the *Shufeldt* claim,[222] the tribunal decided that full compensation must be paid. In the *Lena Goldfields Arbitration*[223], where the foreign concessionaire had been invited into the country by the host State to mine gold, full compensation was also granted.

However, for several reasons, the relevance of these awards to support full compensation may be diminished. Firstly, in all these awards there were contracts involved. Secondly, both in *Shufeldt claim* and in *Lena Goldfields Arbitration*, the expropriations were found unlawful on the grounds of violation of the concessions in question. If such illegality was the basis of the awards, as indicated in chapter 2,[224] modern international law does not consider such violation as unlawful. A third factor which causes upset about these awards has been advanced by Sornarajah:

> Arbitration seemed in them to be a means of settling disputes between clearly unequal parties in a diplomatic manner and the arbitrators seemed to have approached their task with this purpose in view.[225]

Moreover, even Western scholars share the view that full compensation was not the pre-war standard. As Garcia-Amador observes:

> It should be emphasized that even in the pre-war inter-State practice, the rules concerning the quantum of compensation were not so strict and even severe as it is often believed.[226]

Similarly, the main source from which the norm of full compensation has been claimed is the formula of 'prompt', 'adequate' and 'effective' compensation. It was first used by US Secretary of State Cordell Hull during the Mexican expropriations and is generally referred to in the literature as the 'Hull

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[222] The *Shufeldt* claim, R.I.A.A. (1930) 1079. See also Whiteman, *Damages in International Law*, op. cit., at 1652-1660.

[223] *Lena Goldfields* Award, op. cit. See further: the *Goldenberg* case (*Germany v. Romania*), Award of 27 September, 1928, 2 R.I.A.A. 615, and the *De Sabla* case (*United States v. Panama*), Award of 29 June, 1933, 6 R.I.A.A. 358 [*reprinted* also *in* 28 A.J.I.L. (1934) 602].

[224] On the issue, see our discussion in chapter 2, at 118-147.

[225] Sornarajah (1994: 382).

[226] Garcia-Amador (1984: 301). See also White, op. cit., at 13-15.

formula',[227] and sometimes called the 'traditional standard.' Since its proclamation in 1938 the formula has vigorously been challenged The first and most famous instance took place in the exchange between Hull and the Minister of Foreign Relations of Mexico regarding the expropriation of properties owned by American nationals. In that exchange, the United States maintained that its nationals were entitled under international law to "prompt, adequate, and effective" compensation. 'Prompt' means that compensation should be paid prior to or at the time of the expropriation. 'Effective' compensation is defined as compensation in effectively realisable form; that is, in convertible currency. 'Adequate', the central requirement of this triple formula, has been interpreted as reflecting a full compensation, which includes present market value of the property as well as loss of profits.

Although in our remaining discussion of the standard of compensation, reference to the Hull formula will be inevitable, we shall not emphasise this doctrine for two reasons. First, since its formulation, a great deal of writing has been produced for and against this formula and its status in international law,[228] and we cannot add more to what has been said. The second, and primary, reason "is that recent banishing of this formula by its founders and advocates, has put an end to its active life and therefore, there is no point in discussing something which is no longer supported or given much weight even by its very originators and proponents."[229] An elaboration of this second reason will be provided in due course.

Thus, we may fairly conclude that neither the court decisions nor the arbitral awards firmly support the norm of full compensation, except in circumstances where there was a prior finding of illegality in the expropriation of the property.

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[227] See G. H. Hackworth, *Digest of International Law*, Vol. 3, Government Printing Office, Washington D.C. (1942) 655 at 658.

[228] It is not appropriate to give a list of such literature here. For a selective list of references, see the bibliography provided at the end of this thesis.

[229] Piran, op. cit., at 347.

4.2 The Post-World War II Standard

In the previous sub-section we saw that full compensation was not the pre-World War II standard. Even if it were, post-World War II practice has changed the norm. These changes will now be examined in State practice, case law, and resolutions as well as in inter-governmental declarations.

4.2.1 State Practice

As shown in chapter 1, after World War II a large number of expropriations occurred throughout the world, in Asia, Africa, Europe (East and West) and Latin America, and consequently numerous compensation agreements were concluded. These arrangements indicate that States' attitude towards the incidence of expropriation of foreign property, and especially regarding the issue of compensation, has changed since World War II. As Garcia-Amador observes:

> Post-World War II inter-State practice shows a marked and progressive departure from the traditional principles of international law ... *especially with regard to compensation* therefor. This practice developed in connection, and in particular, with nationalizations carried out as part of the broad programs of socio-economic reform undertaken by various countries of Eastern and Western Europe. A system of 'lump sum settlement' ... evolved out of said inter-State practice (emphasis added).[230]

Therefore, as promised before, in this sub-section we shall deal with lump-sum agreements. These agreements are also called 'en block' or 'global' settlements. A pattern of settlement has evolved since the end of World War II,[231] under which the expropriating State pays a lump-sum to the State of nationality of the aliens affected by the expropriation.[232] The latter State, "generally through a national claims commission established pursuant to

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[230] Garcia-Amador (1984: 306-307).

[231] This pattern seems to have been initiated by the Agreement of May 30, 1941, between Sweden and Russia. See Foighel, op. cit., at 97.

[232] Lump-sum compensation agreements have been defined by several writers. See, e.g., Foighel, op. cit., at 97; Wortley, op. cit., at 146; Garcia-Amador (1984: 309), and Seidl-Hohenveldern, op. cit., at 146.

domestic legislation ... adjudicates the separate claims and allocates a share of the fund to each successful claimant."[233]

As indicated above, the main territory in which partial compensation enjoys the highest support is the practice of lump-sum agreements. A review of the lump-sum compensation agreements concluded by Eastern European States with Western countries in respect of the nationalisation of Western economic interests shows that the claims in question were settled substantially below full compensation.[234] The overwhelming majority of authors also advocate the view that 'partial' compensation was the basis of lump-sum agreements. In this respect, Jain remarks:

> It is generally acknowledged that the amount of compensation agreed upon in most of the lump-sum agreements does not represent the full value of the expropriated property even if it is admitted that in most cases the claims are highly inflated.[235]

Chowdhury had this to say:

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[233] R. B. Lillich, "Lump-sum Agreements: Their continuing Contribution to the Law of International Claims", 82 A.J.I.L. (1988) 69 at 69.

[234] See Kronfol, op. cit., at 111-112 and Foighel, op. cit., at 97-127. Note that these agreements also did not meet the two other requirements of the traditional standards, 'prompt' and 'effective'. As regards the 'promptness' of compensation, for example, Garcia-Amador comments:
"The time-limit for the payment of the agreed compensation necessarily depends on the circumstances in each case and, in particular, on the expropriating State's resources and actual capacity to pay. Even in the case of 'partial' compensation, very few States have in practice been in a sufficiently strong economic and financial position to be able to pay the agreed compensation immediately and in full." Garcia-Amador (1984: 312) and (1959: 22, para. 86). Regarding the 'effectiveness' of compensation, the same writer, states:
"Payment was generally effected through the use of frozen assets of the nationalizing State in the other State, or through delivery of specified raw materials or other goods." Garcia-Amador (1984: 312). Note that payments in non-monetary form are called payment in kind, and State practice provides numerous examples of such compensation. (For some early examples, see Kronfol, op. cit., at 117-118). On various occasions the United States has agreed with expropriating States on a compensatory package deal. For instance, in the settlement of the expropriation by Venezuela, as shown in chapter 1, of American oil interests in 1975 and the expropriation by Peru of the Marcona ore company in 1974. In both instances, agreement was reached on a combination of moderate amounts of cash and a substantial long-term business relationship involving service, marketing, transport, production, sales and other contracts. With regard to Venezuela, see G. Coronel, *The Nationalization of the Venezuelan Oil Industry,* Lexington Books, D.C. Health and Company, Lexington (1983) at 82-87. Regarding Peru, see G. Gantz, "The Marcona Settlement: New Forms of Negotiation Compensation for Nationalized Property", 71 A.J.I.L. (1977) 474 at 485-487.

[235] Jain, op. cit., at 156.

> Although the forms of the lump-sum agreements in the postwar period vary considerably, the general trend seems to establish that none of the three components of the Hull rule, i.e. promptness, adequacy and effectiveness, was followed by and large in postwar state practice. On the contrary, *the trend indicates the adoption of partial and negotiated compensation arrangements*, depending upon the circumstances of each case (emphasis added).[236]

In the same vein, Garcia-Amador comments:

> Lump-sum agreements, far from envisaging 'just' or 'adequate' compensation, provide for 'partial' negotiated indemnification, the amount of which may vary appreciably depending on the circumstances. In the case of lump-sum agreements, there is no uniformity with regard to the rule followed in valuing the property and determining the amount of compensation, which is understandable in view of the diversity of the situations giving rise to this type of international settlement.[237]

Some, like Lillich and Weston, however, are in a minority when they support the view that the lump-sum agreements did not deviate from the standard of full compensation.[238]

The acceptance of less than full compensation by Western States is not limited only to the lump-sum agreements which were concluded soon after World War II. The United States, for example, which vigorously supported the standard

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[236] S. R. Chowdhury, "Permanent Sovereignty and its Impact on Stabilization Clauses, Standards of Compensation and patterns of Development Co-operation", in K. Hossain and S. R. (eds.), *Permanent Sovereignty over Natural Resources in International Law*, Frances Pinter, London (1984) 42 at 60.

[237] Garcia-Amador (1984: 311). See further:

- Sornarajah (1994: 363-365) and (1986: 214-217);
- V. Pechota, "The 1981 US-Czechoslovakia Claims Settlement Agreement: An Epilogue to Post-war Nationalisation and Expropriation Disputes", 76 A.J.I.L. (1982) 639;
- R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property", 75 A.J.I.L. (1981) at 553 at 560: "A survey of lump sum agreements from this perspective yields two basic conclusions: that the Hull rule has not been observed in practice ..." And
- Piran, op. cit., at 342-346.

[238] R. B. Lillich and B. H. Weston, *International Claims: Their Settlements by Lump-sum Agreements*, University Press of Virginia, Charlottesville (1975) at 35, and Lillich, op. cit., at 76, n. 40.

of full compensation in its agreement with Peru, has admitted partial compensation.[239]

Having examined the idea that less than full, or partial, compensation is the basis of lump-sum agreements, our next task is to examine the impact of these agreements on the customary international law regarding expropriation of foreign property. There is no consensus among international lawyers on the subject and, loosely speaking, they are divided into three groups. The first group comprises scholars like Fatouros,[240] Francioni,[241] Amerasinghe,[242] Schrijver,[243] Dolzer,[244] Akinsanya,[245] Shaw[246] and Jain[247] who see in lump-sum agreements a hopeful trend. White, for example, remarks that "post-war compensation agreements constitute a valuable potential source of customary international law."[248] Lillich and Weston, who are the most devoted proponents of this view and who have produced an impressive body of writings on the issue,[249] go further and maintain that these agreements constitute a norm of customary international law.[250] Writers who belong to the second group, such as Schwarzenberger[251] and Seidl-

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[239] Gantz, op. cit. (note 234). For recent examples of such settlements by the United States with Albania, Cambodia and Vietnam, see I.L.M. (1995) 595, 600 and 685, respectively.

[240] Fatouros, op. cit., at 331.

[241] Francioni, op. cit., at 280.

[242] C. F. Amerasinghe, "Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice", 41 I.C.L.Q. (1992) 22 at 28, n. 32.

[243] Schrijver, op. cit. (note 5), at 296.

[244] Dolzer, op. cit., at 561-565.

[245] A. A. Akinsanya, *The Expropriation of Multinational Property in the Third World*, Praeger Publishers, New York (1980) at 68.

[246] Shaw, op. cit., at 583.

[247] Jain, op. cit., at 158-159.

[248] White, op. cit., at 183.

[249] See, e.g., the following literature:

- Lillich and Weston, op. cit. (note 238);
- R. B. Lillich, *International Claims: Postwar British Practice*, University Press of Virginia, Charlottesville (1967);
- R. B. Lillich, "Lump-Sum Agreements", Vol. 8, Encycl. P.I.L., 367;
- R. B. Lillich, "Lump-Sum Agreements: Standards therein and Impact thereof", in *Foreign Investment in the Present and a New International Economic Order* (edited by D. Dicke), University Press Fribourg Switzerland (1987) 239;
- Lillich, op. cit. (note 233); and
- B. H. Weston, *International Claims: Postwar French Practice*, University Press of Virginia, Charlottesville (1971).

[250] Lillich and Weston, op. cit., at 259-261. See also Bring, op. cit., at 129.

[251] Schwarzenberger, op. cit., at 44.

Hohenveldern,[252] argue that the law is being weakened by the practice of lump-sum agreements. The third group of authors, who take a position somewhere in between the other two groups, believe that this practice "does not amount to a new trend, much less to an abrogation of the existing customary international law, but rather a compromise in a given situation."[253]

The International Court of Justice had the opportunity to deal with the issue and, in the *Barcelona Traction* case, held that "such arrangements are *sui generis* and provide no guide in the present case."[254] However, a number of jurists have been critical of the Court's finding in denying the evidentiary value of lump-sum agreements. In his editorial comment on the issue, Lillich considered the Court's attitude as "unfortunate in the extreme", since it represents a "singularly restrictive attitude towards one potentially significant source of customary international law."[255] In the same vein, Garcia-Amador observes:

> In light of this impressive response of the academic community to the well-established practice of lump-sum agreements, it is certainly difficult to understand the restrictive, somewhat 'conservative', *dicta*" of [the Court in this case]. [256]

The Iran-US Claims Tribunal also rejected the evidentiary value of these agreements.[257] The Tribunal, in the *Sedco* case, held that "lump-sum settlement agreements can be so greatly inspired by non-judicial considerations ... that it is extremely difficult to draw from them conclusions as to *opinio juris*."[258] However, as in the case of the ICJ, the Tribunal's finding has been criticised by

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[252] Seidl-Hohenveldern, op. cit., at 33.

[253] M. Domke, "Foreign Nationalizations, Some Aspects of Contemporary International Law", 55 A.J.I.L. (1961) 584 at 609.

[254] *Barcelona Traction* Judgment, op. cit., at 40, para. 61.

[255] R. B. Lillich, "Two Perspectives in The Barcelona Traction Case - The Rigidity of Barcelona", 65 A.J.I.L. (1971) 522 at 526.

[256] Garcia-Amador (1984: 331).

[257] The tribunal in the *Aminoil* case took a similar view. *Aminoil* Award, op. cit., at 1036-1037. On the national level, the US Court of Appeals, in the *Banco Nacional* case, also rejected the juridical impact of these agreements. *Banco Nacional* Decision, op. cit., at 892.

[258] *Sedco* (the Second Interlocutory) Award op. cit. (note 208) at 185. See also the *Amoco* Award, op. cit., at 266, paras. 251-252, and the *Phillips Petroleum Company v. The Islamic Republic of Iran*, Award No. 425-39-2 (29 June 1989), *reprinted in* 21 Iran-U.S. C.T.R. 79 at 121, para. 108.

several writers.[259] Commenting on the Tribunal's holding in the *Amoco* award regarding the issue, Amerasinghe made the following meaningful remarks:

> *Clearly the ICJ was not saying that settlement agreements could not be evidence of customary law.* What it did say was that they were so varied as to the classes of beneficiaries of compensation that they could not be evidence of a consistent practice evidencing a norm relating to such beneficiaries. The statement of the ICJ was confined to the question of beneficiaries and had nothing to do with the quantum of compensation. Moreover, even in saying that the agreements were *sui generis*, the ICJ did not imply necessarily that they could not be evidence of customary practice based on *ex post facto* reflections of an *opinio juris* relating to the quantum of compensation.[260]

Thus, he considers the Tribunal's statements on lump-sum agreements as "*obiter*." One may say that the general tendency amongst those who seek to support the payment of full compensation is to downplay the juridical impact of these agreements. For instance, the American arbitrators to the Tribunal, who uniformly advocated the standard of full compensation in their Separate Opinions, have discussed these agreements, but underplayed their significance.[261]

In view of the foregoing, there is little doubt that partial compensation is the basis of lump-sum agreements. Moreover, to the extent that these agreements help to establish a partial compensation rule, the present author regards them "as not only principle-reinforcing, but also norm-creating"[262] with regard to the standard of compensation.

Likewise, regarding post-World War II inter-State practice and its impact on expropriation and compensation, Asante had this to say:

> The juridical impact of this formidable body of material [including the compensation arrangements] has virtually been ignored by writers wedded to traditional principles. Such writers conceive of State

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259 Schachter (1984: 126); Bowett, op. cit., at 65-66, and Lillich and Weston, op. cit. (note 238).

260 Amerasinghe (1992: 29).

261 See, e.g., the Separate Opinion of Judge Holtzmann in *INA* Award, op. cit., at 391-403; the Concurring Opinion of R. M. Mosk in *American International Group Inc. et al. v. The Islamic Republic of Iran*, Award No. 93-2-3 (19 December 1983), *reprinted in* 4 Iran-U.S. C.T.R. 96 at 111-121, and Judge Brower's Separate Opinion in *Sedco* Award, op. cit. (note 208) at 189-206.

262 Lillich, op. cit., at 76, n. 40.

> practice almost exclusively in terms of bilateral investment treaties, which have been celebrated as a renaissance of traditional principles.[263]

In a study of 30 lump-sum settlement agreements from 1953-1976, Bring[264] found that "the compensation afforded met the traditional requirement of adequacy" in only three cases. As to the promptness of compensation, he stated that prompt payment was not the rule in modern nationalisation practice. Rather, most compensation settlements provided for deferred payments. With regard to the adequacy of compensation, the same writer observed that it seemed to be based "more or less" on the 'book value' of the expropriated property. Bring reached the conclusion that the traditional standard of prompt, adequate and effective compensation, "was largely obsolete." For Professor Harris, since the Hull formula nowadays does not enjoy the support of the whole international community, it may not be considered as a general customary rule of compensation.[265]

Similar conclusions were reached by Sunshine in a study of the compensation settlements concerning 154 cases of expropriations in Asia, Africa and Latin America in the 1970s. He found that the general practice was to apply the net book value concept, which fell substantially below the Hull and alternative formulas, such as fair market value and going concern value.[266]

In conclusion, it may be safely laid down that the State practice of both developed and developing countries indicate that, at least since the end of World War II, the traditional standards have not been met.

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263 Asante, op. cit., at 604.

264 Bring, op. cit., at 117.

265 Harris, op. cit., at 570.

266 R. B. Sunshine, *Terms of Settlements in Developing Countries' Nationalization Settlements* - A Study for the U.N. Centre on Transnational Corporations (1981). Additionally, after a survey of compensation practices of African States, Rood concludes that by and large the nationalisations involved only the payment of 'partial' compensation. L. Rood, "Compensation for Takeovers in Africa", 11 J.Int.L.Eco. 521 at 525.

4.2.2 Case Law

In this period there have been several important international arbitral awards which are relevant to the present purpose. Three of them, *Texaco*, *BP* and *Liamco* arose out of Libya's nationalisation of its oil industry in the early 1970s, and the last one is the *Aminoil* award. In enunciating the applicable standards of international law, the awards of these tribunals were varied. Even in the first three cases the three arbitrators differed in their legal reasoning with respect to the compensation and calculation of damages. In the *Texaco* case, Arbitrator Dupuy stated that the Libyan nationalisation of Texaco was unlawful, and accordingly ordered *restitution*. However, having found that Resolution 1803 of the General Assembly represented customary international law on expropriation,[267] the Arbitrator acknowledged 'appropriate' compensation, which was set forth in the resolution as the generally applicable standard.[268] In *BP*, Arbitrator Lagergren avoided the standard of compensation altogether by finding that the proper remedy was damages.[269] Unlike *Texaco* and *BP*, in *Liamco* the nationalisation in question was found lawful by Arbitrator Mahmassani. Thus, he stated that in the light of contemporary developments the inclusion of *lucrum cessans* (lost profits) in the compensation payable could not be sustained. In his words:

> This classical doctrine [the Hull doctrine] was not always accepted neither in the inter-war period nor after World War II. Adequate compensation as including loss of profits, such as was awarded in the old above mentioned arbitral decisions (e.g. in *Delagoa* and *Shufeldt* cases), was no more acceptable as an imperative general rule.[270]

In that case, the Arbitrator applied the formula of 'equitable' compensation as a measure for the estimation of damages.[271]

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267 *Texaco* Award, op. cit., at 30, para. 87.
268 Ibid.
269 *BP* Award, op. cit. (note 22), at 355-357.
270 *Liamco* Award, op. cit. (note 24), at 143.
271 Ibid., at 145.

In *Aminoil*, which involved the nationalisation of rights under oil concession agreements by the host State, the tribunal also considered the relevant standard of compensation under customary international law. Interestingly, while the tribunal did not refer to the triple standard, 'prompt, adequate and effective' compensation, it used the terminology of the United Nations resolutions on permanent sovereignty over natural resources. After concluding that Article 4 of Resolution 1803 "codifies positive principles",[272] it pronounced that:

> The determination of the amount of an award of 'appropriate compensation' is better carried out by means of an inquiry into all the circumstances relevant to the particular concrete case.[273]

On the national level, the US Court of Appeals in the *Banco National* case, also addressed the standard of compensation. Having a comprehensive survey of the developments in this branch of international law, it explicitly acknowledged that appropriate compensation is the prevailing standard. The Court held that:

> It may well be the consensus of nations that full compensation need not be paid in 'all circumstances' ... and that requiring an expropriating State to pay 'appropriate compensation' - *even considering the lack of precise definition of that term - would come closest to reflecting what international law requires*. But the adoption of an appropriate compensation requirement would not exclude the possibility that in some cases full compensation would be appropriate (emphasis added).[274]

Thus, it is fair to say that none of the above-mentioned awards confirmed the full implications of 'prompt, adequate and effective' compensation. Although in the *Texaco* and *BP* awards there was reference to full compensation, in both instances the arbitrators found that the nationalisation measures were unlawful. In *Liamco*, which is perceived as the most "radical" of the awards,[275] the deviation from the traditional standards is much evident. Finally, though one may say that the amount of compensation awarded in the particular circumstances

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272 *Aminoil* Award, op. cit., at 1032, para. 143.
273 Ibid., at 1033, para. 144.
274 *Banco Nacional*, op. cit., at 892.
275 Mendelson, op. cit., at 418.

of *Aminoil* approximated to full compensation, its findings on the issues, such as stabilisation clauses, the post-World War II developments concerning permanent sovereignty over natural resources and, primarily, the standard of appropriate compensation, seem to supersede the quantum of compensation in that award.

4.2.3 Resolutions and Inter-governmental Declarations

The examination of the standard of compensation would be incomplete without reference to the impact of the numerous UN resolutions on permanent sovereignty over natural resources. These resolutions also do not support the norm of full compensation in the expropriation of foreign property. Among them, Resolution 1803 and the 1974 Charter of Economic Rights and Duties of States of the General Assembly are highly relevant to the present purpose. The former resolution, which was adopted almost unanimously, provides 'appropriate compensation'.[276] There has been some effort to explain the use of 'appropriate' as meaning 'full' compensation.[277] However, the *travaux préparatories* of the resolution indicate that "the formulation was a compromise, the capital-exporting States agreeing to the use of 'appropriate' provided there was a reference to international law as providing the standards."[278] Thus, 'appropriate compensation' does not mean 'full compensation.' The latter resolution, the Charter, requires that "appropriate compensation be paid ... taking into account the relevant laws and regulations and all circumstances that the State considers pertinent."[279] Leaving aside the debate among jurists as to whether these resolutions have law-making effect, at the least they indicate a desire on the part of the States to reject full compensation as the standard of compensation.[280]

Moreover, the inter-governmental declarations altogether do not support the whole triple standard of 'prompt, adequate and effective', compensation. In

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276 General Assembly Resolution 1803 (XVII).

277 S. M. Schwebel, "The Story of the UN's Declaration of Permanent Sovereign over Natural Resources", 49 A.B.A.J. (1963) 463 at 465.

278 Sornarajah (1994: at 405). See also W. Friedmann, *The Changing Structure of International Law*, Stevens & Sons, London (1964) at 138.

279 Article 2(2)(c)of the 1974 Charter of Economic Rights and Duties of States.

280 See our discussion on the legal status of the relevant UN resolutions in chapter 1, at 168-190.

Article 3 of the 1967 OECD Draft Convention,[281] for instance, it was stipulated that expropriation measures must be accompanied by a provision for the payment of just compensation. Such compensation is to represent the genuine value of the property affected, be paid without undue delay, and be transferable to the extent necessary to make it effective for the party entitled thereto. Commenting on the Article, Asante observes that while it is difficult to accept that the traditional requirement of adequate compensation was met by the terms 'just' and 'genuine value', he observes:

> The provision for paying compensation without undue delay and for transferring compensation 'to the extent necessary to make it' recognises the constraints on the foreign exchange resources of developing countries and the fact that in some cases the particular circumstances of the investor may justify payment of compensation in local currency.[282]

Similarly, under the ILA Seoul Declaration, the standard of compensation is 'appropriate compensation' having regard to the legitimate expectations of the parties, and taking into account all pertinent circumstances.[283] The 1980 Inter-Arab Investment Agreement provides 'equitable' compensation.' Such compensation is to be effected within a period not to exceed one year from the date the expropriation decision becomes final.[284] Although the language of Article 10(2) of the Organisation of Islamic Conference Investment Agreement is reminiscent of the Hull formula, the same article stipulates that compensation due must be paid in accordance with the laws and regulations of the host State.[285]

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[281] The OECD Draft Convention on the Protection of Foreign Property of 1967, *reprinted in* 7 I.L.M. (1968) 128.

[282] Asante, op. cit., at 609-610

[283] Section 5.7 of the ILA Seoul Declaration, op. cit. (note 29).

[284] Article 9(2)(a) of the Inter-Arab Investment Agreement of 1980, cited in Schrijver, op. cit., at 353, n. 212. See also Article VI of the Treaty for the Promotion and Protection of Investments among South-East Asian Member States (ASEAN), *reprinted in* 27 I.L.M. (1988) 612 at 613.

[285] Article 10(2) of the Agreement for the Promotion, Protection and Guarantee of Investment among Member States of the Organisation of Islamic Conference. For the full text of the Agreement, see *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States*, H. Moinuddin, Clarendon Press, Oxford (1987), Appendix III, 197 at 201. Moinuddin himself characterised this provision as "blending between the classical compensation formula and the Calvo clause as embodied in Article 2(2)(c) of the 1974 Charter of Economic Rights and Duties of States. Ibid., at 163.

However, the qualifications used in the provisions for paying compensation by NAFTA[286] and the Energy Charter Treaty[287] concur with the classical formula of 'prompt, adequate and effective' compensation.

4.2.4 Writings of Publicists

Juristic opinions, like international law itself, are dynamic rather than static. Authors of different sciences express their views with regard to the needs of the time in which they live, and writers in the field of law are not excluded from this rule. In the past, there was a degree of practice which indicated that publicists mostly favoured full compensation for expropriation of foreign property. Since there was no meaningful literature on the issue in hand from developing countries, the debate was carried out among Western scholars, among whom many began to move away from full compensation.[288] This division became more evident when the New International Economic Order was acknowledged in the mid 1970s. International lawyers from developing countries have produced a substantial body of writings on the issue which also advocate standards other than full compensation.

In the United States the division of opinions among legal scholars on the standard of compensation became clear when the American Law Institute sought to recognise that there has been a movement away from full compensation in its Third Restatement. Professor Schachter, who served as one of the drafters, made the following comments:

> Advocates of the Hull formula often characterize it as a traditional rule of international law. The record does not support this. No international judicial or arbitral tribunal, before or after 1938, has declared the 'prompt, adequate and effective' payment formula to be generally accepted international law. The leading European scholars De Visscher, Lauterpacht, Rousseau have concluded that State practice does not support that standard. The Institute de Droit International reflected these views in a resolution adopted in 1950

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[286] Article 1110(2-6) of NAFTA (North America Free Trade Agreement) *reprinted in* 32 I.L.M. (1993) 605 at 641.

[287] Article 13(1) of the European Energy Charter Treaty 1995, *reprinted in* 34 I.L.M. (1995) 360 at 391.

[288] Among them Sir H. Lauterpacht was the most important writer.

> and numerous studies in Europe and the United States have confirmed these conclusions with detailed evidence. I draw attention to the European and American studies to show that the opposition to treating the Hull formula as customary law does not come only from the 'third world'. Even in the United States where the executive and legislative branches have sought to affirm the Hull formula as accepted law, the courts - including the Supreme Court - have noted the disagreement among States and have declined to find the prompt, adequate and effective standard to be customary law. The Restatement of Foreign Relations Law adopted in 1965 by the American Law Institute considered that the formula was qualified by 'what is reasonable in the circumstances' and it noted that 'less than full value' or 'fair market value' was accepted in certain cases. The revised Restatement of 1987 does not consider the Hull formula as internationally accepted law.[289]

Murphy observes that in the light of the resolutions on permanent sovereignty over natural resources, the drafters of the Restatement (Revised) hesitated to declare the Hull formula as a universally accepted standard of compensation.[290]

Besides the number of writers moving away from the norm of full compensation having increased,[291] a substantial number of them maintain the view that the universally accepted standard in international law would be the 'appropriate compensation' formula. As Mouri puts it:

> It is this inherent flexibility (which may range from zero,[292] if found to be just, to full value) and its evaluating from the point of view of both expropriating and expropriated parties which distinguishes the standard of 'appropriate compensation' from the *inflexible and one-*

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[289] The other American scholars took a similar view. For example, W. D. Rogers, "Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas", 72 A.J.I.L. (1978) 1 at 16, and D. F. Vagts, "Minimum Standard", Vol. 8, Encycl. P.I.L., 382 at 384.

[290] J. Murphy, op. cit. (note 72), at 84.

[291] Shaw, e.g., observes:
"In the sensitive and controversial process of assessing the extent of compensation, several distinct categories should be noted." Shaw, op. cit., at 579.

[292] Higgins, op. cit., at 277. One commentator also suggests that:
"Appropriate compensation is a reference to a flexible standard which could range from the payment of full compensation, the amount of future profits lost, to the payment of no compensation at all in circumstances where the foreign investor had visibly earned inordinate profits from his investment and the host state had no benefits at all from it." Sornarajah (1994: 406).

> *sided standard of 'full compensation'* (emphasis added and the last two footnotes omitted).[293]

Schrijver concludes that:

> The formula of 'appropriate compensation', as in the 1962 Declaration and the ILA Seoul Declaration, or the formula of 'just' or 'equitable' compensation which the present author would prefer,[294] may be the best to ensure that in determining compensation for a lawful taking of foreign property the interests of both host and home States, and those of the party whose property is taken, are accounted for.[295]

Additionally, among those who took a similar view, one may consult J. Murphy,[296], Dolzer,[297] Francioni,[298] Piran,[299] Murphy[300] and Falk.[301]

Therefore, it may be fair to conclude that since the end of World War II, inter-State practice has been profoundly changed with regard to expropriation, and especially compensation. Neither treaty law, with the exception of bilateral investment treaties, which will be considered in the next sub-section, nor customary practice supports the standard of full compensation. As to UN General Assembly resolutions, they have suggested the formula of appropriate compensation, which is the preferred standard of many writers in this field, including the present author.

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[293] Mouri, op. cit., at 365.

[294] Judge Lagergren suggests that the terms 'appropriate', 'equitable', 'fair' and 'just' may be used interchangeably as far as standards of compensation are concerned. See his Separate Opinion in the *INA* Award, op. cit., at 389.

[295] Schrijver, op. cit., at 359.

[296] J. Murphy, op. cit., at 88.

[297] Dolzer, op. cit., at 599.

[298] Francioni, op. cit., at 276.

[299] Piran, op. cit., at 351-353.

[300] C. F. Murphy, "Limitations over the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization", in R. B. Lillich (ed.), *The Valuation of Nationalized Property in International Law*, Vol. III, University Press of Virginia, Charlottesville (1975) 49 at 52:
"The 'appropriate' compensation referred to in General Assembly Resolution 1803 (XVII), understood as an amount that is reasonable under all the circumstances, is probably the governing principle."

[301] Falk, op. cit., at 29.

4.3 The Current Standard

Under this heading, the possible impact of bilateral investment treaties on the standard of compensation and the jurisprudence of the Iran-US Claims Tribunal and of the ICSID tribunals' practice on the issue in hand will be addressed.

4.3.1 Bilateral Investment Treaties

In the examination of the standard of compensation in treaty law, only bilateral investment treaties (hereinafter BITs) remain to be considered. Thus, our task will be the assessment of the possible impact of BITs on the standard of compensation. Since the 1960s, BITs have replaced their predecessor, the bilateral treaty of Friendship, Commerce and Navigation (the so-called FCN treaty). The number of BITs treaties increased rapidly, and up to 1996 more than 1,000 were concluded.[302] They are often used as one of the main authorities by proponents of full compensation in support of their arguments; they argue that BITs reflect the traditional international law standard of compensation for expropriation.

However, there is a debate among writers as to their status and evidentiary value in international law. Some, like, Schrijver and De Waart,[303] take the view that such treaties have appeared to create customary international law. Two main reasons are advanced for this statement: first, the existence of a large number of BITs and, second, many States which in the past rejected the traditional standards have now admitted them by conclusion of the treaties. The view is shared by Akehurst,[304] Mann[305] and Robinson.[306]

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302 Schrijver, op. cit., at 190-191.

303 P. Peter, N. J. Schrijver and P. J. I. M. De Waart, "Foreign Investment and State Practice", in Hossain and Chowdhury (eds.), op. cit., at 88.

304 M. Akehurst, "Custom as a Source of International law", 47 B.Y.I.L. (1974-75) 1 at 42-52.

305 F. A. Mann, "British Treaties for the Promotion and Protection of Investments", 52 B.Y.I.L. (1981) 241 at 249-250.

306 D. R. Robinson, "Expropriation in the Restatement (Revised), 78 A.J.I.L. (1984) 176 at 178.

However, there are a considerable number of authors, such as Francioni,[307] Dolzer,[308] Schachter,[309] Asante,[310] Bowett,[311] Abi-Saab,[312] Amerasinghe,[313] Sornarajah,[314] Shaw[315] and Chowdhury[316] who have taken a critical view of BITs. The latter scholar rightly observes that these BITs are often the product of "unequal bargaining powers on a 'take it or leave it' basis and admittedly in an inhospitable investment climate." If these treaties create special regimes for a closer form of economic co-operation in which protection is one of the aspects, it means that "developing states reconciled themselves as a matter of commercial bargain and not in response to any legal obligations."

A third group of writers, who have taken a position somewhere in between the two groups, may be added. They suggest that if BITs do not create customary international law, they must be viewed as evidence of State practice.[317]

One of the reasons that virtually no reference to BITs was made by the Iran-US Claims Tribunal was the invocation of such treaties by few claimants. Mouri further observes that "this failure might, in turn, have been motivated by the fact that they [BITs] could offer little support for the 'full' standard of compensation sought by them."[318] Thus, the Tribunal only on one occasion, in the *Sedco* award, touched upon BITs, where it rejected the juridical impact of such treaties. It ruled that:

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307 Francioni, op. cit., at 264.
308 Dolzer, op. cit., at 566.
309 Schachter (1984: 126-127) and (1991: 323).
310 For him, BITs "are at best only a part of the body of instruments relating to investments." Asante, op. cit., at 607-608.
311 Bowett, op. cit., at 65.
312 G. Abi-Saab, "Permanent Sovereignty over Natural Resources and Economic Activities", in M. Bedjaoui, *International Law: Achievements and Prospects*, Martinus Nijhoff, Dordrecht (1991) 597 at 612-613.
313 Amerasinghe (1992: 30 and n. 38).
314 In his view (1994: 362):
"The divergence in the standards used and the fact that many of them provide for valuation of compensation to be made by national authorities make the possibility of such treaties creating a norm as to the standard of compensation remote." See also Sornarajah (1986: 40).
315 Shaw, op. cit., at 583.
316 S. R. Chowdhury, "Permanent Sovereignty over Natural Resources", in Hossain and Chowdhury (eds.), op. cit., 1 at 35 and 39.
317 Schrijver, op. cit., at 296.
318 Mouri, op. cit., at 359.

> The bilateral investment treaty practice of States, which much more often than *not reflects the traditional international law standard of compensation for expropriation*, more nearly constitutes an accurate measure of the High Contracting Parties' views as to customary international law, but also carries with it some of the same evidentiary limitations as lump sum agreements. Both kinds of agreements involve in some degree bargaining in a context to which '*opinio juris* seems a stranger.'[319]

Therefore, there is not sufficient reason to conclude that bilateral investment treaties reflect customary international law relating to the standard of compensation.

4.3.2 Iran-US Claims Tribunal

Following the hostage crisis in Tehran, the Iran-US Claims Tribunal[320] was established in the Hague in 1981 to deal with claims over disputes then outstanding between the Government of Iran and American nationals arising out of 'expropriations or measures affecting property rights.' It mainly operates through three Chambers composed of a 'neutral' President, an Iranian arbitrator and an American arbitrator. The Tribunal's awards on compensation indicate that the American arbitrators uniformly advocated the standard of full compensation, and that the neutral arbitrators also did so, but with qualified support. The Iranian arbitrators took the view that compensation was always due on the expropriation of foreign property, but that this requirement was met if book value of the expropriated property was paid as compensation.

There is an argument among jurists regarding the Tribunal's contribution to international law generally, and to its branch - expropriation law. Some argue

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319 *Sedco* Award, op. cit. (note 208), at 185.

320 Among a substantial body of literature on the Tribunal, see *inter alia*:

- Pellonpää and Fitzmaurice, op. cit.;
- R. Khan, *The Iran-United States Claims Tribunal - Controversies, Cases and Contribution*, Martinus Nijhoff, Dordrecht (1990);
- J. A. Westberg, "Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal", 5 I.C.S.I.D. Rev. (1990) 256, and the same writer's other literature, "Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation: ICSID and Iran-United States Claims Tribunal Case Law Compared", 8 I.C.S.I.D. Rev. (1993) 1; and
- Mouri, op. cit. (note 4).

that the relevance of the work of the Tribunal to international law is limited because of the special circumstances in which it was created and because of the wide nature of powers given to it.[321] As Schrijver states "It is not easy to identify common trends in the awards of the often deeply divided Chambers and to assess their impact on international law and expropriation law."[322] In the same vein, Mouri concludes that the Tribunal's contribution to the question of compensation:

> Is weakened and blurred by a number of uncertainties not only because of contradictions in the Chamber's findings or changes of positions occasioned by vacillating between the customary rules of international law and the requirements of the Treaty of Amity, but also because in a number of important Cases the Chambers' primary efforts were aimed at challenging or distorting each others' rulings.[323]

However, Schachter observes that "the number of expropriation cases submitted to the Tribunal, the large amount claimed, extensive pleadings and involvement of many lawyers have given the Tribunal prominence as a source of international law."[324] In the same manner, Amerasinghe states that the awards of the Tribunal "are decided by inter-State arbitrations and have particular value as precedents in a subsidiary source of law."[325]

Many of the Tribunal's awards applied the standard of compensation which was incorporated in the 1955 Treaty of Amity between Iran and the United States.[326] But some of them were based on customary international law (as *lex generalis*). The problem is that the Tribunal did not clarify when the awards were based on the Treaty and when they were rendered under the customary

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321 See, e.g., Higgins, op. cit., at 329; Abi-Saab, "Permanent Sovereignty over Natural Resources and Economic Activities", in Bedjaoui, op. cit., at 613, and Gray, op. cit., at 181.

322 Schrijver, op. cit., at 195.

323 Mouri, op. cit., at 351.

324 Schachter (1989: 4).

325 Amerasinghe, op. cit., at 41-42.

326 The 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (entered into force on 16 June 1957), *reprinted in* U.N.T.S., Vol. 284, at 93, and U.S.T.S., Vol. 8, at 899.

rules. To some, this difficulty "will diminish the utility of the awards as evidentiary sources of customary law."[327]

Juristic opinion is also divided as to whether the Tribunal's awards on compensation supported the standard of full compensation or not. Mangard, rather conservatively, considered the awards of the Tribunal as a victory for the full standard.[328]. Others, such as Asante[329] and Sornarajah,[330] took a contrary view. One commentator[331] has taken a somewhat different position. While concluding that the Tribunal's awards provided strong support for the payment of full compensation, Westberg points out that the monetary amounts of the awards, after the application of appropriate methods of valuation, were substantially below the amount claimed.

The cases of expropriation before the Tribunal may be divided into two main groups: nationalisation cases and individual expropriation cases. Let us begin with the former. In these cases the takings resulted from, or were part of, the take-over by Iran of entire industries, like insurance and petroleum, in the course of implementing State control over areas of the economy. The Tribunal's first compensation award was rendered in the *American International Group* case, which involved the nationalisation of a 35% share interest of American claimants in an Iranian insurance company. The Tribunal rejected the contention of the claimants that the nationalisation was unlawful for lack of "prompt, adequate and effective compensation." Having applied general principles of public international law, the Tribunal held that "even in the case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation."[332] It stated further that the appropriate standard was the going concern value "taking into account not only the net book value of its assets but also such elements as good will and likely future profitability, had the company

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327 Sornarajah (1994: 395) and (1986: 202).
328 Cited in ibid., at 396. See also Schrijver, op. cit., at 355-356.
329 Asante, op. cit., at 603.
330 Sornarajah (1994: 395).
331 Westberg (1990: 291) and (1993: 27).
332 *American International Group* Award, op. cit., at 105.

been allowed to continue its business under its former management."[333] The compensation awarded was virtually a quarter of the amount claimed.

There are several problems with the last statement of the Tribunal. The statement indicates that the Tribunal equated the consequences of lawful with that of unlawful expropriation, which is in conflict with the logical finding of the PCIJ in the *Chorzow Factory* case. The distinction alluded to earlier between lawful and unlawful expropriation and its impact on the quantum of compensation is well settled in international law. Thus, one may say that the statement of the Tribunal is not an accurate one.[334] Another problem relates to the distinction between individual expropriation and large-scale nationalisation, as discussed above, and its impact on the amount of compensation in a downward direction. While the nationalisation in question fell into the category of large-scale nationalisation, the Tribunal held that full compensation should be the applicable standard of compensation in the award. The last difficulty concerns the brevity of the award, which "tried to avoid any analysis and discussion as to the standard of compensation under international law."[335]

In the *INA Corporation* case,[336] which also involved the nationalisation of an insurance company, the Tribunal departed from the traditional rules by confirming the distinction between large-scale nationalisation and the expropriation of isolated items of property. In the case of the former category, it held that:

> In the event of such large-scale nationalisations of a lawful character, international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' (when used as identical to 'full') compensation standard as proposed in this case.[337]

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333 Ibid., at 109.
334 See Sornarajah (1994: 387), and Mouri, op. cit., at 372 and n. 1091.
335 Piran, op. cit., at 364.
336 *INA* Award, op. cit., at 378.
337 Ibid.

However, the Tribunal found that the nationalisation in the case did not fall into the category of large-scale nationalisation on the grounds that it was "involving an investment of a rather small amount shortly before the nationalisation." The applicable standard, accordingly, was compensation in the amount equal to the fair market value of the investment.[338]

The Tribunal's finding as to the distinctions between large and small investments, and between investments made shortly before the nationalisation measures and those that had existed for a long time previously, is tenable and in a sense interesting.[339] Such distinctions were made under customary international law, but the award was based on the standard of compensation incorporated in the Treaty of Amity. Article IV, paragraph 2, of the Treaty provides that taking must be accompanied by provision for the payment of just compensation. Such compensation is to represent the 'full equivalent of the property taken'. The Tribunal understood this phrase to mean that it includes the fair market value of the claimant's share interests.

However, the finding by the Tribunal that the Treaty, as *lex specialis*, was applicable to the award, makes the above distinctions superfluous. As Sornarajah observes:

> It [the Tribunal] did not have to apply these distinctions as it found an alternative basis on which to peg the standard of compensation in the Treaty of Amity.[340]

In this award two Separate Opinions and one Dissenting Opinion as to the status of compensation under customary international law were filed. As indicated above, the Tribunal in the award stated that international law has undergone a gradual reappraisal which undermines the viability of the 'full' or 'adequate' compensation standard. This crucial point was elaborated by Judge Lagergren. In his words:

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338 Ibid.
339 Sornarajah (1994: 388). See also Piran, op. cit., at 371-372.
340 Ibid.

> Whether this standard [appropriate compensation] is more correctly characterised as an exception to a still subsisting - though admittedly shrinking - Hull doctrine, or, as evidence of a more general tendency towards the wholesale displacement of that doctrine as the repository of the o*pinio juris*, is still the subject of debate. But the latter view appears by now to have achieved a rather solid basis in arbitral decisions and in writings.[341]

He reached the conclusion that:

> An application of current principles of international law, as encapsulated in the 'appropriate compensation' formula, would in a case of lawful large-scale nationalisations in a state undergoing a process of radical economic restructuring normally require the 'fair market value' standard to be discounted may, of course, never be such as to bring the compensation below a point which would lead to 'unjust enrichment' of the expropriating state. It might also be added that the discounting often will be greater in a situation where the investor has enjoyed the profits of his capital outlay over a long period of time, but less, or non, in the case of a recent investor, such as INA.[342]

Lagergren based his statement on: (1) UN General Assembly resolutions, particularly Resolution 1803; (2) modern arbitral practice;[343] (3) judgments of national or regional courts;[344] and (4) writings of publicists.[345]

The American Arbitrator, Holtzmann, seeking support from virtually the same authorities used by Judge Lagergren, drew an entirely different conclusion in his Separate Opinion. He forcefully rejected any changes in the international law standard of compensation.[346] Similarly, in his Dissenting Opinion, the Iranian arbitrator, Ameli, agreed with the Separate Opinion of Judge Lagergren that current international law requires 'appropriate compensation' as opposed to 'prompt, adequate and effective' compensation.[347]

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341 The Separate Opinion of Lagergren in *INA* Award, op. cit., 385 at 387.
342 Ibid., at 390.
343 References made to the *Texaco* (known also as *Topco*) and *Aminoil* awards.
344 References to: the *Banco Nacional*, and *Lithgow* judgments.
345 References to, including: Sir H. Lauterpacht; Arechaga; Schachter; Higgins and Dolzer.
346 Judge Holtzmann's Separate Opinion, op. cit. (note 261), at 391.
347 The Dissenting Opinion of Ameli in the *INA* Award, op. cit. (note 127), 403 at 415.

The other case of this category is *Phillips Petroleum*,[348] in which there was a claim by an American oil company for compensation in respect of the nationalisation of its interest in an Iranian joint venture. Having established the liability of Iran to pay compensation, the Tribunal held that the applicable standard of compensation was the Treaty standard.[349]

In the *Amoco* case, involving the expropriation of the American-owned share interest of an oil-producing agreement, the Tribunal rejected the claimant's allegation that the expropriation was illegal. Relying on the teaching of the *Chorzow Factory* case judgment, the Tribunal made a distinction between lawful and unlawful expropriation and applied the practical consequences of such a distinction to the standard of compensation.[350] With regard to the standard of compensation, it concluded that the Treaty standard was applicable in the case. However, the Tribunal held that loss of future profits (*lucrum cessans*) was not compensable in lawful expropriations.[351] Commenting on the award, one observer states that:

> This finding undermines the existence of a uniform requirement of full compensation for all expropriations and subverts the conventional wisdom that *Chorzow Factory* provides the remedy of restitution equally for all types of nationalisation ... The award punches a big hole in the case of those who support the Hull standard.[352]

Besides nationalisation cases, there were a considerable number of individual expropriation cases with which the Tribunal had to decide. In these cases, the standard of full compensation was applied. However, "in calculating the compensation the Tribunal took into account factors such as the changes that had been brought into the Iranian economy by the revolution and the effects it would have on the value of the shares and the property involved."[353] In the *Sedco*

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348 *Phillips Petroleum Company of Iran v. The Islamic republic of Iran*, Award No. 425-39-2 (29 June 1989), *reprinted in* 21 Iran-U.S. C.T.R. 79.

349 Ibid., at 119, para. 106.

350 *Amoco* Award, op. cit. (note 3), paras. 192-193 and 196-197.

351 However, other elements, such as goodwill and commercial prospects may be awarded.

352 Sornarajah (1994: 394-395).

353 Ibid., at 391.

case, the Tribunal began with the premise that prior to World War II, full compensation was the standard for any kind of expropriation. It then stated that the question was whether practice changed this rule. Having examined the relevant authorities, the Tribunal found that the evidence provided by lump-sum agreements and bilateral investment treaties are inconclusive, except Resolution 1803. It considered the resolution, which requires 'appropriate compensation' for expropriation of foreign property, as reflecting current international law.[354] However, in applying the law to the case, the Tribunal drew a distinction between individual expropriation and large-scale nationalisation and it held that in the case of the former, international law still requires full compensation.[355] Although the Tribunal made such a distinction, it ruled that the Treaty standard was applicable in the award.

The distinction between ad hoc expropriation and large-scale nationalisation made by the Tribunal, and its effect on the standard of compensation is in conformity with the view of the majority of scholars in this field. However, its finding that the Treaty standard was applicable in the award makes its analysis of the international law standard of compensation superfluous.

In the *Sola Tiles Inc.* case,[356] the standard of compensation was also addressed. After examining the state of international law on the issue of the standard of compensation, the Tribunal found that the standard of 'appropriate compensation' represents the current customary international law. However, the Tribunal equated the 'appropriate compensation' standard with that of 'adequate' or 'full' compensation.[357] A number of authors, who surveyed the case law of the Tribunal on the issue in hand, have been critical of its interpretation of the term 'appropriate compensation.' According to Amerasinghe:

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354 *Sedco* (the Second Interlocutory) Award, op. cit. (note 208), at 186.

355 Ibid., at 187.

356 *Sola Tiles Inc. v. The Islamic Republic of Iran*, Award No. 298-317-1 (22 April 1987), *reprinted in* 14 Iran-U.S. C.T.R. 223. See also *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran et al.*, Award No. 141-7-2 (29 June 1084), *reprinted in* 6 ibid., 219; *Thomas Earl Payne v. The Islamic Republic of Iran*, Award No. 245-335-2 (8 August 1986, *reprinted in* 6 ibid., 3, and *Phelps Dodge Corp. et al. v. The Islamic Republic of Iran*, Award No. 217-99-2 (19 March 1986), *reprinted in* 10 ibid., 121.

357 Ibid., at 234-235, paras. 41-45.

> The Tribunal ignored entirely the avowed intention of the resolution [Resolution 1803] as espoused by the majority of States supporting the resolution and warranted by the *travaux préparatories*.[358]

In the same vein, Sornarajah comments:

> The explanation of the change from adequate compensation to appropriate compensation as a mere terminological convenience in the award is too facile. It is, once more, a technique to conserve the claims of the capital-exporting states in the face of the contrary claims which have been made by the capital-importing states.[359]

Though the Tribunal applied the standard of full compensation in the award, in assessing the value of the property, it rejected the claim for goodwill and lost future profits on the grounds that the business in question was unlikely to continue as a going concern after the Iranian Revolution of 1979.[360]

In its more recent award in the *Ebrahimi* case, where the expropriation was through the appointment of directors in an Iranian construction firm in which the claimants had shares, the Tribunal also found that the 'appropriate compensation' standard represents the prevailing standard of compensation. It was held that:

> International law theory and practice do not support the conclusion that the 'prompt, adequate and effective' standard represents the prevailing standard of compensation. Rather, *customary international law favors an 'appropriate' compensation standard ...* the gradual emergence of this rule aims at ensuring that the amount of compensation is determined in a flexible manner, that is, taking into account the specific circumstances of each case (emphasis added).[361]

It continues:

> Considering the scholarly opinions, arbitral practice and Tribunal precedents noted above, the Tribunal finds that once the full value of the property has been properly evaluated the compensation to be

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358 Amerasinghe (1992: 45).

359 Sornarajah (1994: 392). Mouri, op. cit., at 368-369, has also advanced several reasons that the award is in error.

360 *Sola Tiles* Award, op. cit., at 240-241, paras. 61-64.

361 *Ebrahimi* Award, op. cit. (note 26), para. 88. Similarly, although the Tribunal, in the *Amoco* case, did not apply the 'appropriate compensation' standard, it treated the standard as reflecting the current rule of international law. *Amoco* Award, op. cit., at 258, para. 226.

> awarded must be appropriate to reflect the pertinent facts and circumstances of each case.[362]

Having recognised the importance of the distinction between lawful and unlawful expropriation and its impact on the standard of compensation, the Tribunal awarded the claimants *damnum emergens* only, but not *lucrum cessans* (lost profits).[363] By endorsing the 'appropriate compensation' standard in 1994, the Tribunal has deviated not only from the traditional standards, but also from its own precedents in this regard.

From the above it would appear that the jurisprudence of the Tribunal does not support the standard of full compensation. In some awards, the Tribunal made a distinction between lawful and unlawful expropriation, and applied the effect of such distinction to the standard of compensation. In the former, the amount of compensation did not include lost profits. It also drew a distinction, in some awards, between large-scale nationalisation cases and ad hoc expropriation ones. While in the former case the standard of full compensation was applied, by and large it left the door open for a departure from full compensation in the latter case. Moreover, where loss of profits were awarded, it was recognised that such profits would be negligible in the context of the regime change and the hostile climate towards foreign investment which was generated.[364]

The ICSID tribunals have also had occasion to dealt with the standard of compensation. They are established under the Convention for the Settlement of Investment Disputes, which is an international Convention.[365] In the absence of an express choice of law, Article 42(2) of the Convention requires the tribunal to apply the law of the Contracting State party (the host State) and international law to the dispute. It has been suggested that "such disputes remain mainly under

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362 Ibid., para. 95.
363 Ibid., para. 96.
364 Sornarajah (1994: 395).
365 International Bank for Reconstruction and Development (I.B.R.D.) Convention of Settlement of Investment Disputes between States and Nationals of other States, *reprinted in* 4 I.L.M. (1965) 524.

municipal law."[366] Put differently, it is generally accepted that the interpretation of the above-mentioned article gives primacy to the law of the host State. Therefore, in the *Agip* case,[367] which involved the expropriation of a foreign investment project, the tribunal was prepared to apply the Congolese law in holding that Congo had to indemnify the loss suffered and the profit lost as a result of the expropriation. "Since the tribunals did not indicate whether they were applying domestic [sic] law or the law of the host State, the practice of these tribunals is of limited use."[368]

The foregoing discussion indicates that none of the authorities which have been considered under the heading of the current standard supports the norm of full compensation. Supposing that bilateral investment treaties uniformly advocate the Hull compensation standard, they neither create customary international law nor State practice in this respect. Moreover, the jurisprudence of the Iran-US Claims Tribunal does not support the view that full compensation must be paid for any kind of expropriation. In some awards, a departure from full compensation was permitted in the case of large-scale nationalisation, and when the expropriation measures were lawful.

5. Valuation of Expropriated Property

A brief examination of the valuation of expropriated property will be our last discussion on the issue of expropriation of foreign property in this thesis. There was no meaningful case law which addressed the subject of valuation in the context of compensation, until recent awards of the Iran-US Claims Tribunal and the ICSID tribunals. Benefiting from the teaching of the *Chorzow Factory* case judgment, Sornarajah[369] observes that for present purposes legal principles

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366 Kronfol, op. cit., at 148.

367 *Agip Co. v. The Republic of Congo*, Award of (ICSID), Award of 30 November 1979, *reprinted in* 21 I.L.M. (1982) 726. In *SARL Benvenuti & Bonfant v. The Republic of the Congo*, Award of 8 August 1980, *reprinted in* 21 I.L.M. (1982), 740, the tribunal took a similar position. For a survey of the ICSID tribunals' case law on the standard of compensation, see Westberg (1993: 1-28).

368 Sornarajah (1994: 384). Presumably the contrast is in fact between international and domestic law.

369 Ibid., at 378-379 and 411-412.

must be first identified, and then compensation or damages be assessed on the basis of such principles. It should not be the case that accountancy principles of valuation dictate the relevant legal principles. Put in technical terms, "valuation is a secondary issue", and "the primary issue is the standard on which the law requires compensation to be paid." Further, he noted that "Methods of valuation should not be the means by which the tail is made to wag the dog."

As in the case of the standard of compensation, different valuation methods were used by the Iran-US Claims Tribunal. There were several reasons[370] for this disharmony: (1) the existence of contradictions in the findings of the Chamber; (2) the change of positions occasioned by vacillating between the requirements of customary international law and those of the Treaty of Amity between Iran and the United States; and (3) the challenge between the Chambers' rulings in a number of important cases. This comes close to what one commentator has observed: "No conclusion of general relevance can be drawn from the valuation practice of the Tribunal."[371]

There is now a substantial body of literature on the issue. Much of the literature is designed to create new standards of compensation through the principles of valuation, which is not tenable. As Sornarajah observes:

> Valuation is an objective process. It should not be permissible for standards or theories of compensation to be built in through valuation principles. If there are technical problems of valuation the tribunal can always get experts to help it in making the valuation. Valuation is not the main issue of controversy ... *these principles should not be the means of reintroducing standards of compensation through the back-door ... they are secondary to the finding of the compensation standard* applicable to the dispute (emphasis added).[372]

It seems to be in order to mention the methods of valuation which have been used in determining the value of an expropriated property. There are two main methods of valuation: book value and market value.

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370 Mouri, op. cit., at 351.
371 Sornarajah (1994: 412).
372 Ibid.

5.1 Book Value

In the book value method, the value of a property is assessed on its value in the books of the undertaking, having regard to its depreciation. Schachter observes that most proponents for appropriate compensation favour this method as the appropriate formula for valuation.[373] "They also argue that there should be flexibility in the applicable valuation formula to take into account all the circumstances of the investment, the length of investment, profits and past returns in determining the appropriate compensation."[374] As indicated in chapter 2, in the 1970s Middle Eastern oil-producing States replaced the old concessionary system, partly by negotiation and partly by nationalisation. This method of valuation was used in virtually all nationalisation measures, though the undertakings in question were productive and in working order (or, in the jargon, 'going concerns').[375] A decade later, it was also invoked by Kuwait in the *Aminoil* case,[376] and by Iran in all expropriation cases before the Iran-US Claims Tribunal. Interestingly, in 1989 the United States, in the *ELSI* case[377] which involved the expropriation of an American company by the Italian Government, argued that the book value of the corporation was the most appropriate criterion in this regard. Similarly, in a study commissioned by the United Nations Centre for Transnational Corporations, it was stated that the prevailing practice was the application of the book value concept.[378] Therefore, where damages for an unlawful expropriation are not involved and where the award of lost profits is not permissible, book value should be the logical method.[379]

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373 Schachter (1989: 13).
374 Ibid., at 13-14.
375 Bowett, op. cit., at 65 n. 65.
376 However, the tribunal regarded book value as appropriate only in cases of a recent investment, where original cost is close to replacement cost. *Aminoil* Award, op. cit., at 1039, para. 165.
377 *ELSI* case (1989), I.C.J. Pleadings, at 81 and 85.
378 Sunshine, op. cit. (note 266).
379 Sornarajah (1994: 413).

5.2 Market Value

This method of valuation is designed to assess a property based on its real value in a given market. The market value of a property was defined by the Iran-US Claims Tribunal as:

> The price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat.[380]

Unlike book value, market value takes into account future profitability. This method of valuation was favoured by those who supported the Hull formula. All authors who have rejected that formula have also rejected market value as the applicable method of valuation.

This method of valuation is permissible only if an award can be rendered on the basis of both the loss of actual profits (*damnum emergens*) and the loss of future profits (*lucrum cessans*). The overwhelming view is that the method of market value is applicable only when the expropriation measure is unlawful.

To determine the market value of a property, several methods, such as value of shares on the stock market,[381] going concern value[382] and discounted cash flow[383] are available. Besides these well known methods of valuation, there are some other methods which have been used in this respect. They include: the latest tax value, balance-sheet values and the insurance value. The latter is the only reliable method, since it "shows how high the owner himself had valued his property."[384]

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[380] *Starrett Housing Corp. et. al. v. The Islamic Republic of Iran*, Award No. 314-24-1 (14 August 1987), *reprinted in* 16 Iran-U.S. C.T.R. 112 at 201.

[381] The title of the method is self-explanatory. In the post-war nationalisations in France, in 1946 and 1982, as well as in the United Kingdom in 1974, this method was used.

[382] When a productive enterprise is the subject of an expropriation act, and there is no readily available market for the property in question, the method of 'going concern' value has been suggested. This method takes into account not only the tangible assets of the enterprise but also other elements, such as goodwill, contractual rights and likely future profitability.

[383] For a full discussion about these methods and their implications in the awards of the Iran-US Claims Tribunal, see: Piran, op. cit., at 393-442, and Mouri, op. cit., at 405-500.

[384] Seidl-Hohenveldern, op. cit., at 145.

Among the above-mentioned methods, the discounted cash flow method (hereinafter DCF) merits further explanation. DCF represents future profits and discounting of certain amount for costs and commercial risks. Some writers took a critical view as to this method. For instance, Sornarajah expressed his view in the following terms:

> This is a new banner pressed in to stem the tide running strongly against the market value ... This introduces standards of compensation through the back-door and makes the distinction between lawful and unlawful takings meaningless. To the extent that the method requires the future factors to be taken into account, those who seek its application must show that the taking involved was an unlawful taking.[385]

Additionally, in the case of large-scale nationalisation, the DCF method has not been welcomed by the international tribunals. Two reasons have been advanced in this respect.[386] First, since nationalisation *per se* is lawful, it does not allow the calculation of *lucrum cessans* for determining the amount of compensation. Second, DCF "is entirely based on the speculation of the future cash flow of the business and the speculation of a discount rate which itself is based on several uncertain elements."

6. Conclusion

Our study of the issue of compensation suggests that nowadays there is no doubt that compensation is due in the event of expropriation or nationalisation of foreign property.[387] The duty to compensate is based on several theories, amongst which the doctrine of unjust enrichment may be considered as a firm legal basis, because of its equitable foundation.

As to the standard of compensation, supposing that full compensation was the pre-World War II standard, it is no longer so because post-World War II inter-State practice has changed. It was replaced by flexible standards. At the

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385 Sornarajah (1994: 413-414).

386 Piran, op. cit., at 400.

387 Exceptions to the principle of compensation have been recognised by jurists. See the citations in note 5 of this chapter.

present stage of international law, among different standards such as, 'equitable', 'fair' or 'appropriate' compensation, it seems that the latter standard, which the present author would prefer, has reached a status that may be considered as a universally accepted standard. This formula is flexible enough to take into account various interests in each particular case. Although there is no definition of the term 'appropriate' compensation, it cannot be taken as 'full' compensation. Besides giving unnatural meaning to the term, as alluded to earlier, the *travaux préparatories* of Resolution 1803 also indicates that the resolution was adopted in a compromise climate.[388] Moreover, the drafting history of the 1974 Charter of Economic Rights and Duties of States of the General Assembly demonstrates that it also does not mean 'no' compensation. The position of 'no compensation' which was originally adopted was abandoned during the discussion of the instrument.[389]

Likewise, the payment of less than full or partial compensation is not only justifiable in large-scale nationalisations, such as land reform, indigenisation programmes, expropriation of natural resources or general restructuring of the economy, but has also become a settled rule. As indicated above, the main reason for the partial compensation rule is that the nationalising State cannot afford full compensation, and "imposing such a requirement on the State would deprive it from exercising its sovereign right to take control of its essential economic activities."[390] The legality of the expropriation measures and dual nationality status have also a negative effect on the quantum of compensation. In the former, the compensation to be paid in a lawful expropriation is limited to the value of the undertaking at the moment of the dispossession. In the latter, where a dual national acquires rights in immovable property, or continues to enjoy benefits not available to him through his dominant nationality, and such rights are expropriated by the original State, the deprived dual national should receive some compensation, but not full compensation.

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388 See note 278 of this chapter.
389 Arechaga (1978: 184), and Schachter (1991: 321-324).
390 Piran, op. cit., at 353.

With regard to the valuation of an expropriated property, legal principles must be first identified and then compensation or damages must be assessed on the basis of such principles. The present author shares the view that accountancy principles of valuation should not be the means of reintroducing standards of compensation through the back-door and that they are secondary to the finding of the compensation standard applicable to the dispute.

CHAPTER FIVE

CONCLUSION

1. There is an argument that expropriation and nationalisation, which are our concern in this thesis, have lost much of their importance in the 1990s. With the collapse of Socialism in 1991, the concepts of expropriation and nationalisation waned, if not disappeared. "Both Socialist and 'dirigiste' state economies have undergone a political sea-change, moving toward privatization and a liberalized economy."[1] Moreover, nearly all countries welcome foreign investment; there is a climate which is now favourable to foreign investment.

However, "expropriation has nothing to do with Socialism. It existed [long] before the emergence of Socialism and will continue to do so as long as property and property laws exist." Although nationalisation first emerged with the Soviet Revolution of 1917, "it did not remain a monopoly of Communism." By its very definition, nationalisation "occurs whenever there is a conviction in a society that a certain class of property should not be owned by private persons, national or alien, and should come under the public ownership."[2] As shown in chapter 1, this conviction has emerged in all kinds of societies with different political, legal and ideological systems. As regards the current position towards foreign investment, Sornarajah[3] has enumerated several reasons. They include "The shortage of foreign investment, the belief that foreign investment will lead to economic growth and the fact that trade, lending and aid are tied to developing

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1 O. Schachter, *International Law in Theory and Practice*, Martinus Nijhoff, Dordrecht (1991) at 325.

2 H. Piran, *Nationalization of Foreign Property in International Law and Iran-United States Claims Tribunal* (unpublished PhD thesis, University of Liverpool, 1992) at 443-444.

3 M. Sornarajah *The International Law on Foreign Investment*, Cambridge University Press (1994) at 410. See also ibid., at 281 and 357.

countries maintaining a favourable stance towards foreign investment are all responsible for such a climate." He goes on to say that:

> The picture could change after a period when foreign investors have become stabilised in the host states. Nationalistic feelings will be aroused when the dominance of foreign corporations becomes evident. Ideological or economic attitudes to foreign investment could change. Then, one could expect a fresh bout of nationalisations.

Thus, it is submitted that expropriation - nationalisation or other forms of expropriation - will be a cyclical phenomenon, and could always take place.

2. Traditional principles of customary international law relating to expropriation revolve around the law of State responsibility for injury to aliens and alien property. Since the emergence of this doctrine in the nineteenth century, there has been a controversy over the principles governing the treatment of aliens. Thus, one of the issues that has generated much debate is the standard by which to measure the international responsibility of the State with regard to the treatment of aliens. As discussed in chapter 2,[4] due to the shortcomings of the two standards, viz., the 'international minimum standard' and 'national treatment', neither of them can be used to test the international responsibility of the State regarding the treatment of aliens. To the same effect is the argument that there are several human rights instruments which, instead of referring to nationals or aliens, are concerned with 'individuals' within a certain jurisdiction without discrimination. The above account suggests that the international legal scene demands the formulation of new standards.

As in the case of the treatment of aliens in general, in the context of expropriation there are no established rules to govern the expropriation of foreign property. Thus, the standard of compensation is highly controversial. "As a result of this lack of common ground [i.e., established rules], judges and arbitrators trying foreign expropriation cases, have added to the confusion by

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4 See our discussion in this respect, in chapter 2, at 77-78.

rendering contradictory and irreconcilable decisions."[5] The contemporary important international tribunal, viz., the Iran-US Claims Tribunal, also shares this confusion as evidenced by its rendering contradictory awards in this respect.

3. The above does not mean that we should be entirely hopeless. As discussed in chapter 2, the General Assembly of the United Nations dealt with the issue under discussion for over twenty years, between 1952-1974, and adopted numerous resolutions. In essence, the Assembly made several important contributions in this regard. The first contribution is the elevation of the concept of permanent sovereignty over natural wealth and resources to the status of a well-settled principle of international law. To the present writer, the principle is one of the candidate rules which may have the special status of *jus cogens*. Similarly, as indicated in chapter 2, in the pertinent resolutions on the principle, the latter has been qualified by such terms as 'permanent', 'inalienable' and 'full'. The purpose of these terms is to emphasise that sovereignty is the rule and can be exercised at any time. Limitations on this rule are exceptions and cannot be permanent, but are limited in scope and time. A basic corollary right from the principle of permanent sovereignty is the right to nationalise foreign property.

4. The second contribution of the General Assembly is the recognition of an international obligation to pay compensation in the case of expropriation or nationalisation. Although it seems that the existence of such an obligation was generally recognised before World War II, the permanent sovereignty resolutions reaffirm this obligation.

5. The last contribution of this principal organ of the United Nations relates to the key question of the standard of compensation. In the 1962 Declaration, for the first time the Assembly, after reaffirming the sovereign right of a State to expropriate foreign property in the public interest, prescribed the duty to pay 'appropriate compensation' as the consequential obligation in such a case. Appropriate compensation is a reference to a flexible standard which could range from zero compensation, if found to be just (e.g. "in the circumstances where the

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5 Piran, op. cit., at 445.

foreign investor visibly earned inordinate profits from his investment and the host state had no benefits at all from it,"[6]) to full compensation, including lost future profits (*lucrum cessans*). The standard is flexible enough to accommodate various interests in a particular case. Since the formula of appropriate compensation has been recognised by the international community, the triple standard of 'prompt, adequate and effective' compensation (referred to as the Hull formula) ceased to be considered as a valid principle of contemporary international law.[7]

6. Having stated the General Assembly's contributions to this branch of international law, it is timely to summarise our findings on the question of the standard of compensation, i.e., the heart of the issue under discussion, for expropriated property. As indicated above, a State is required to pay compensation to the owner of the affected property. However, "no rigid or exclusive standard of compensation is either feasible or admissible in all cases of expropriation." Put in technical terms, we can say that besides "some established preliminary considerations",[8] which were studied in chapter 4, it is impossible to suggest a fixed and precise standard which can apply to all circumstances and situations. These preliminary considerations include: (1) different treatment of lawful and unlawful expropriations from the viewpoint of compensation; (2) consideration of the ability of the State to pay compensation when the measures involve large-scale expropriations, namely nationalisations, of the natural-resource sector; and (3) consideration of the dual nationality status of a dual national who acquires rights, in the original State, in immovable property which are not available to him through his dominant nationality, and its impact on the amount of compensation.

6.1 In its judgment in the *Chorzow Factory* case, the Permanent Court of International Justice acknowledged that the consequences of lawful expropriation cannot be equated with that of an unlawful measure. Thus, the Court recognised

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6 Sornarajah, op. cit., at 406.
7 See our discussion in this respect, in chapter 4, at 298-329.
8 Piran, op. cit., at 448.

that the legality of the measures has a negative effect on the amount of compensation, and now is a well-settled rule in international law.[9] Under this rule, lawful expropriation attracts liability for compensation which bears a reasonable relation to the value of the property; it is limited to the value of the expropriated property at the moment of expropriation (*damnum emergens*). In the case of unlawful expropriation, the appropriate remedy would be damages, which in addition to the value of the expropriated property at the moment of the expropriation, may include lost profits (*lucrum cessans).*

6.2 Nationalisation, as a separate concept from expropriation, merits a different standard of compensation from that of individual expropriations. It is defined as "the transfer of an economic activity to the public sector as part of a general programme of social and economic reform."[10] By this definition, "it is always a lawful measure,[11] and, therefore, the nationalizing State's liability is limited to the value of the property taken at the time of nationalization."[12] It is not only the financial capacity of the nationalising State that calls for such treatment, but also, perhaps primarily, the conflict between the permanent sovereignty of States over their natural resources and the claim for full compensation. That is why the overwhelming view is that in the instance of nationalisation 'partial' compensation would be the appropriate compensation.[13]

6.3 The impact of dual nationality status on the quantum of compensation, for the first time in the history of the subject, has been recognised by the Iran-US Claims Tribunal in its recent awards. Following the establishment of the Tribunal's jurisdiction over the dual nationality claims, many cases were filed with the Tribunal by Iran-United States dual nationals whose eminent and effective nationality was that of the United States. In those cases, claimants asserted that their properties, including real estate, were expropriated by the

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9 See our discussion in this respect, in chapter 4, at 280-285.

10 N. Schrijver, *Sovereignty Over Natural Resources*, Cambridge University Press (1997) at 285-286.

11 See also Sornarajah, op. cit., at 13 and n. 38.

12 Piran, op. cit., at 449.

13 See our discussion in chapter 4, at 285-292.

Government of Iran directly or indirectly, and hence it incurs the responsibility of Iran. The latter's main arguments in these cases were that because claimants come before the Tribunal as United States nationals and because their claims relate to benefits limited by Iranian law to sole Iranian nationals, their claims should be barred by the *A18* caveat. Iran also invoked principles, such as clean hands, estoppel, good faith and abuse of rights, which operate in international law.

As discussed in chapter 4, there is no consensus among the Chambers of the Tribunal on the issue. Thus, three categories of awards can be identified. In the first category, the Tribunal took the position that the claimants concerned should be barred from recovering against the Government of Iran for interference with property rights that, under Iranian law, they could have acquired only as Iranian nationals. In the second category of awards, the Tribunal took a contrary position. In the last category, which is highly relevant to the present purposes, the Tribunal explicitly endorsed the negative effect of such a status on the quantum of compensation. While noting that leaving the claimant concerned without compensation would be unjust to him, the Tribunal insisted that it would also be unfair to award the claimant the full market value of his property. Thus, it applied a discount of 25% to the value of the property in question. Although the statement of the Tribunal is not without its difficulty from the viewpoint of the novel application of the *A18* caveat to the case in question, which is outside the scope of this study, it is tenable, as far as our present purposes are concerned.

From the above it would appear that dual nationality status has a negative effect on the quantum of compensation. Thus, in the case where a dual national acquires rights in immovable property, or continues to enjoy benefits not available to him through his dominant nationality, and such rights are expropriated by the original State, the deprived dual national should receive less than full compensation.

In view of the foregoing, we can say that, besides the above-mentioned considerations which should be observed by adjudicators in determining compensation, it is impossible to suggest a specific and definite standard which

would apply to all cases of expropriation. However, as shown in chapter 4, the weight of authority has shifted in favour of the application of 'appropriate compensation'. This standard has received recognition not only among scholars,[14] but also in recent international arbitral awards,[15] judgments of national courts[16] and in the permanent sovereignty resolutions.[17] Thus, as seen in this thesis, the appropriate compensation standard was applied in a number of important arbitrations, such as *Texaco*, *Liamco* and *Aminoil*. Two outcomes,[18] as far as the issue in hand is concerned, have emerged from the awards of these cases. The first is that the standard of appropriate compensation "must not be construed either to always require partial compensation or to always exclude full compensation." The second outcome is that "these awards reflect a consistent concern not to determine the amount of compensation rigidly, i.e., without taking

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[14] See *inter alia*:

- A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal*, Martinus Nijhoff, Dordrecht (1994) at 365;
- Schrijver, op. cit., at 297 and 359;
- C. F. Murphy, "Limitations over the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization", in R. B. Lillich (ed.), *The Valuation of Nationalized Property in International Law*, Vol. III, University Press of Virginia, Charlottesville (1975) 49 at 52;
- J. Murphy, "Compensation for Nationalization in International Law", 110 S.A.L.J. (1993) 79 at 88; and
- R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property", 75 A.J.I.L. (1981) 553 at 559.

[15] See, for example:

- *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award of 19 January 1977, *reprinted in* 17 I.L.M. (1978) 1;
- *Libyan American Oil Company (Liamco) v. The Government of the Libyan Arab Republic*, Award of 12 April 1977, *reprinted in* 20 I.L.M. (1981) 1 at 145; and
- *The Government of Kuwait v. American Independent Oil Company (Aminoil)*, Award of 24 March 1982, *reprinted in* 21 I.L.M. (1982) 976 at 1032, para. 143; and
- The Iran-US Claims Tribunal's awards, including *INA Corporation v. The Islamic Republic of Iran*, Award No. 184-161-1 (12 August 1985) *reprinted in* 8 Iran-U.S. C.T.R. 373 at 378, and its recent award in *Shahin Shaine Ebrahimi et al. v. The Islamic Republic of Iran*, Award No. 560-44/46/47-3, para. 88 (12 October 1994) (*unprinted*).

[16] See, e.g., *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 658 F.2d 875, at 892 (2d Cir. 1981).

[17] See, *inter alia*:

- Paragraph 4 of the General Assembly Resolution No. 1803 (XVII), adopted on 14 December 1962. For the full text of the resolution, see I. Brownlie, *Basic Documents in International Law* (3rd ed.), Clarendon Press, Oxford (1991) 230, and Article 2(2)(c) of the Charter of Economic Rights and Duties of States (Resolution No. 3281 (XXIX), adopted on 12 December 1974). For the full text of the resolution, see 14 I.L.M. (1975) 251, and Brownlie, *Basic Documents*, op. cit., at 235.

[18] *Ebrahimi* Award, op. cit., para. 93.

into account the specific circumstances of each concrete case." Therefore, it is submitted that at this stage of international law, with regard to its flexible character, appropriate compensation may be the best standard to ensure that, in determining compensation for the expropriation of foreign property, the interests of both the expropriating and expropriated parties are accounted for.

7. Before ending the conclusion a word must be said on the contribution of the Iran-US Claims Tribunal to international law generally, and to its branch - expropriation law. As indicated in this thesis, this is a unique situation in which many cases on the issue of expropriation, especially indirect expropriation, have been decided by an international tribunal, and the rendered awards should reasonably be a fruitful source in this respect. However, it seems that this is not the case for two reasons. In the first place, the Tribunal dealt with takings that took place in the context of a revolutionary upheaval, following the overthrow of the Shah of Iran in 1979, not in a normal situation, and hence the propositions the Tribunal formulate may not have relevance outside this context. Second, the Algerian Declarations [19]- the Tribunal's constituent instruments - gave it a wide power to deal not only with expropriations but also "other measures affecting property rights."[20] As discussed in chapter 3, such a wide definition of expropriation is untenable in international law for the simple reason that many normal activities of States, such as taxation, affect property rights and cannot be expected to give rise to international concern.[21]

As in the case of international law in general, the Tribunal's contribution to the standard of compensation is weakened and blurred by a number of uncertainties. These uncertainties include: firstly, as shown in chapter 4, the Tribunal's awards were based on two sets of standards, viz., the standard of compensation which was incorporated in the 1955 Treaty of Amity between Iran

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[19] The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the Islamic Republic of Iran and the Government of the United States (signed on January 19, 1981), *reprinted in*: 1 Iran-U.S. C.T.R. 3; 75 A.J.I.L. (1981) 418, and 20 I.L.M. (1981) 224.

[20] Article II(1) of the Claims Settlement Declaration.

[21] On the issue, see R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Hague *Recueil* (1982-II) 259 at 329, and Sornarajah, op. cit., at 282-283.

and the United States (as *lex specialis*)[22], and the customary international law standard (as *lex generalis*), albeit in few awards. The problem is that the Tribunal did not clarify when the awards were based on the Treaty and when they rested on the customary rules. Secondly, not only are there contradictions in the findings of the different Chambers of the Tribunal, but also in the findings of the same Chamber. This comes close to what Mouri observes:

> The Tribunal's contribution to this question [the standard of compensation] ... is weakened and blurred by a number of uncertainties not only because of contradictions in the Chamber's findings or changes of positions occasioned by vacillating between the customary rules of international law and the requirements of the Treaty of Amity, but also because in a number of important Cases the Chambers' primary efforts were aimed at challenging or distorting each others' rulings.[23]

However, the last word should always be an optimistic one. In the light of the uncertainties and disagreement which surround the law regarding the standard of compensation, bearing in mind that bilateral investment treaties do not reflect customary international law in this respect, the best solution that could be hoped for in the present stage of international law is for States to settle the question of compensation through such treaties. States are increasingly resorting to this strategy. Where such a treaty exists, the standard referred to in the treaty is conclusive. Nevertheless, reference should be made to a specific standard; a generally worded standard may not be helpful, for it would only revive the controversy over what is the proper standard of customary international law in a given situation. In present circumstances both legal and political considerations suggest that the most effective way forward in the most problematic area - that of compensation - lies through the flexible 'appropriate compensation' standard. This cannot, of course, put an end disputes over expropriation or even over level of compensation. It can, however, set a framework within which understanding

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[22] The 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (entered into force on 16 June 1957), *reprinted in* U.N.T.S., Vol. 284, at 93, and U.S.T.S., Vol. 8, at 899.

[23] Mouri, op. cit., at 351. For a brief account of the shortcomings of the Tribunal's awards, see Piran, op. cit., at 451-468.

may develop and out of which an international jurisprudence may emerge which ultimately can provide a clearly agreed structure for compensation awards. In so doing most of the heat may be taken out of other controversial questions in this area which may, as the Iran-US Claims Tribunal proceedings to some degree suggest, lead to a more rational resolution of these questions then was currently available.

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