Compensation for Expropriated Property in Recent International Law

Amir Rafat

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the International Law Commons, and the Property Law and Real Estate Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol14/iss2/1

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
COMPENSATION FOR EXPROPRIATED PROPERTY
IN RECENT INTERNATIONAL LAW

AMIR RAFAT†

I. INTRODUCTION

CUSTOMARY INTERNATIONAL LAW recognizes the right of states to expropriate alien property with compensation. While the right of alien property holders to compensation is generally acknowledged, considerable controversy rages over the terms of compensation. This controversy can at least partially be explained by the emergence and increasing participation in world affairs of the newly independent countries in Asia, Africa, and the Middle East. It is generally conceded that modern international law originated in the 16th century among the European Christian states. The new countries, having had no participation in the formation and development of international law, refuse to submit to some sections of it — including the rules of compensation — as unsuitable to their economic and industrial growth. Oddly enough, these same countries often stand to lose from the present confusion surrounding the rules of compensation. It is common knowledge that most of the underdeveloped countries are badly in need of foreign investment and skills to improve their economic resources; foreign capital, however, will be slow to come as long as the rules of international law protecting alien property against arbitrary seizure are not clearly defined and observed.

The developed industrial countries of the West, on the other hand, are understandably disturbed by the refusal of the new states to comply with the traditional law. The time when coercive power could be used to protect investments seems to be passing, and, against

† Associate Professor of Political Science, DePauw University. B.A., University of Geneva, 1955; M.A., University of Nebraska, 1958; Ph.D., University of Minnesota, 1964.
1. International law, at least at the present stage of its development, does not regulate the relations between states and their nationals. For this reason, the scope of the present study is limited to such takings as are carried out against property owned by aliens.
3. VERZIJL, WESTERN EUROPEAN INFLUENCE ON THE FOUNDATION OF INTERNATIONAL LAW, 1 INT'L REL. 137 (1955).
this background, the capital-exporting countries must rely on the rules of international law for the protection of their nationals' property interests abroad. These rules, however, in order to be effective, must be redefined in accordance with changing conditions in the international community. As a matter of general proposition, it may be stated that any legal system, to serve as an effective instrument of social control, should be responsive to the needs of the community to which it applies. A recent writer has observed, "Law . . . is not a constant in a society, but is a function. In order that it may be effective, it ought to change with changes in views, powers and interests in the community." This is particularly true of international law which, lacking in a centralized enforcement system, must rely for its implementation upon voluntary compliance by states. Obviously, the latter would not comply unless the law is adapted to their interests.

It scarcely requires argument that with the rise of the new African and Asian countries as a force in international relations, the conditions under which the traditional standards of compensation were formulated have changed. This, in the light of what was said above, suggests the need for redefinition of the rules of compensation in accordance with changed circumstances. The present study hopes to take a step in that direction by analyzing at length four recent expropriation cases, namely, expropriations undertaken by Iran, Egypt, Indonesia, and Cuba. Although the primary concern here is with four case studies, it must be noted that the experience embodied in these cases cannot be appreciated unless seen in a perspective that takes into account the general literature on compensation. Accordingly, the first part of this Article is devoted to an analysis of the problem of compensation in its broader aspects. The object here consists mainly of identifying the areas of disagreement with reference to which the four case studies can be profitably examined for solutions. It is also proposed to examine in this part the compensation agreements resulting from some earlier expropriation actions (Mexican, East European, etc.) inasmuch as such agreements, it is believed, together with the practice embodied in the Iranian, Egyptian, Indonesian, and Cuban cases can be used as a basis for conclusions. In the second part, attention is shifted to the four case studies mentioned above. Here, first-hand material — official statements, statutes, etc. — bearing upon the cases in question is extensively drawn upon in order to ascertain the respective positions of the expropriating and claimant states in regard to the question of compensation. In the concluding section,

an attempt is made to show how the experience embodied in the recent expropriations can be applied toward the solution of some of the problems raised in the first part.

At the outset, a few terms must be defined. The term "expropriation" is used in this Article to mean any compulsory taking of private property by state action. Expropriation is called "individual" when it constitutes an isolated taking, usually carried out in the enforcement of an administrative decree. Individual expropriation is exemplified by such action as the taking of property for the construction of roads or hospitals, or destruction of private property for sanitary purposes.

"General" expropriation, on the other hand, denotes taking carried out in pursuance of a general program. The property thus expropriated may be transferred to another person as is the case with general expropriations carried out in the enforcement of agrarian reform programs, or it may be transferred into state ownership. The latter kind is here referred to as "nationalization."

The distinction between individual and general expropriations is important for present purposes, since, as will appear below, certain commentators and states have maintained that the terms of compensation or even the very existence of a rule obligating the expropriating state to compensate depend upon whether the taking is individual or carried out in pursuance of a general and impersonal legislation.

II. COMPENSATION FOR EXPROPRIATED ALIEN PROPERTY

A. Compensation in General

1. Duty to Compensate

There seems to be general agreement in international law that the expropriating state is obligated to pay compensation for the expropriated property. This obligation has been recognized by a good many writers, including Wortley, White, Delson, Foighel, Hyde, Domke, Guggenheim, Oppenheim, Woolsey, Fachiri, and Scelle.

The principle that there is an obligation to afford recovery at
least insofar as alien property is concerned also finds support in inter-
national case law, as well as in the practice of states. It must not,
however, be assumed that the existence of a rule requiring compen-
sation is recognized by all states or commentators. At least two states
and a small number of writers — mostly from communist countries —
have repudiated the existence of any such obligation insofar as general
and impersonal expropriations are concerned. This was essentially
the position adopted by Mexico in connection with its agrarian and oil
expropriations. The Mexican position was clearly expressed in the
note of August 3, 1938, to the United States, in which, repudiating
the American allegation that Mexico had rendered itself guilty of an
international offense by denying compensation to foreign property
holders, the Mexican Foreign Minister maintained that under inter-
national law expropriation of the kind carried out in Mexico entailed
no liability for compensation. The pertinent portion of that note reads:

[T]here 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 compen-
sation, for expropriations of a general and impersonal character.

In a similar vein, the Soviet Union persistently and successfully denied
the right of deprived aliens to receive compensation.

This view has also found favor with some communist-oriented
writers. Bystriky and Benkô, for instance, at the Sixth Congress of
the International Association of Democratic Lawyers at Rome, asserted
that “socialist” nationalizations involved no obligation under inter-
national law to afford recovery to deprived aliens.

2. Equality of Treatment v. Minimum International Standard

Some other authorities have adopted a position which if pushed
to its logical conclusion would have the effect of denying compensation
to foreign owners of property at least insofar as the nationals of the
taking state are treated in the same fashion. This school maintains
that apart from the duty under international law of the nationalizing
state to grant to alien owners of property equality of treatment with
nationals, there is no other rule of positive international law to impose

17. As will appear below all the states with the exception of the Soviet Union and
Mexico have recognized the duty to compensate.
18. 1 Documents on American Foreign Relations, 1938–39, at 93 (S.S. Jones
& D. Myers eds. 1939).
19. See p. 208 infra.
20. International Association of Democratic Lawyers, 6th Conference
19–26 (1956).
upon that state the duty of paying compensation for the property taken. It follows that the inequality of treatment with nationals is the sole basis upon which a claim for compensation can lawfully be made, and no such claim arises when the nationalizing state grants equality by denying to both nationals and foreigners a right to indemnity. This was in substance the position adopted by Sir John Fischer Williams in an article he wrote over 30 years ago and in which he took sharp issue with the views concerning compensation expounded by Fachiri\textsuperscript{21} in an earlier article. Sir John stated the question in these terms:

\[W\]hether or not, apart from any special terms imposed by a "concession" or by treaty, there exists a general rule that if a state expropriates the property of an alien without the payment of full compensation it commits a wrong of which the state of the alien affected is entitled to complain, even if the measure of expropriation applies indiscriminately to nationals and to aliens.\textsuperscript{22}

He found no basis for an affirmative answer to this question notwithstanding the fact that "[t]he affirmative of this proposition is asserted by many lawyers of great eminence, and appears at the present time to be supported by the predominant sentiment of the jurists of the United States."\textsuperscript{23}

Another early expression of the "equality of treatment" position is to be found in Strupp who about the same period, in connection with Rumania's agrarian reform, wrote:

\[T\]here is no rule of customary international law which prohibits the State from expropriating the property of the nationals of another State, with or without compensation, provided that, in so doing, the expropriating State does not establish any difference in treatment or any inequality between its own nationals and aliens (in the absence of a treaty, equal treatment with nationals is the most an alien can demand) and that the measure in question is not in fact or in law directed against aliens generally or some aliens as such.\textsuperscript{24}

This was in fact the conclusion reached by Kaeckenbeeck who in his Hague lectures in 1937 stated that, aside from the rule of nondiscrimination, for violation of which the taking state makes itself guilty of international delinquency, he failed to find any other positive standard

\begin{footnotesize}
\begin{enumerate}
\item Fachiri, \textit{supra} note 14.
\item Id.
\end{enumerate}
\end{footnotesize}
on the basis of which a claim for compensation can be pressed.\textsuperscript{25} The view that under general international law equality of treatment is all that an alien owner of property can claim has more recently been espoused by Friedman\textsuperscript{26} and Brierly.\textsuperscript{27}

So far as state practice is concerned, the government of Mexico on the occasion of Mexican agrarian reforms adopted this position, thus refuting the United States allegation that foreign owners of nationalized property were entitled to a minimum standard of justice regardless of treatment accorded the nationals. The Mexican position was expressed in the note of August 3, 1938, in which the Mexican Minister of Foreign Affairs, referring to an earlier communication in which the United States Government had claimed compensation for American property affected by Mexican agrarian measures, stated:

The demand for unequal treatment is implicitly included in your Government's note; for, while it is true that it does not so state clearly, it does require the payment to its nationals independently of what Mexico may decide to do with regard to her citizens; and as your Government is not unaware that our Government finds itself unable immediately to pay the indemnity to all affected by the agrarian reform, by insisting on payment to American landholders, it demands in reality, a special privileged treatment which no one is receiving in Mexico.\textsuperscript{28}

\textsuperscript{25} Kaeckenbeeck, La Protection Internationale des Droits Acquis, 59 Recueil des Cours 321, 367 (1937). Kaeckenbeeck speaks of a minimum standard to which states must conform. However, he refers to this standard in language which suggests that it is still in the ought-to-be stage of its development. He writes:

Certes, on peut voir dans ce standard minimum le noyau d'un droit international futur relatif à la responsabilité des Etats envers des individus étrangers. Mais son élaboration devra se faire par les rapports graduels d'une jurisprudence internationale à la fois prudente et avisée, empreinte également de sens politique et d'équité, et douée d'une autorité incontestée.

Tant que l'élaboration judiciaire de ce droit fera presque entièrement défaut, on devra rester très sceptique à l'égard de toutes théories proclamant l'immunité des détels ou tels droits à être supprimés sans adéquate compensation par la législation générale d'un Etat."

Certainly one can see in this minimum standard the nucleus of a future rule of international law concerning the responsibility of States vis-à-vis aliens. But such a rule can only develop through the gradual contributions of international case law which is conservative, being aware of political as well as equitable considerations, and at the same time endowed with incontestable authority.

As long as this judicial contribution is entirely missing, one must remain very skeptical about all theories claiming immunity for such and such right from confiscation without adequate compensation by the general legislation of a State.

\textit{Id at} 376.

\textsuperscript{26} S. Friedman, Expropriation in International Law 210 (1933).


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

\textsuperscript{28} 1 Documents on American Foreign Relations, 1938-39, \textit{supra} note 18, at 96.
Secretary Hull, answering the Mexican Minister in a note of August 23, 1938, asserted that the allegation made by Mexico would in fact amount to saying

that it is wholly justifiable to deprive an individual of his liberty if all other persons are equally deprived, and if no citizen is allowed to escape. In this instant case it is contended that confiscation is so justified. The proposition scarcely requires answer. 29

In the above note Secretary Hull seems to be subscribing to the theory that the equality of treatment is not sufficient to relieve a state from international responsibility which would arise if the taking is not carried out in conformity with certain minimum standards of justice as imposed by the law of nations. This theory seems to prevail in both doctrine 30 and the practice of states. 31

To sum up, the prevailing view in international law seems to be that the expropriating state is under an international obligation to afford some recovery to deprived aliens and that such obligation exists independently of the treatment accorded the nationals of the expropriating state.

The major difficulty, however, arises when one comes to the question of the amount of compensation and the time and form of its payment. It is to this question that we now turn.

3. Adequate, Prompt, and Effective Compensation

In the controversy between the United States and Mexico over the Mexican agrarian and oil expropriations the United States, accord-

29. Id. at 106. Secretary Hull further elaborated that the United States was not seeking a privileged status for its nationals, as it was falsely assumed by the Government of Mexico, but treatment in accordance with certain standards to which Mexicans themselves were entitled under the Mexican Constitution. He added:

It is, of course, the privilege of a Mexican national to decline to assert such claims, as it is the power of the Mexican Government to decline to give it effect: but such action on the part of Mexico or her nationals cannot be construed to mean that American nationals are claiming any position of privilege.

Id.

30. L. Cavare, LA PROTECTION DES DROITS CONTRACTUELS RECONNU PAR LES ETATS A L'EXCEPTION DES EMPRUNTS 102 (1956); Bindschedler, LA PROTECTION DE LA PROPRIETE PRIVEE EN DROIT INTERNATIONAL PUBLIC, 90 RECUEIL DES COURS 179, 207-08 (1956); Borchard, THE "MINIMUM STANDARD" OF THE TREATMENT OF ALIENS, 38 MICH. L. REV. 445 (1940); Herz, EXPROPRIATION OF FOREIGN PROPERTY, 35 AM. J. INT'L L. 243, 248 (1941); Kunz, MEXICAN EXPROPRIATIONS, 5 CONTEMP. L. PAMPHLETS 1, 31 (1940). See also the judicial precedents cited by Bindschedler, supra at 205-06.

31. In addition to the United States and Swiss positions, see the position of the United Kingdom Government in the Finley case, 39 BRITISH AND FOREIGN STATE PAPERS 410 (1850), involving the taking of private property of a British national by the King of Greece. In connection with this case Lord Palmerston, the British Foreign Minister, stated: "The British government can pay no attention to the argument that compensations equally inadequate has been accepted by natives or by subjects of other states for similar injuries sustained by them." Quoted in CORNELL LAW SCHOOL, PROCEEDINGS OF THE 3RD SUMMER CONFERENCE ON INTERNATIONAL LAW 140 (1960).
ing to a formula which has now become famous, claimed payment of adequate, prompt, and effective compensation. Secretary Hull, in his note of April 3, 1940, to the Mexican Foreign Minister, stated the point of view of his government in these terms: "[T]he right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation." This same principle guided the attitude of the United States toward expropriation of American property in Guatemala and Cuba.

The orthodox requirements of adequacy, promptness, and effectiveness represent the traditional measure of compensation for individual expropriations. The United States Government in the above-quoted communication and subsequent statements concerning compensation was implying that the traditional criteria also apply in regard to general and impersonal expropriations. While it would seem an exaggeration to say, as do some, that the great majority of international law commentators subscribe to the orthodox restrictions of "adequate, prompt, and effective" compensation, it may safely be asserted that a good many writers from Western countries would still hold that the right of a state to take foreign property is conditioned by its ability and readiness to pay adequate compensation promptly and in an effective fashion, although some would qualify the requirement of promptness with a view to making it easier for the expropriating state to comply.

33. See the United States note of August 28, 1953, concerning expropriation of the property of the United Fruit Company by the Government of Guatemala in 29 Dep't State Bull. 357 (1953).
35. Mexico, however, dismissed this assertion. In its note of August 3, 1938, it stated: "[T]here does not exist in international law any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character." Quoted in H. Briggs, The Law of Nations 559 (1952).
36. P. Adriaase, Confiscation in Private International Law 6 (1956); B.A. Wortley, supra note 5, at 124; Domke, supra note 10, at 603-08. See also the report of the International Committee on Nationalization of the International Law Association to the 48th session of the Association in which the Rapporteur stated that in response to a detailed questionnaire the reply of "all members except those of Professor Katzarov and Dr. Magarasevic agree that the taking of foreign property obliges the taking State to pay adequate, prompt and effective compensation for such property." The members of this Committee included: Bindschedler (Chairman), Seidl-Hohenveldern (Rapporteur), Berezowski, Cheng, Hidemori Egawa, Foighel, Jansma, Paavokastari, Lauterpacht, Martin Luther, Magarasevic, Mario Miele, Roed, Sandiford, Hifzi Timur, Hisao Ganaic. International Law Association, Report of the Forty-Eighth Conference 187 (1959).
37. Hyde and Bindschedler, for instance, would see nothing wrong in deferred payment provided adequate interest is paid. 1 C.C. Hyde, International Law Chiefly as Interpreted and Applied by the United States 718-19 (1945); Bindschedler, supra note 30, at 251.
4. Partial Compensation

Some writers, however, maintaining the distinction between individual expropriations and those carried out in pursuance of a general and impersonal legislation, have asserted that within the context of the latter type the alien owner of property must satisfy himself with a "partial" compensation which would take into account the resources and paying capacity of the taking state. 38 This was the position taken by De La Pradelle in 1950 in his report to the Institut de Droit International at Bienne where he maintained that the large-scale nationalizations entail only "une indemnité basée sur les possibilités du débiteur raisonnablement considérées, dans un paiement échelonné sur un délai normal." 39 This view came under sharp attack from some other members of the Institut including Bagge, 40 Verzijl, 41 and Wehberg, 42 who subscribed to the orthodox standards; while Rolin 43 agreed with the Rapporteur on the issue of partial compensation. Lauterpacht, writing in Oppenheim, has suggested that "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 ... [a] solution must be sought in the granting of partial compensation." 44

No international tribunal has ever passed on a case involving extensive deprivations of the kind for which the above authorities suggest a compromise in the form of "partial compensation." In the Norwegian Shipowners' Claims 45 case, the International Court of Arbitration ruled that the claimant party was entitled to "just" compensation. In the Goldenberg Case, 46 a Special Arbitral Tribunal found that

38. This group includes, among others, I. Fischel, supra note 8, at 88; S. Friedman, supra note 26, at 206; W.H. Gould, An Introduction to International Law 467 (1957); 1 P. Guggenheim, supra note 11, at 334.

39. "[A]n indemnity based upon the debtor State's financial capacity, equitably estimated, with payment spread over a reasonable length of time." 43 Annuaire Institut de Droit International 20 (1950).

40. Id. at 75.
41. Id. at 101.
42. Id. at 111.
43. Dans la mesure ou la nationalisation atteint les biens des ressortissants étrangers, l'Etat nationalisateur doit ... assurer au dépossédé, dans la mesure de ses possibilités financières raisonnablement appréciées, une indemnité proportionnée au préjudice subi, payable éventuellement par annuités. (Insostar as the nationalization measure affects the assets of aliens, the nationalizing State ... to the extent of its paying capacity, reasonably estimated, must afford the dispossessed [alien] an indemnity, in proportion to the loss sustained, which could be paid in annual installments.)

44. Id. at 93.
46. Goldenberg Case (Germany v. Rumania) [1928], Ann. Dig. 542 (No. 369), 2 U.N.R.I.A.A. 901 (1928).
a requisition carried out by German authorities after the outbreak of World War I was contrary to international law when, after a reasonable time, the plaintiffs did not obtain full compensation. The Permanent Court of International Justice (P.C.I.J.) in the Chorzow Factory (Indemnity) Case judgment held that “the value of the undertaking at the moment of dispossessions plus interest to the day of payment” constituted a “fair” measure of compensation for lawful expropriations. As regards the requirement of “promptness,” the international courts have ruled that payment must be made “in due time,” or “within a reasonable time.” It is well to remember that these decisions were rendered in the context of individual expropriations and their application to extensive takings, in the view of advocates of partial compensation, would not be warranted.

B. Settlement of Claims Arising Under the 20th Century General Expropriations

It is now intended to examine the practice of states as embodied in settlements of claims arising from 20th century expropriations with a view to discovering whether it establishes a pattern of settlement which may be useful to our consideration of more recent expropriation cases.

1. Soviet Expropriations

After the success of the Communist Revolution, Russia embarked upon extensive nationalizations without acknowledging an obligation to afford recovery for nationalized alien property. The Soviet action occasioned protest from some 20 states which on February 13, 1918, joined to declare the Soviet takings “without effect” as regards their nationals. Three years later the delegates participating at the Brussels Conference on Russia passed a resolution in which they asserted: “The forcible expropriations and nationalizations without any compensation or remuneration of property in which foreigners are interested is totally at variance with the practice of civilized states.” Efforts to achieve a settlement ended in complete failure with the result that no recovery was afforded, while Western countries maintained their legal position that Russia had made itself guilty of a breach of international law by refusing compensation for the property taken.

50. Quoted in B.A. Wortley, supra note 5, at 61.
2. Mexican Expropriations

In point of time the next extensive expropriation occurred when Mexico, implementing certain provisions of the Constitution of 1917, expropriated American property interests for the purpose of its agrarian reform.51 Following voluminous diplomatic correspondence between Mexico and the United States an agreement was reached in 1941 whereby Mexico undertook to pay in annual installments a sum exceeding $350 million in full satisfaction of all American claims arising under Mexican agrarian takings. In the meantime, the Government of Mexico, pursuant to a decree of 1938, had proceeded to the nationalization of oil properties in which British, American, and Dutch interests were involved. American claims under the oil takings were made the object of a settlement in 1942 whereby Mexico agreed to a lump sum of about $24 million as against American claims totaling $260 million.52 British and Dutch claims arising from oil nationalization were not settled until 1946, when an agreement was concluded for a compensation totaling $81.5 million to be paid in installments and bearing interest at 3 percent from March 18, 1938, to September 18, 1948.53

3. Western Nationalizations

The French postwar nationalizations affected the Bank of France, four commercial banks, 34 insurance companies, and coal, electricity, and gas undertakings.54 In contrast to confiscation decrees carried out for penal purposes without indemnity, the nationalizations proceeded from the assumption that former owners were entitled to just compensation.55 This does not mean, however, that orthodox prescriptions were honored, as will appear from the following survey of compensation decrees. For the Bank of France compensation was set at a point between the liquidation value of the shares and their average market price between September 1, 1944, and August 31, 1945. The average price was calculated at 28,000 francs per share while the normal liquidation value was first estimated at 70,000 francs but later reduced to 44,000 francs "on the basis of an evaluating procedure of dubious validity."56 In the case of the commercial banks,

51. For a comprehensive discussion of Mexican expropriations, see Kunz, Mexican Expropriations, 5 CONTEMP. L. PAMPHLETS 1 (1940).
55. Id. at 119.
56. Id. at 40.
compensation "was to be based on the average market value for the period from September 1, 1944, to October 31, 1945, a period during which the nationalization of the banks had become a certainty."57 Compensations for electricity and gas enterprises were based on 1938 market value of the shares multiplied by 3.78 and 4.46, respectively. In all instances, compensation was paid in the form of 50-year amortizable bonds or stock. Summing up the French compensation provisions Einaudi, Bye, and Rossi conclude:

[T]he French situation, as a result of political pressures and variables, fluctuates between the extremes of partial compensation due to low valuations and inflation and of provisions which, if fully applied in the case of electricity, might result in interest payments to the former owners higher than is warranted by their present riskless status.58

Dawson and Weston point to French indemnity provisions as indicative of "the difficulty of applying orthodox preferences even against an economically-advanced depriving State."59 It is true that France subsequently entered into an agreement with Great Britain for a more satisfactory compensation to British investors in the nationalized gas and electricity industries. But even under this agreement, Schwarzenberger has estimated that the agreed compensation amounted to only 70 percent of the total British investments.60

The British postwar nationalization legislation also carried provisions for compensation. Here most commentators have agreed that indemnity was paid on a more satisfactory basis.61 In most instances shareholders in nationalized enterprises were provided with government stocks representing the value of their shares on the stock exchange for the first week of November, 1946. It will be noted that the designated date is after the nationalization provisions were known, and, therefore, the market quotation of the shares during that period does not reflect the actual value of the interests involved. It should, however, be added that in the case of the coal mines and communications, provisions were made for lucrum cessans,62 and for the Bank of England compensation was made on a scale which is described by Friedman

57. Id.
58. Id. at 41.
59. Dawson & Weston, supra note 52, at 745.
61. S. Friedman, supra note 26, at 64; B.A. Wortley, supra note 5, at 129. See also Schmittoff, The Nationalization of Basic Industries in Great Britain, 16 LAW & CONTEMP. PROB. 557 (1959). He holds that one of the important features of British nationalization legislation "is its axiomatic insistence on the principle that compensation must be paid for assets transferred from private to national ownership." Id. at 566.
62. B.A. Wortley, supra note 5, at 130.
as "generous." Commenting on the British compensation terms, Wortley states that they satisfy traditional requirements of adequacy. Katzarov, however, would not agree with this conclusion. Referring to the French and British situations, he observes: "The compensation provisions in the nationalizations carried out after the 2nd World War were designed to give impression of a fair compensation rather than to realize it effectively."

Before concluding this consideration of Western practice, mention must be made of a relatively recent development which has been interpreted by some as a change in the Western conception of private property. Certain noncommunist states have modified their constitutional requirements concerning compensation in a way that can be described as departures from traditional constitutional protections surrounding exercise of the sovereign right of eminent domain. Thus, the Constitution of Colombia provides that

For reasons of public benefit or of social interest defined by the lawmaker, there may be expropriation by judicial order and after indemnification.

Nevertheless, the lawmaker, for reasons of equity, may specify cases in which there shall be no occasion for indemnification, upon the favorable vote of the absolute majority of the members of both houses.

Article 14 of the Basic Law of the Federal Republic of Germany stipulates that in case of expropriation "[t]he compensation shall be determined upon just consideration of the public interests and of the interests of the persons affected." Article 35 of the Portugese Constitution, emphasizing the "social function" of private property, also uses language which may be interpreted as warranting expropriation without payment of full or prompt compensation.

From these and other municipal developments certain writers have inferred the emergence of a new conception of property which as a general principle of law recognized by civilized nations must be reflected in the international law of nationalizations.

63. S. Friedman, supra note 26, at 64.
64. B.A. Wortley, supra note 5, at 129.
68. Article 35 of the Portugese Constitution reads: "Property, capital and labor have a social function in the field of economic co-operation and common interest, and the law may determine the conditions of their use or exploitation in accordance with the community aim in view." Id. at 734.
69. See, e.g., K. Kazarov, supra note 65, at 442.
4. Nationalisations in Eastern Europe

Following World War II, the countries of Eastern Europe embarked upon large-scale nationalization programs affecting rights and properties of nationals of Western countries. The nationalizing states, in most instances, recognized their obligation to compensate the deprived owners but due to circumstances arising from the war proved unable to honor that obligation. The Western governments were subsequently led to conclude with these states settlements which resulted in payment of a lump sum in full satisfaction of claims arising under nationalizations and some wartime measures. Significant features of those agreements will be examined here.

Only three of these agreements resulted in the payment of compensation in one single transaction; but even then it may be said that the orthodox requirement of promptness was not satisfied in that the settlements were concluded years after the passing of nationalization decrees. All the other lump-sum agreements provided for compensation to be paid in installments spread over a considerable period, in certain instances up to 20 years.

It is generally agreed that the amount of compensation in most of these global settlements did not represent the full value of nationalized property. White states, for instance, that figures applied by the Foreign Compensation Commission, a body established in England to administer lump-sum agreements, estimated the total value of British claims against Yugoslavia at £25,120,582, whereas, under the agreement with Yugoslavia, the United Kingdom Government settled for only £4,500,000. The lump-sum compensation agreed upon with Czechoslovakia and Poland also fell far below the full value of the British property nationalized by those states. More recently, under the United States-Rumanian agreement of March 30, 1960, the United States Government, which had estimated the value of American property and interests affected by various Rumanian measures as totaling $84,729,291, satisfied itself with a lump sum of $24,526,370, in full

70. The United States-Yugoslavia agreement of July 19, 1948, in Bindschedler, supra note 30, at 261; the Norway-Poland agreement of Dec. 23, 1955, in G. White, supra note 6, at 208-09; and the Sweden-Czechoslovakia agreement of Dec. 22, 1956, in id.

71. See S. Friedman, supra note 26, at 211; G. White, supra note 6, at 210; Dawson & Weston, supra note 52, at 742; Garcia Amador, supra note 24, at 22.

72. G. White, supra note 6, at 210. For the Anglo-Yugoslav agreement, see Moller, Compensation for British Owned Foreign Interests, in 44 Grotius Society, Transactions for the Year 1958-59, at 223, 225 (1959).

73. Dawson & Weston, supra note 52, at 744.


https://digitalcommons.law.villanova.edu/vlr/vol14/iss2/1
and final satisfaction of all American claims against that country.\textsuperscript{75} While it is open to question to what extent estimates advanced by claimant states represented the full value of nationalized property, it is submitted that in many cases the gulf between the estimated value and the compensation actually agreed upon is so wide as to warrant the conclusion that the requirement of adequacy was not met.

As to the criterion of "effectiveness," in most cases special arrangements were made to enable the debtor state to discharge its obligations in an effective manner. It should be noted that due to special circumstances growing out of the war, the nationalizing states were facing a shortage of foreign exchange which in many cases would have made it impossible for them to discharge their obligations had the creditor states not agreed to associate compensation with collateral trade agreements under which the taking states were supplied with new sources in foreign currency. In many instances, special arrangements were made so that installments could be paid from the proceeds of exports into the claimant state. Thus, in the agreement between Switzerland and Yugoslavia of October 1, 1948, the compensation was set at 78 million Swiss francs, most of which was to be paid by means of a 5 percent deduction from the proceeds of Yugoslav exports into Switzerland.\textsuperscript{76} In a similar fashion, payment of compensation for British nationalized property under agreements with Yugoslavia and Czechoslovakia, was made possible by the conclusion of collateral trade agreements with these countries.\textsuperscript{77} Under the Trade and Financial Agreement with Czechoslovakia, for instance, the United Kingdom agreed to an annual import of £575,000 of Czech goods and advanced loans to that country for industrial improvements. The July 1960 agreement between the United States and Poland also should be considered with reference to arrangements under which Poland received $61 million in loans from the Export-Import Bank and was given the privilege of buying farm produce from the United States at low prices.\textsuperscript{78}

\textsuperscript{75} Id. at 622. Under the United States-Poland agreement of July, 1960, Poland pledged to pay $40 million spread over 20 years in full settlement of United States claims arising from Polish seizures, while the total value of United States property affected by Polish nationalization had been estimated at several hundred million dollars. N.Y. Times, July 17, 1960, at 1, col. 4.

\textsuperscript{76} Doman, Postwar Nationalization of Foreign Property in Europe, 48 COLUM. L. REV. 1125, 1151 (1948). Switzerland concluded on November 26, 1954, a similar agreement with Bulgaria whereby the latter undertook to pay the lump sum of 7,500,000 Swiss francs, of which 2,500,000 francs were paid in cash and the remainder was spread over a period of 10 years and payable by means of a 7 percent deduction of Bulgarian export proceeds to Switzerland. Bindschedler, supra note 30, at 265–66.

\textsuperscript{77} G. White, supra note 6, at 209–10.

\textsuperscript{78} N.Y. Times, July 22, 1960, at 1, col. 5.
In still another group of agreements, compensation did not take the form of money payments but delivery of specified quantities of raw materials to the claimant state. An example of this type of settlement is furnished by the Franco-Polish agreement of March 17, 1948, whereby France accepted compensation in the form of specified quantities of Polish coal to be delivered over a period of years.79

The question of "effectiveness" did not arise in instances where frozen assets belonging to the taking state or its nationals were found to be in the possession of the claimant state and were applied by the latter in satisfaction of its nationals' claims. Thus, the United States claims arising from the Yugoslav measures were settled by an agreement reached on July 19, 1948, whereby the United States undertook to release $46,800,000 in Yugoslav gold in exchange for a lump sum of $17 million payable within 45 days after the signing of the agreement.80 The United States was also in possession of frozen assets belonging to Bulgaria, Hungary, and Rumania or their nationals. Under the International Claims Settlement Act of 1949, these assets were liquidated in satisfaction of United States claims against those states arising under 1947 peace treaties. However, the frozen assets proved insufficient to cover American claims and subsequently the United States Government entered into negotiations in 1960 with Rumania and Bulgaria to achieve a more satisfactory settlement. Under the agreement which evolved from negotiations with Rumania, compensation was set at $24,526,370, whereas Rumania's frozen assets amounted to $22,026,370. Rumania agreed to supplement the frozen assets by payment of $2,500,000 spread over a period of 4 years.81

Opinion varies as to what conclusions can be drawn from the practice contained in the global agreements with the states of Eastern Europe. Some have read into these global settlements a recognition by the claimant states that the orthodox restrictions of "adequate, prompt, and effective" compensation are not applicable to large-scale expropriations. Dawson and Weston, after a survey of agreements concerning claims arising from Mexican and postwar nationalizations, interpret the practice embodied in these agreements as testifying to the recognition by the claimant states "of the sui generis character of extensive deprivations," and emphasize, on the basis of this practice, "[t]he need to abandon orthodoxy and seek alternative measures through which all interests may be better protected."82

79. Garcia Amador, supra note 24, at 22.
80. Doman, supra note 76, at 1151.
81. Dawson & Weston, supra note 52, at 743.
82. Id. at 749. See also K. Karpov, supra note 65, at 129.
On the other hand, there are those who maintain that the lump-sum compensations merely constitute compromise settlements to which creditor states consented in view of exceptional circumstances growing out of World War II, and that the practice embodied in these agreements does not represent a repudiation of the established principles governing compensation. Mr. John Stevenson spoke for this group of commentators when he stated in 1960: "[T]he lump-sum settlements following postwar nationalization programs of the Eastern European countries were negotiated compromises and as such do not constitute a departure from the traditional international law principle."83 Similar conclusions have been reached by Wortley,84 Domke,85 and White.86

It must, however, be noted that compensation short of orthodox standards has by no means been limited to settlements with Eastern European countries. As it appears from the above survey, countries like France, Great Britain, and Mexico paid the dispossessed owners of nationalized property compensation which falls below the orthodox standards of adequacy. It was, furthermore, shown that in certain noncommunist municipal legal systems, traditional restraints on the exercise of the right of eminent domain have given place to provisions authorizing the legislature to take private property, under certain circumstances, without payment of adequate compensation. In short, it may be concluded that although there is still considerable doctrine for the "adequate, prompt, and effective" proposition, in the practice of states orthodoxy has given way to flexibility, at least insofar as general and impersonal expropriations are concerned. This flexibility has also been reflected in the attitude of the Communist countries which seem to have moved away from the extreme position adopted by the Soviet Union that there is no rule of international law compelling states to pay compensation for "socialist" nationalizations. The Communist countries of Eastern Europe have recognized the duty to compensate not only in their practice as embodied in the settlements they concluded with the Western States, but also in their nationalization laws.87


85. Domke, supra note 10, at 609.

86. G. White, supra note 6, at 226, 237.

III. EXPROPRIATIONS IN IRAN, EGYPT, INDONESIA, AND CUBA

A. Nationalization of the Anglo-Iranian Oil Company by the Government of Iran

On May 1, 1951, the Iranian Parliament passed the Oil Nationalization Act, which nationalized the oil industry throughout the country. This action affected exclusively the Anglo-Iranian Oil Company (A.I.O.C.) which had been in control of the oil industry in Southern Iran under a concession granted in 1933. The United Kingdom Government held a controlling share in the A.I.O.C., although the latter operated as a private corporation.

1. Respective Positions of Iran and the United Kingdom in Regard to Compensation

The Iranian compensation provisions were laid down in articles 2 and 3 of the Nationalization Act. Apparently following the precedent set by Mexico, the Iranian legislature provided for 25 percent of the net revenues derived from the nationalized industry to be set aside to meet the claims of the A.I.O.C. arising out of the nationalization of its enterprises in Iran. Article 3 directed the Mixed Board to investigate the claims of both the government and the A.I.O.C. and report its findings to Parliament for ratification. There was no indication in the provisions of this article as to the nature and extent of Iranian claims against the company, but subsequent statements by Iranian officials intimated that the claims included income tax which Iran should have received from the A.I.O.C. under its tax laws. Nor was it clear from the text of this law what standards would be applied by the Mixed Board in assessing the amount of compensation. However, in its proposal of August 22, 1951, the Iranian Government came more closely to grips with the issue and suggested three bases upon which
which adjudication of the company's claims may proceed. The proposal said:

The Iranian Government is prepared to settle that question [of compensation] in any of the three following ways: (a) On the basis of the quoted value of the shares of the Company prior to the passage of the Oil Nationalization Law; (b) On the basis of the procedures followed by other countries where industries have been nationalized; (c) On any basis which would be mutually satisfactory to both parties, having due regard to the counter-claims of the Iranian Government. 93

It is essential to note at this point that the Iranian officials on various occasions made it clear that in their view the claims of the A.I.O.C. must be restricted to the physical assets of the company in Iran and that under no circumstances was the company entitled to compensation for loss of anticipated profits. 94

As to the manner of compensation it appears from the text of the Nationalization Act that Iran was to pay compensation in installments. 95 This was substantially the position that the Iranian Government consistently maintained throughout the negotiations. Thus in counterproposals submitted to Mr. Churchill in September 24, 1952, Dr. Mossadegh, the Iranian Prime Minister, reiterated that in the event the amount of compensation is agreed upon his government would make arrangements to pay that amount "by installments." 96 On a later occasion the Iranian Premier stated that compensation will be paid in the shortest period of time either from 25 percent of the net revenues derived from the oil or by delivery of crude oil. 97

The British reaction to the Iranian proposals was that they failed to satisfy the requirements of law concerning expropriation of property. This view, however, was not reflected in the position of the United Kingdom during the first phases of negotiations which followed the oil nationalization largely because it was still hoped in London that a compromise could be worked out with the Iranian Government for associating the A.I.O.C. with the operations of the oil industry in Southern Iran. It was in this spirit that the first British proposals were formulated and submitted to the Iranian officials on August 13,
1951, by Mr. Stokes.98 The Stokes plan proposed the transfer by the A.I.O.C. of all its installations, machinery, plants, and stores in Iran to the National Iranian Oil Company (N.I.O.C.), a public corporation established by the Iranian Government to operate the nationalized oil industry. A Purchasing Organization was to be set up to provide an assured outlet for the Iranian oil and, to that end, to obtain a long term contract with the N.I.O.C. for the purchase of large quantities of crude oil and products. The question of compensation does not appear to have received much attention. It was only stipulated that the A.I.O.C. would transfer its assets to the N.I.O.C. "on favorable terms" and that "the Purchasing Organization will buy the oil from the N.I.O.C. ... after allowing for the discount and for the costs of making the oil available to the Purchasing Organization."99 It was only after the Stokes proposals were turned down and it became clear to the United Kingdom Government that "the Persian Government [was] in effect insisting on the full implementation of the nine-point law of 1st May 1951 [the Nationalization Law]"100 that the British attitude stiffened and the United Kingdom began considering seriously the matter of compensation.101

The views of the United Kingdom Government on compensation were comprehensively developed in the memorial filed in October 1951 with the International Court of Justice (I.C.J.),102 and it is to this document that we now turn for the British position as to what constituted adequate compensation in the instant case. Applying the doctrine of "adequate, prompt, and effective" compensation to the Nationalization Act, the memorial concluded that the Iranian measures were of a "confiscatory" nature.103 It was charged that the provisions of article 2 cannot possibly meet the international standard of adequacy of compensation. The memorial stated:

---

99. Id. at 135.
100. Statement of the Foreign Office, August 23, 1951, id. at 136.
101. At this point in the dispute the United Kingdom began adopting economic sanctions against Iran. On August 11, 1951, Sir Francis Shepherd, British Ambassador to Iran, announced that financial and trading facilities for Iran were withdrawn and licenses for scarce goods to Iran were revoked. See the British note of August 11, 1951, id. at 138-39.
102. See the text in Pleadings, supra note 98, at 101. On May 26, 1951, the United Kingdom, making representations for the A.I.O.C., instituted proceedings before the I.C.J. The British submission requested the court to declare that Iran "[was] not entitled to refuse to submit the dispute between themselves and the A.I.O.C., limited, to arbitration," and, alternatively, to declare that the implementation of the Nationalization Act was contrary to international law. Id. at 12. The I.C.J. delivered its final decision on July 22, 1952, finding that it lacked jurisdiction to entertain the case. Report of Judgments, Advisory Opinions and Orders, Anglo-Iranian Oil Co. Case. [1951] I.C.J.
It would seem . . . that the Iranian legislators thought that, as a maximum, 25 percent of current revenue less expenses would provide a fund adequate to provide for the compensation of the Company. In no event could a fund constituted in this way produce adequate compensation.  

Moreover, the United Kingdom contended that the method of assessing compensation, as spelled out in article 3 failed to establish "an impartial judicial procedure by which the amount of compensation should be assessed," and with the two Houses of the Iranian Parliament and a Mixed Board itself composed of 10 members of the Parliament and the Minister of Finance as chairman "there is every reason to fear that purely political considerations will govern the decision." Summing up his arguments concerning the provisions of article 3, the agent for the United Kingdom concluded: "Article 3 . . . gives every reason to suppose that the procedure for compensation offers no guarantees either for its adequacy in amount, its promptness of payment or its effectiveness."

It should be noted that the United Kingdom went even further in extending the liability of the Iranian Government beyond the requirement of "adequate, prompt, and effective" compensation which was regarded to be the norm applicable only to cases where the property is lawfully taken. Relying for this part of its argument upon the judgment of the Permanent Court of International Justice (P.C.I.J.) in the *Chorzow Factory* (Indemnity) Case, the agent for the United Kingdom contended that the only lawful remedy for an action of the kind taken by Iran is restitution in kind, or, if circumstances have rendered specific performance impracticable, payment of compensation representing the value which a restitution in kind would bear. It will be noted that in the *Chorzow Factory* case the P.C.I.J. had to pass upon the validity of an action by Poland expropriating German property; and, finding that such action was in violation of Poland's international obligations under the Geneva Convention, the court concluded that the Polish taking constituted an unlawful expropriation for which the proper remedy under international law was restitution in kind as distinguished from cases of lawful expropriation which merely gave rise to an obligation for pecuniary compensation representing "the value of the undertaking at the moment of dispossession, plus interest to the day of payment." In view of the relevance to the British argument

104. *Id.* at 109.
105. *Id.* at 108.
106. *Id.*
107. *Id.*
of the distinction formulated by the court, it seems desirable to quote here the pertinent portions of the Chorzow Factory judgment:

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.

The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

The Government of the United Kingdom submitted that the action of the Iranian Government in nationalizing the oil was unlawful because discriminatory and in violation of agreements of an international character to which Iran was a party. In consequence, they reasoned that the Iranian nationalization entailed liability of the kind laid down by the P.C.I.J. in cases of unlawful expropriations, i.e., restoration of the status quo ante or, if this is not possible, payment of a compensation representing the value which restitution in kind would bear. Bringing these considerations to bear upon the extent of compensation due the A.I.O.C. the memorial concluded:

[T]he compensation would have to cover the value of all the property of the Company in Iran of which the Company has been deprived as a result of the confiscation of this property by the

110. Id.
111. The right of states to expropriate private property is qualified by the undisputed requirement that expropriation must entail no discrimination against aliens. For a discussion of the rule of nondiscrimination, see S. Friedman, supra note 26, at 190; Herz, supra note 30, at 249; Fischer Williams, supra note 22, at 1. In the proceedings before the I.C.J., the United Kingdom argued that the Oil Nationalization Act constituted a case of discrimination because, despite the language used in the law, it was actually directed exclusively against a particular foreign enterprise. Pleadings, supra note 98, at 93.
112. The British Government submitted that the 1933 concession concluded between Iran and the A.I.O.C., while a concessionary contract, was at the same time vested with the character of a treaty between the United Kingdom and Iran. This submission rested on the argument that the conclusion of the 1933 concession involved negotiations between the two governments under the auspices of the League of Nations. Pleadings, supra note 98, at 75–77. The I.C.J., however, dismissed the United Kingdom's submission, deciding that the 1933 concessionary agreement did not have the character of a treaty. Reports of Judgments, Advisory Opinions and Orders, Anglo-Iranian Oil Co.
Iranian Government (this constituting the value of the investment which the Company had made in Iran — *damnum emergens*), and in addition compensation for all the loss of prospective profits which the Company had suffered (*lucrum cessans*). Under this heading of loss of profits would be included not merely an estimate of the profits which the Company had lost by the cessation of the Iranian portion of its enterprise, but the loss which it had suffered (including, if necessary, the extra expense in which it would be involved) by reason of the fact that the non-Iranian portion of its enterprise with which the Company is left would be an ill-balanced truncated portion of what was designed to be a part of one balanced whole and would, therefore, be far less valuable as a truncated portion as compared with its value as part of a whole.\(^{113}\)

The I.C.J. because of its decision that it lacked jurisdiction to entertain the case was unable to pass on the merits with the result that the question of the adequacy of the Iranian offer remained a matter of legal uncertainty. Nor was it clearly determined whether the A.I.O.C., as the United Kingdom claimed and Iran persistently denied, was entitled to compensation for loss of business.

The United Kingdom's claims for compensation covering the loss of prospective profits and the Iranian attitude in persistently denying it appear to have been the major stumbling block keeping the parties from reaching agreement on the issues of compensation. The manner and effectiveness of compensation did not loom large in the dispute. It was earlier indicated that Iran proposed to pay compensation in installments. The United Kingdom was not opposed to this arrangement provided that:

(a) the total amount to be paid is fixed promptly; (b) allowance for interest for late payment is made; (c) the guarantees that the future payments will in fact be made are satisfactory, so that the person to be compensated may, if he so desires, raise the full sum at once on the security of the future payments.\(^{114}\)

The claim for interest for deferred payment might have met with some opposition in Iranian circles as nowhere in Iranian pronouncements is found any provision for interest. But the negotiations with the Mossadegh government never reached the point where the issue of interest for deferred payment could be seriously considered. It is interesting to note, however, that in a later proposal the British accepted payment in installments spread over a period of 20 years without any mention of interest.\(^{115}\)

\(^{113}\) Pleadings, *supra* note 98, at 117–18.

\(^{114}\) *Id.* at 106.

\(^{115}\) The proposal was submitted to the Iranian Government on January 20, 1953. N.Y. Times, Mar. 21, 1953, at 6 (col. 3).
As regards effectiveness of compensation, the Iranian Government proposed to pay either in hard currency or in delivery of oil. It was common ground that compensation in the form of crude or refined oil would be acceptable to the A.I.O.C., as Iranian oil was needed in England for domestic consumption. And in fact in its proposals of January 20, 1953, the United Kingdom agreed to payment either in sterling or delivery of oil.116

Another issue in the dispute which deserves mention is the question of the forum for the determination of compensation. Originally, the Government of Iran took the view that the oil nationalization fell exclusively within the domestic jurisdiction of Iran and, in consequence, only Iranian courts had competence to entertain claims and counterclaims of the parties.117 However, later in the course of negotiations Iran agreed, in what was regarded in Iranian circles as a gesture of compromise, to submit the issue to the I.C.J. but raised conditions which if accepted would have had the effect of restricting the freedom of the court in fixing the extent of compensation. Thus, in the Iranian counterproposals of September 24, 1952, acceptance of the court's jurisdiction was coupled with the condition that the court will restrict its award to the loss of physical assets by the company pursuant to the Iranian action.118

2. Iran's Claims Against the A.I.O.C.

Next to the extent of compensation, the most outstanding issue in the controversy over compensation was the question of claims advanced by the Government of Iran against the A.I.O.C. Under article 3 of the Nationalization Act, the Mixed Board was directed to "investigate the lawful and rightful claims of the Government as well as those of the Company,"119 and on subsequent occasions the Government of Iran reiterated that in evaluating the amount of compensation Iranian claims against the company must be taken into account. In his letter of September 24, 1952, to Mr. Churchill, Dr. Mossadegh dealt with the issue of the claims of his government in more detail and proposed three alternative procedures "to be recognized by the I.C.J. as fair and just for settling the parties' claims and used by it as the basis for judgment."120 These were as follows:

116. Id.
118. DOCUMENTS ON INT'L AFFAIRS 1952, supra note 92, at 349.
119. Id. at 481.
120. Id. at 485.
a) Examination of claims of the two parties up to the date of nationalization of the oil industry on the basis of the d'Arcy agreement, with due regard to the calculation of income-tax which the Iranian Government should have received in accordance with the country's enacted laws.

b) Examination of claims of both parties from 1933 to the end of 1947 on the basis of the invalid agreement and from the beginning of 1948 to April 30, 1951, on the basis of the above-mentioned invalid agreement and the Gass-Golshayan supplementary draft agreement121 which was agreed to and signed by the former company but which both Houses of the Iranian Parliament did not consider adequate for obtaining the Iranian nation's rights.

c) Examination of the claims of both parties on the basis of the fairest concession agreements of the oil-producing countries in the world, where the cost of producing oil, according to that concession, is not cheaper than the cost of producing Iranian oil during a corresponding period.122

The Iranian proposal emphasized in connection with each alternative procedure that claims to be settled are restricted to those up to the date of the oil nationalization, thus ruling out the claims of the company relating to the period subsequent to the Iranian action. This restriction was not acceptable to the United Kingdom, which in a note of October 14, 1952, stated: "The International Court of Justice should be asked to consider all claims and counter-claims of both parties without limitation . . . ."123

It appears from the last-quoted passage that the United Kingdom had no objection to Iran's presenting claims of its own to the I.C.J. However, disagreement developed over the content of such claims. Although the extent and nature of Iranian claims were never clearly defined, examination of statements and communications issued by Iranian officials reveals two categories of claims.

The first category included taxes, dividends, and royalties due to Iran in the amount of £49 million which Iran claimed was shown on the A.I.O.C.'s balance sheet for 1950. In his letter of September 24, 1952, Dr. Mossadegh insisted that this sum must be paid immediately and prior to reference to the I.C.J.124 This claim seems to represent the sum which would have become due to Iran had the Gass-Golshayan

121. The text of the Gass-Golshayan Agreement, July 17, 1949, appears in Pleadings, supra note 98, at 274.
122. Documents on Int'l Affairs 1952, supra note 92, at 345-46 (footnote added).
123. This proposal suggested that the dispute be submitted to international arbitration and indicated that as soon as the Iranian Government agreed to the proposal, arrangements would be made for the movement of oil already stored in Iran, and the United Kingdom would move to relax restrictions on exports to Iran. See the text in id. at 349.
124. Id. at 346.
Agreement entered into force. That Agreement — popularly known as the Supplemental Agreement — was concluded between Iran and the A.I.O.C. on July 17, 1949, in response to Iranian demands for revision of the royalty system of the 1933 concession agreement. The sum of £49 million represented the additional financial benefits which under the revised system would have accrued to Iran. However, the agreement failed of ratification in the Majlis (the lower House of the Iranian Parliament). The Mossadegh government, in insisting upon payment of the sum as a condition for reference to the I.C.J., was apparently implying that certain provisions of the Supplemental Agreement instead of creating new rights or obligations simply recorded obligations incumbent upon the A.I.O.C. by virtue of the 1933 concession. In consequence, failure of the Majlis to ratify the Supplemental Agreement did not wipe out obligations which existed prior to and independent from that agreement and continued to be binding upon the A.I.O.C. despite the fact that the Agreement never entered into force. If this were the Iranian contention, it does not seem to be substantiated by the language in the Supplemental Agreement which clearly stated that the provisions in the Agreement were intended as modification of certain terms of the 1933 concession. The preamble to the Supplemental Agreement announced that the parties

have . . . agreed that in view of the changes in economic conditions brought about by the World War of 1939-1945 the financial benefits accruing to the Government under the Principal Agreement should be increased to the extent and in the manner herein-after appearing.\textsuperscript{125}

In achievement of this objective the Agreement increased the royalty payable to the Iranian Government from 4 to 6 shillings per ton (clause 3), raised Iran’s share in the general reserve, and guaranteed a minimum payment of £4 million in respect to allocations to the general reserve (clause 5). Clause 6 provided that the “payments to be made by the Company under clauses 4 and 5 of this Agreement shall be in lieu of and in substitution for” the payments under comparable provisions of the 1933 concession. In short, there is nothing in the tenor or the provisions of the Agreement to suggest that it was intended to clarify the rights and obligations of the parties under the 1933 concession. On the contrary, the immediate background to the negotiations resulting in the Agreement indicates that it was concluded with a view to changing the royalty formula as established by the concession of 1933.\textsuperscript{126}

\textsuperscript{125} Reprinted in Pleadings, supra note 98, at 274.

\textsuperscript{126} A. Ford, supra note 117, at 48.
In advancing claims to the sums accruing to Iran under the Supplemental Agreement, Dr. Mossadegh, however, pointed out that his government was prepared to regard that sum as a temporary estimate of the amount due and should the I.C.J. find that Iran was not entitled to all the amount or any part of it, the "sums received in this connexion will be regarded as the Iranian Government's debt to the former oil company and will be settled without delay by delivery of oil."\(^{127}\) The British reply denied that Iran had any right to the £49 million independently from the Supplemental Agreement and stated that the United Kingdom was not disposed to entertain any such claim in view of the failure of Iran to ratify that Agreement.\(^{128}\)

The second category of Iranian claims included demands for damages suffered as a result of direct and indirect activities of the A.I.O.C. in order to prevent the sale of Iranian oil.\(^{129}\) As a background to this claim it must be noted that in September of 1951 the A.I.O.C.'s headquarters in London issued a warning that "[s]hould . . . any concerns or individuals enter into transactions with the Iranian Government in regard to the oil products concerned, they are warned that this Company will take all such action as may be necessary to protect its rights in any country."\(^{130}\) Subsequent to this announcement the A.I.O.C. instituted actions in Aden,\(^{131}\) Rome,\(^{132}\) and Tokyo\(^{133}\) to recover oil sold by the Iranian Government. The Supreme Court of the Colony of Aden gave judgment for the company, while the courts of Rome and Tokyo found in favor of the defendants. In one instance also the A.I.O.C. received payment for oil sold by Iran to the cargo vessel "Issa Vigo."\(^{134}\) At the same time the British Government brought pressure to bear upon foreign governments in order to discourage the sale of Iranian oil to interested purchasers. Assurances to that effect were secured from the Italian,\(^{135}\) Swiss,\(^{136}\) and Japanese Governments. The British note of October 14, 1952, however, denied any liability for damages resulting to Iran from activities of the kind described here. The note stated:

\(^{127}\) Documents on Int'l Affairs 1952, supra note 92, at 346.
\(^{128}\) Id. at 350.
\(^{129}\) Id. at 346.
\(^{131}\) Anglo-Iranian Oil Co. v. Jaffrate, 20 I.L.R. 316 (Supreme Court, Aden, 1953).
\(^{133}\) Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 20 I.L.R. 305 (Dist. Ct., Tokyo, Japan, 1953), aff'd, 20 I.L.R. 312 (High Ct., Tokyo, Japan, 1953).
\(^{134}\) A. Forum, supra note 117, at 303, n.52.
\(^{135}\) N.Y. Times, June 14, 1952, at 3, col. 5.
\(^{136}\) Id.
\(^{137}\) N.Y. Times, May 10, 1953, at 4, col. 1.
Her Majesty's Government cannot admit that Persia has any claim against the A.I.O.C. in respect of Persia's failure to sell oil abroad. The A.I.O.C. have merely exercised their legal rights in regard to oil they regard as theirs, an attitude in which they have the full support of Her Majesty's Government, and they have declared their intention of defending those rights throughout the world.  

3. **Summary of the Respective Positions of the United Kingdom and Iran in Regard to Compensation**

From the foregoing paragraphs, it appears that the United Kingdom and Iran disagreed as to the extent of compensation to be paid by Iran for the loss sustained by the A.I.O.C. as a result of the oil nationalization. The Iranian Government took the view that the provisions of the Nationalization Act provided an adequate basis for compensation, whereas the United Kingdom, applying the orthodox doctrine of "adequate, prompt, and effective" compensation, rejected those provisions as inadequate and arbitrary. The United Kingdom also claimed compensation for loss of business resulting from the unilateral cancellation of the 1933 concession by Iran. This conclusion was reached on the basis of legal arguments purporting to show that the Iranian action was illegal under international law and, therefore, entailed liability for compensation for loss of business as well as expropriated assets of the A.I.O.C. in Iran. The Iranian Government, on the other hand, regarded the nationalization as a lawful exercise of its sovereign right and offered to compensate the A.I.O.C. only for its physical assets. There was also considerable disagreement in regard to claims advanced by Iran against the A.I.O.C.

As to the forum for the determination of compensation, the original Iranian position was that only Iranian courts were competent to pass on claims and counterclaims of the parties. Later in the negotiations, Iran agreed to submit the claims to the I.C.J. for adjudication but set conditions upon which the court's award should be based, thus restricting the freedom of the court in assessing the compensation.

The parties to the dispute seem to have agreed that compensation could be paid in installments and in the form of delivery of oil. The United Kingdom at one time claimed interest for late payment, but negotiations never developed to the point where the issue of interest could be seriously considered. This remained in substance the positions of the parties until the fall of the Mossadegh government in August 1953.

---

4. Iranian Compensation Provisions Before Foreign Courts

The I.C.J. ruled that it lacked jurisdiction in the action brought by the United Kingdom with the result that we are left with no guidance from that tribunal as to the adequacy of the Iranian provisions. But, as indicated earlier, the oil nationalization gave rise to a number of cases decided by foreign courts. It is interesting to consider here the relevant portions of those judgments.

These cases involved actions brought by the A.I.O.C. to recover oil sold by the Government of Iran subsequent to the nationalization. The company claimed ownership of the oil on the ground that, inter alia, the Iranian action violated the norms of international law governing compensation. This submission prevailed with the Supreme Court of the Colony of Aden which held the Iranian legislation to be confiscatory. After quoting article 2 of the Iranian Nationalization Act of May 1, the Aden court objected that it was so loosely drawn that it did not actually amount to an offer to pay compensation. In the opinion of the court, the provision of article 2 consisted "of no more than a suggestion that at some future time the matter of compensation may be considered and it gives the Government power to deposit in a Bank a proportion of the future profits of the expropriated business against that contingency." And, commenting on article 3 of the same Act, Judge Campbell wrote:

I cannot see that this is really any advance over the previous Article. It says that a Committee of Senators and Deputies shall go into the question of compensation. But the plaintiffs would have no rights even if the Committee found they were entitled to compensation. For the approval of the House of Parliament is then necessary. They might approve: but they might not.

The court further said that a fair test to decide whether the Iranian offer amounted to a satisfactory compensation is to ask whether the plaintiffs "would be any worse off if the Articles had been omitted." The answer was found to be "clearly no."

Concluding his findings on the question of compensation, Judge Campbell asserted:

In discussing what is meant by the word "compensation" in relation to international law it has sometimes been said that it must be "adequate, effective and prompt." The question of adequacy may often be difficult for a court to decide and no doubt this has caused

139. Anglo-Iranian Oil Co. v. Jaffrate, 20 I.L.R. 316 (Supreme Court, Aden, 1953).
140. Id. at 321.
141. Id. at 321-22.
142. Id. at 322.
143. Id. at 321.
and will cause considerable trouble in other cases in dealing with the extra-territorial effect of foreign nationalisation. But here I can only find to be true the plaintiffs' contention that expropriation has taken place without any compensation and that this is confiscation.\(^{144}\)

It appears from the language quoted above that the court evaded the question of whether compensation must be "adequate, prompt, and effective" by basing its finding on the alternative ground that the Iranian compensation provisions were so illusory as to make an inquiry into the question of applicability in international law of the "adequate, prompt, and effective" proposition unnecessary.

The District Court of Tokyo, also applying the standards of international law, reached different results. In *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha,*\(^{145}\) the court recognized "that the principle that expropriation of foreign rights and interests should be accompanied by just and immediate compensation is a reasonable principle,"\(^{146}\) but upon examination of the pertinent provisions of the Iranian Law decided that these requirements were met and the A.I.O.C.'s claim that "the Nationalization Law is invalid because it is a confiscation law which does not provide for compensation"\(^{147}\) is unwarranted. The court, observing "that in the Nationalization Law no amount, manner or time of payment of compensation is laid down, and there is no evidence that any compensation has actually been paid,"\(^{148}\) recognized that the standards established by international law if applied strictly would lead to the conclusion that "there has been no immediate compensation in this case."\(^{149}\) But this, in the judgment of the court, was justified because "the vastness of the rights and interests expropriated, the complexity and diversity of the interests involved, the extreme difficulty of the final assessment of compensation and the difficulty of prompt payment in the present case are unprecedented."\(^{150}\) Thus the court accepted the principles of "just" and "immediate" compensation as "reasonable" but recognized that such principles need not be strictly applied in cases where expropriation involves such vast and complex interests as to make assessment and prompt payment of compensation difficult. The court was, moreover, satisfied that the terms of the Act "indicate that the applicants can claim compensation" and that the Government of Iran has shown its good faith by opening.

\(^{144}\) Id.

\(^{145}\) 20 I.L.R. 305 (Dist. Ct., Tokyo, Japan, 1953).

\(^{146}\) Id. at 310.

\(^{147}\) Id. at 311.

\(^{148}\) Id. at 310.

\(^{149}\) Id.

\(^{150}\) Id.
a deposit account with the Bank Milli in conformity with article 2 of the Nationalization Act.\textsuperscript{151}

On appeal, the High Court of Tokyo upheld the decision of the District Court but on somewhat different grounds. It accepted that:

There is an established principle of international law that in the event of a violent social reform or revolution in a State, whether or not the property of the nationals of that State is confiscated, property belonging to foreign nationals can only be expropriated with compensation; it cannot be confiscated. Moreover, such compensation must be "adequate, efficient and immediate compensation." This has been confirmed by the practice of many States, by precedents, and by the writings of acknowledged authorities.\textsuperscript{152}

But

in view of the fact that the Nationalization Law is not a completely confiscatory law, contrary to the rights and interests of foreign nationals, but a law of expropriation subject to payment of compensation, the Court feels bound to hold that it cannot try the validity or invalidity of such a law by examining the compensation and seeing whether or not it is "adequate, effective and immediate."\textsuperscript{153}

Thus the court subscribed to the orthodox requirement of adequacy, promptness, and effectiveness but declined to test the Iranian legislation against those standards, apparently on the theory that, as a matter of international comity, Japanese courts are foreclosed from examining the validity of a foreign expropriation insofar as that legislation is not "completely confiscatory" or "contrary to the rights and interests of foreign nationals."

In \textit{Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.},\textsuperscript{154} the Civil Court of Rome found the Iranian compensation offer as embodied in the Nationalization Act adequate enough to make the Iranian nationalization lawful under both international law and the forum's public policy. The court said:

[I]t is not required either by our law or by the generally accepted provisions of international law that the \textit{quantum} of the compensation must appear actually equivalent to the value of the property forming the subject of the expropriation, that is to say, it is enough that there is \textit{some} compensation for the expropriation to be lawful.

Dissentient opinions among writers who endeavour to maintain the necessity of payment of compensation equivalent to the

\textsuperscript{151} Id. at 310.
\textsuperscript{152} Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 20 I.L.R. 312, 313 (High Ct., Tokyo, Japan, 1953).
\textsuperscript{153} Id.
\textsuperscript{154} 22 I.L.R. 23 (Civ. Ct., Rome, Italy, 1954).
value of the property, have not found much support, so that only in cases where the compensation is purely fictitious, illusory and non-existent can the expropriation be deemed to be unlawful.\textsuperscript{156}

5. The Consortium Agreement of 1954

Following the fall of Dr. Mossadegh in August 1953, negotiations reopened between the United Kingdom and Iran for settlement of differences arising from the Iranian nationalization of the A.I.O.C.\textsuperscript{157} The first round of talks led to an agreement between the A.I.O.C. and seven American, Dutch, and British oil companies joining together in a consortium for the purpose of restoring the flow of Iranian oil to the world market. Following this agreement negotiations proceeded on three levels: between the Iranian Government and the A.I.O.C.; between the Iranian Government and the consortium; and among the eight companies forming the consortium. The outcome of these talks was the Consortium Agreement of September 14, 1954, which consists of two parts.\textsuperscript{158} Part I signed between the Iranian Government and the consortium establishes rules for the operation of the oil industry. Part II was concluded between Iran and the A.I.O.C. and embodies settlement of claims arising from the oil nationalization and is, therefore, of special interest to this study. The provisions of part I will be considered here only to the extent that they cast light on the question of compensation. In addition, an agreement was signed between consortium members themselves which is essential for purposes of this study because it presumably provided for compensation to the A.I.O.C. for loss of anticipated profits. Although the details of this agreement have not been disclosed, some statements issued by top British officials indicate something of the measure of compensation embodied in that document. Following analysis of the relevant provisions of these documents, an attempt will be made to test the terms of compensation in the light of the doctrine of “adequate, prompt, and effective” compensation.

Part I of the Consortium Agreement sets up two operating companies to be incorporated under the laws of the Netherlands and registered in Iran. One of these companies deals with exploration and production of crude oil, the other with refining (article 3).\textsuperscript{159} The Agreement stipulates that the operating companies will carry on the basic operations “in behalf of Iran and the National Iranian Oil Company” (article 4). The Agreement also sets up a number of trading

\textsuperscript{155} Id. at 36.

\textsuperscript{156} For an account of the events following Dr. Mossadegh's fall and leading up to the signing of the Consortium Agreement, see L.P. Elwell-Sutton, Persian Oil, A STUDY IN POWER POLITICS 309 (1955).

\textsuperscript{157} For the text of the Consortium Agreement of September 14, 1954, see National Iranian Oil Co., The Enabling Act and the Oil and Gas Agreement 4 (1954).

\textsuperscript{158} Id. at 9.
companies to purchase crude oil from the N.I.O.C. at the rate of 12\% per cent of the applicable posted price of such oil (articles 22 and 23).\textsuperscript{159} In other words, one-eighth of the gross income, representing one-fourth of the net income, from crude oil will accrue to the N.I.O.C. in the way of royalties (although the term "royalty" is carefully avoided).\textsuperscript{160} Furthermore, the operating companies are subject to Iranian income tax laws which for purposes of the Agreement were frozen as they stood at the date of the conclusion of the Agreement. Under provisions of those laws, income in excess of $25,000 is taxable at the rate of 50 per cent; while payments made by oil companies as "stated payment" are deductible from income tax payable to the government.\textsuperscript{161} Thus Iran will receive payments under two headings: (1) income tax at the rate of 50 per cent; (2) one-fourth of the net income from the oil business. However, payments to the government will never exceed 50 percent of the total income from oil as much as payments under the second heading are deductible from taxes payable under the first.\textsuperscript{162} The effect of the above provisions is to establish a 50:50 profit-sharing system, thereby bringing the rate into accord with what prevails in other oil-producing countries in the Middle East.

In connection with part I of the Consortium Agreement, mention should be made of a provision which indirectly benefits the A.I.O.C. Under the terms of article 6-D in part I, operating companies are allowed to include over a period of 10 years in their operating costs a total sum of £67 million. The effect of this article is to reduce the income from which taxes are to be paid.\textsuperscript{163}

As regards compensation for physical assets of the A.I.O.C., part II, signed between Iran and the company, provides that Iran will pay the sum of £25 million in 10 equal annual installments "in full and final settlement of all claims, and counter-claims by Iran and the N.I.O.C., on the one hand, and the Anglo-Iranian Oil Company, Limited, on the other."\textsuperscript{164} This sum was arrived at after offsetting the claims of Iran in the amount of £51 million against the company's claims for compensation. Installment payments were to begin on January 1, 1957, and carried no interest for late payment.

\textsuperscript{159} Id. at 37-39.
\textsuperscript{160} The agreement says "stated payment." Id.
\textsuperscript{161} Article 35 of the Iranian Income Tax Law, id. at 74.
\textsuperscript{162} It has been suggested that this complicated system of payment was adopted in view of the United States income tax laws under which taxes paid by American companies abroad are deductible while royalties are not. Farmanfarma, The Oil Agreement Between Iran and the International Oil Consortium: The Law Controlling, 34 Texas L. Rev. 259, 267 (1955).
\textsuperscript{163} National Iranian Oil Co., supra note 157, at 17.
In addition to the compensation settlement negotiated with Iran, the A.I.O.C. concluded an agreement with other consortium companies under which the A.I.O.C. was to retain a 40 percent interest in oil and receive payments totaling £214 million from other members of the consortium for their share in the operations of the oil industry.\(^\text{165}\)

The foregoing paragraphs outlined the terms of compensation afforded the A.I.O.C. under various agreements concluded for the settlement of the oil dispute. It is now proposed to examine those provisions to see whether they constituted full compensation in accordance with orthodox standards.

The A.I.O.C. received compensation in the amount of £25 million for its physical assets. It has been said that this sum "bears no relation to the value of the company's total assets in Iran."\(^\text{166}\) It should be noted, however, that the sum of £25 million was reached after offsetting the claims of Iran estimated at £51 million. Assuming that the claims of Iran represented debts actually owed by the company, it appears that indemnity for physical assets of the company added up to £76 million. As to compensation for loss of anticipated profits, the A.I.O.C. retains a 40 percent interest in the consortium operations and stands to receive payments in the amount of £214 million from other companies for their share in oil operations.

The total value of the refinery in Abadan was estimated at £300 to £500 million.\(^\text{167}\) Tested against these valuations, it seems that payments to the company, adding up to some £290 million plus a 40 percent interest in future operations, constituted adequate and effective compensation. Moreover, an additional compensation is indirectly afforded the A.I.O.C. under the terms of article 6-D in part I which authorizes the consortium companies to include over a period of years in their operating costs a total sum of £67 million, thereby considerably reducing the taxable income of the consortium companies. Exactly what proportion of profits thus realized by the consortium will accrue to the A.I.O.C. cannot be established in view of the private nature of the profit-sharing system within the consortium.

One may raise doubt as to whether the requirement of promptness was met since payment was to be made in installments free of interest. It is possible that the adequacy of compensation was a major consideration in the company's decision not to press for interest.

\(^\text{165. Royal Institute of International Affairs, Survey of International Affairs 1951, at 222 (1957).}\)

\(^\text{166. Economist (London), Aug. 7, 1959, at 461.}\)

\(^\text{167. This was the estimate given by Mr. Rasmara, then Premier of Iran, in a report of March 3, 1951, to the Special Oil Committee of Majlis. Cheng, Anglo-Iranian Oil Company (London), at 387, 388 (1951).}\)
In evaluating the terms of the settlement mention must also be made of the benefits acquired by Iran under the system established by the Consortium Agreement. First, a 50:50 profit-sharing rate was adopted which, as far as Iran is concerned, is an improvement over the system established by the 1933 concession. Second, claims of Iran were recognized and estimated at £51 million in lieu of the £49 million originally claimed by the Iranian Government. Throughout the negotiations with Dr. Mossadegh, the United Kingdom persistently denied these claims. Its recognition, therefore, represents a concession on the part of the United Kingdom.

**B. Nationalization of the Suez Canal Company by the Government of Egypt**

On July 26, 1956, President Nasser in a speech delivered at Alexandria announced the nationalization of the Suez Canal Company (S.C.C.).168 This action came a few days after the Government of the United States, followed by Great Britain, withdrew its offer of financial assistance to Egypt for the building of a dam at Aswan.169 It was estimated that on the eve of the nationalization, the British Government held 44 percent of the S.C.C.'s shares, while 79 percent of the remaining shares were controlled by French nationals.170 Although the Suez crisis centered primarily around the question of freedom of navigation through the canal, which issue eventually precipitated the Israeli-Franco-British invasion of Egypt, the present inquiry will limit itself to the controversy between the Egyptian Government and the S.C.C. over the question of compensation.

1. **Egyptian Compensation Offer for the Nationalization of the S.C.C.**

The Egyptian Nationalization Law of July 26, 1956, provided for compensation in the following terms:

Shareholders and holders of constituent part 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.

---

168. *Royal Institute of International Affairs, Documents on International Affairs* 1956, at 77 (1959) [hereinafter cited as *Documents on Int'l Affairs 1956*].


170. 1 Suez Canal Co., La Compagnie Universelle de Suez et la Décision du Gouvernement Egyptien 64 (1956).
Payment of compensation shall take place immediately after the State receives all the assets and property of nationalized company.\textsuperscript{171}

The compensation as provided by the Law was estimated by the British authorities to amount to £70 million.\textsuperscript{172} It appears from the text of the Law that Egypt was to pay the compensation in cash provided she “receives all the assets and property of the nationalized company.” The latter condition is worthy of note since under the Nationalization Law the Government of Egypt claimed ownership of assets situated outside Egyptian territory. That legislation provided: “The money and property of the nationalized company in Egypt and abroad are frozen. Banks, organizations and individuals are prohibited from disposing of same in any manner except by order of board mentioned in Article 2.”\textsuperscript{173} Few states were disposed to entertain the Egyptian claims to assets outside Egypt inasmuch as compliance with this provision would have amounted to giving extraterritorial effects to a foreign act of nationalization contrary to prevailing international practice.\textsuperscript{174}

Two other features of the above provisions must be noted. First, compensation under the above provisions was to be paid directly to shareholders and not to the S.C.C., which from the Egyptian point of view had lost its standing by virtue of the nationalization. In the second place, the Egyptian Law restricted payment to shareholders and holders of constituent shares, thus excluding owners of \textit{parts civiles} (common shares)\textsuperscript{176} from compensation.

The only substantial change in the Egyptian position occurred on April 24, 1957, when the Government of Egypt, in connection with a unilateral declaration deposited with the Secretary General of the United Nations, offered to submit the matter to international arbitration. The declaration said: “The question of compensation and claims

\textsuperscript{171} Law of July 26, 1956, Official Gazette [1956], No. 60 (Egypt).

\textsuperscript{172} Statement by Prime Minister Eden on August 8, 1956, in \textit{DOCUMENTS ON INT'L AFFAIRS 1956}, supra note 168, at 160.

\textsuperscript{173} Law of July 26, 1956, Official Gazette [1956], No. 60 (Egypt).

\textsuperscript{174} It is generally recognized that expropriations cannot operate extraterritorially to affect the status of property located outside the territory of the expropriating state. Some municipal courts, however, have given such effect to foreign expropriatory decrees. \textit{See generally} Seidl-Hohenvelden, \textit{Extraterritorial Effects of Confiscations and Expropriations}, 49 Mich. L. Rev. 851 (1951).

\textsuperscript{175} Egypt was entitled to 15 percent of the net profits of the company. On March 21, 1880, Egypt undertook to sell her share in the company to the Crédit Foncier de France. The latter transferred the right to the “Société Civile pour le recouvrement de 15% des produits nets de la Compagnie Universelle du Canal Maritime de Suez attribués au gouvernement égyptien,” which in turn issued 85,507 \textit{parts civiles}. Foscanneau, \textit{L'Accord Ayant pour Objet l'Indemnisation de la Compagnie de Suez Nationalisée par l'Egypte}, 5 \textit{ANNuaire Francais de Droit International} 161 (1959).
in connection with the nationalization of the Suez Maritime Canal Company shall, unless agreed between the parties concerned, be referred to arbitration in accordance with the established international practice."\textsuperscript{176}

With this exception the Egyptian position remained the same until the conclusion of Heads of Agreement on April 29, 1958.\textsuperscript{177}

2. The S.C.C.'s Attitude Toward the Egyptian Compensation Offer

The immediate reaction of the S.C.C. to the Egyptian action was that the nationalization constituted an acte de violence, the only remedy for which was restoration of the situation which prevailed before the Law of July 26, 1956, became effective. In an early letter to Foreign Minister Pineau, the President of the Board of Directors of the company urged the French Government to press for restitution.\textsuperscript{178} However, from negotiations which opened between the United Kingdom, France, and the United States it became clear that the primary concern of those governments was establishment of an international system of control over the Suez Canal, rather than restoration of the nationalized assets to the S.C.C. This position was reflected in the tripartite proposal submitted on August 5, 1956, to the First London Conference in which the Governments of the United Kingdom, France, and the United States demanded the grant of “fair compensation to the Suez Canal Company.”\textsuperscript{179}

Discouraged by the attitude adopted at the London Conference, the S.C.C. abandoned its claims to restitution and submitted proposals for compensation. In a letter to the French and British Foreign Ministers dated August 7, 1956, the S.C.C. outlined the principles which in the view of the company must form the basis for negotiation.\textsuperscript{180} The same principles were outlined in a report by the Board of Directors to the Extraordinary Meeting of Shareholders\textsuperscript{181} in October, as well as in a letter the following December addressed by the company to the Secretary General of the United Nations.\textsuperscript{182} The

\textsuperscript{176} Reprinted in The Suez Canal Settlement 37 (E. Lauterpacht ed. 1960).
\textsuperscript{177} Reprinted in Compagnie Financière de Suez, Bulletin No. 1, at 31 (1958).
\textsuperscript{178} Letter of August 4, 1956, reprinted in 1 Suez Canal Co., La Compagnie Universelle de Suez et la Decision du Gouvernement Egytien 7 (1956). For this section of the Article, the author has relied extensively on Focsaneanu, L'Accord Ayant pour Objet l'Indemnisation de la Compagnie de Suez Nationalisée par l'Egypte, 5 Annuaire Francais de Droit International 161 (1959).
\textsuperscript{179} The Tripartite Proposal is reproduced in Documents on Int'l Affairs 1956, supra note 168, at 173.
\textsuperscript{180} The text of this letter appears in 1 Suez Canal Co., supra note 178, at 25.
\textsuperscript{182} Letter in 1 Suez Canal Co., supra note 178, at 24.
position of the S.C.C. as expressed in the above documents can be summarized as follows:

(a) The Stock Exchange quotations on the day before the nationalization was "by no means a fair basis" for compensation inasmuch as the company's share "had very definitely depreciated in actual value by comparison with the average of French securities."\(^{183}\) It was further contended by the S.C.C. that the depreciation had no relation to the financial position of the company but "reflected the fear of political risks"\(^{184}\) brought about by the approaching date of withdrawal of the British troops and the unreasonable demands made by Egypt during the financial negotiations. That is the reason why the report explained, the company's share had fallen from 120,000 ancients francs in August 1955 to 92,000 ancients francs on the eve of the Egyptian action nationalizing the S.C.C. The report concluded: "It is therefore inadmissible that quotations which had so obviously depreciated as a result of the political circumstances should be proposed as the basis of a compensation that would then only confirm the loss which we dread."\(^{185}\)

(b) Egypt was liable to pay compensation for the loss of profits which the S.C.C. might have reasonably expected to realize had not the Egyptian action brought an end to its concession.

(c) Payments were to be made directly to the S.C.C. and not to the shareholders as provided in the Nationalization Law. It was also emphasized that the Egyptian action could not affect the legal existence of the S.C.C. which would continue to operate as owner of assets located outside Egypt.

(d) Finally, the compensation provided for in the Egyptian Law was described as "uncertain" inasmuch as its payment was conditioned upon the seizure by the government of the S.C.C.'s assets outside Egyptian territory. Also, absence of any indication in the Law as to when compensation was to be effected as well as omission of provisions concerning local remedies open to shareholders were cited as leading to the "gravest doubts that compensation will materialize."\(^{186}\)

3. Agreement Concluded Between the U.A.R. and the S.C.C. for Settlement of Claims Arising from the Egyptian Nationalization

The Heads of Agreement,\(^{187}\) concluded on April 29, 1958, was the outcome of negotiations which began in Rome on February 19,
1958, under the auspices of the International Bank for Reconstruction and Development. From the Egyptian point of view the act of nationalization had divested the S.C.C. from its legal capacity to negotiate a settlement. Accordingly, negotiations in Rome were held between the United Arab Republic (as successor to the Government of Egypt) and the representatives of S.C.C.'s stockholders. However, in the course of negotiations, the Government of the U.A.R. consented to the company’s maintaining its corporate entity to hold the assets outside Egypt and negotiate a settlement of claims arising from the nationalization.188

Meanwhile the S.C.C. had reorganized itself under French laws, assuming the name “Compagnie Financière de Suez” (C.F.S.). Accordingly, the Final Agreement of July 13, 1958, was signed between the U.A.R. and the representatives of C.F.S.189 Insofar as the question of compensation is concerned, the Final Agreement simply incorporated the principles outlined in the Heads of Agreement in April 1958. In order to avoid repetition, only provisions of the Agreement of July 13, 1958, will be summarized.

The Government of the U.A.R. consented to leave the assets outside Egypt to the C.F.S. (article 3). At the same time, it was agreed that C.F.S. would assume responsibility for liabilities of the S.C.C. outside Egypt (article 5).

The U.A.R. undertook to pay the global sum of £28.3 million “as a full and final settlement of the compensation due to shareholders and holders of Founders’ (constituents’) Shares as a consequence of Law No. 285, and in full and final settlement of claims of the holders of the Parts Civiles” (article 3). The global sum was to be paid in installments and free of interest (article 8). Article 8 further stated that as an initial payment, the U.A.R. would leave to the C.F.S. the transit dues in the amount of £5.3 million collected in Paris and London after July 26, 1956. The balance was to be paid in five installments of £4 million and one installment of £3 million. Payments were to be made in Pounds Sterling in London and in French francs in Paris.

Evaluating the compensation terms of the above settlement, it appears that the global payment by Egypt falls far below what may be regarded as full compensation in the instant case. Not only does the sum fall short of the original claims of the S.C.C. representing £204 million plus external assets,190 but it does not even measure up to more modest estimates submitted by the Council of Administration in its report to the General Assembly of Stockholders on December 16,

188. Id. at 22.
189. The text is reprinted in id. at 21.
1958. In that report the Council estimated the gross value of the assets in Egypt at 91,830,607,239 anciens francs. Offsetting this sum against the company's total liabilities in Egypt of 22,165,659,664 anciens francs, responsibility for which was assumed by the U.A.R. under the agreement, the net value of assets in Egypt may be estimated at 69,664,947,575 anciens francs. Instead, the C.F.S. received £E28,300,000 representing about 34 million anciens francs. It should be noted that the Council's estimate of losses sustained by the company in consequence of the Egyptian action did not include loss of anticipated profits, a claim valued at £120 million which the company was led to abandon in the course of negotiations.

Another way of evaluating the adequacy of the compensation paid to the S.C.C. is to compare the net amount accruing to the company in consequence of the Agreement with the value of the shares on the Paris Stock Exchange prior to the nationalization. Adding up the sum of £E28.3 million and the net value of the external assets, estimated by Rausching at about £E13 million, it appears that the net compensation left to the S.C.C. amounted to £E41.3 million as against £70 million which was said to constitute the value of the shares prior to the nationalization.

As compared with concessions which the S.C.C. was led to cede, modifications in the Egyptian position seem rather insignificant. These modifications included: (a) renunciation of the external assets of the S.C.C.; (b) recognition of the right of the holders of parts civiles to compensation; (c) recognition of the corporate capacity of the C.F.S. beyond the purposes of the nationalization. Only renunciation by Egypt of the external assets of the S.C.C. seems to constitute a genuine concession on the part of that government. Inclusion of the holders of parts civiles in the list of stockholders entitled to compensation was not much of a concession as compensation was paid in the form of a global sum and not in the form of payment to individual shareholders. Also, recognition granted by Egypt to the C.F.S. was nothing more than recognition of the fact that a corporate entity had been organized under the laws of France for the purpose of disposing of the assets outside Egypt and of negotiating a settlement in behalf of shareholders. The decision by Egypt to recognize that entity was

---

192. Id. at 15.
193. Id. at 16.
194. ECONOMIST (London), supra note 190.
196. Estimated by Prime Minister Eden in his statement of August 8, 1958.

Documents on Int'l Affairs 1956, supra note 168, at 160.
made subject to the condition that such recognition would not impair the operation of the Nationalization Law.

C. Indonesian Expropriations

Beginning with Act No. 86 in December 1958, Indonesian authorities adopted a series of measures resulting in the nationalization of Dutch-owned enterprises in Indonesia. These measures were linked to the dispute between the Netherlands and Indonesia over the status of West New Guinea (Irian Barat). As background to this dispute, it must be noted that the Round Table Agreements of 1949 which transferred sovereignty over the Netherlands East Indies to the Republic of Indonesia left the question of West New Guinea in abeyance, providing that the political status of that territory would be settled through negotiations in the ensuing year. In the course of subsequent negotiations, the Indonesian Government interpreted the Round Table Agreements as transferring sovereignty over the whole of the East Indies including West New Guinea and concluded that the grant of independence applied to the latter territory as well as to the rest of Indonesia. The decision to nationalize Dutch property was adopted in retaliation against the refusal of the Netherlands Government to accede to Indonesian demands over West New Guinea. The basic provisions for the nationalization were laid down in Act No. 86 and subsequently implemented by Ordinances Nos. 2, 3, 4, and 9. The Dutch enterprises affected by these measures included shipping, agricultural estates, and gas and electricity undertakings.


Under the provisions of article 2 of Act No. 86, the owners of expropriated enterprises were entitled to receive damages and a committee appointed by the Indonesian Government was to assess the amount of compensation due. Decisions of this committee were subject to appeal to the Supreme Court of Indonesia whose findings in


the matter were final. The article further stated that the manner of payment will be regulated in a separate act. In pursuance of this provision Ordinance No. 9 was enacted on March 31, 1959, under which a Committee for the Fixation of Compensation was established "to make the necessary investigation regarding the state of the Dutch-owned enterprises which are nationalized and to determine the amount of the compensation that may be awarded." The owners of Dutch enterprises were authorized to file claim for compensation with the Committee (article 2) which would then propose to the Board for the Nationalization of Dutch-owned enterprises (BANAS) what part of revenues from the nationalized enterprises must be set aside for compensation (article 3).

2. Respective Positions of the Netherlands and Indonesia Concerning Compensation

Reffring to the compensation provisions as embodied in Act No. 86 and Ordinance No. 9, the Indonesian note of April 8, 1959, observed that:

[D]espite the fact that the obligation to pay ... compensation is not unanimously recognized as a clear principle of international law, whilst furthermore the practice of various countries differs in this respect — the Nationalization Law of the Republic of Indonesia clearly recognizes this obligation and lays down that compensation shall be granted to the owners of the enterprises which are nationalized, the amount of compensation being fixed by a commission specially set up for this purpose.

The Dutch Government, however, maintained that the Indonesian measures failed to comply with the requirements of international law concerning compensation. The measures were said to be "confiscatory" because there was "no question of any prompt payment of an adequate and effective compensation." The grounds for this conclusion were adduced in the Netherlands note of December 18, 1959, and may be summed up as follows:

(a) The Dutch Government maintained that the compensation provisions laid down in the Indonesian legislation were vague and gave

204. Preamble to Ordinance No. 3, Feb. 23, 1959, [1959] State Gazette No. 6 (Indonesia).
205. The note was supplied to this writer by the Netherlands Ministry of Foreign Affairs and is on file in the Case-Western Reserve University Law Library.
207. Id.
no indication of the extent of compensation due and the manner and timing of its payment.

(b) From statements by Indonesian officials, it was concluded that the Government of Indonesia had no serious intention to pay compensation. In this connection, reference was made to a statement by the Indonesian Minister of Agriculture making the payment of compensation dependent upon Indonesia’s ability to pay. The note also cited a decree by the Indonesian Prime Minister to the effect that in case of the nationalization of the enterprises partly owned by non-Dutch aliens compensation would be paid for that portion of the capital owned by such aliens. The Dutch Government inferred from this statement that Indonesia did not really intend to pay compensation for the portion of the undertaking owned by Netherlands nationals.

(c) The Government of the Netherlands further argued that from various Indonesian decrees dealing with the amount of compensation, it appeared that the scope of compensation contemplated by Indonesian authorities bore no proportion to the actual value of nationalized property. The note referred to the above-mentioned Ordinance No. 9 and an Instruction dated August 21, 1959, from the Managing Board of the BANAS providing for only 1 percent of the gross revenues from nationalized enterprises after deduction of corporate income tax to be set aside for the payment of compensation at a future time. Commenting on this, the note concluded: “It will be clear that such a reservation is not even sufficient to cover the interest on the capital due, let alone to guarantee the redemption of the principal.”

(d) The note finally implied that the Indonesian offer is at variance with the prevailing practice in international law in that it makes the payment of compensation dependent upon settlement of the dispute over West Irian Barat. Although not clearly stated, the implication here seems to be that the payment of compensation is an obligation owed to the Dutch owners of private property and must be discharged independently of the outcome of the dispute between the two governments.

Under these circumstances the Government of the Netherlands felt that the Dutch property owners were justified in not submitting their claims for compensation “since such submission would amount to assisting in the actual application of those [Indonesian] measures.”

Answering the Dutch arguments in its note of August 12, 1960, the Indonesian Government took the position already outlined in the previous note — that there is no obligation under international law

208. Id. at 488.
209. Id. at 489.
to pay full and prompt compensation for expropriations carried out as part of a general program of social reform, and, given this, the Indonesian compensation offer was within the requirements of international law. The note said:

[International law as it has developed in recent years does not oblige a State which nationalizes foreign enterprises to pay compensation at once. The capacity to pay and the economic situation of the country in question should be taken into consideration. Furthermore, measures of nationalization taken within the framework of great economic and social changes are judged by special criteria.

The Nationalization Act and the provisions for its implementation concerning compensation are a clear proof that the Indonesian Government is acting in conformity with international law. Each request for compensation from Dutch enterprises entitled to receive compensation will be dealt with in a regular manner.210

In summing up the positions of the Netherlands and Indonesia concerning compensation as expressed in the above documents, it appears that the Dutch Government subscribed to the orthodox doctrine that expropriation must be carried out against adequate, prompt, and effective compensation, while Indonesia felt that the orthodox standards do not apply to expropriations effected as part of a reform program. As of this writing, despite the settlement of the Irian Barat question in August 1962,211 the Dutch-Indonesian dispute concerning compensation for the nationalized Dutch assets still remains unsettled. The number of Dutch enterprises affected by various Indonesian measures has been estimated at 250 with a total value of “several billion Dutch guilders.”212

3. Indonesian Compensation Provisions Before the Foreign Courts

The Indonesian nationalization measures came before the Dutch and German courts for judgment on their conformity with the established principles of international law. Proceedings in both courts involved tobacco harvested from expropriated Dutch estates and shipped abroad. The Dutch owners brought suit to recover the tobacco in

210. Letter from the Netherlands Ministry of Foreign Affairs to this writer, Aug. 23, 1963, which contains a summary of the Indonesian note of Aug. 12, 1960, on file in the Case-Western Reserve University Law Library.

211. The text of the agreement settling the Irian Barat dispute is reprinted in Permanent Mission of the Republic of Indonesia to the United Nations, Agreement Between the Republic of Indonesia and the Netherlands on West Irian (1962).

212. Letter of Aug. 23, 1963, to this writer from the Netherlands Ministry of Foreign Affairs, on file in the Case-Western Reserve University Law Library. One U.S. dollar is equal to 3.5 guilders.
question as still their property, partially on the ground that the Indonesian action violated international law and, consequently, must not be given effect in the Netherlands and Germany, respectively.

Both German and Dutch courts thus had occasion to test the adequacy and effectiveness of the Indonesian provisions concerning compensation to deprived Dutch nationals. The Court of Appeals of Amsterdam held the Indonesian measures illegal under international law because, inter alia, they were "confiscatory" in nature. This conclusion was reached notwithstanding article 2 of the Nationalization Act which established procedures whereby compensation can be assessed. Referring to article 2, the court observed that it provides that compensation will be granted to the owners of the nationalized enterprises, that the amount of this compensation will be assessed by a Commission to be designated by the Government, that these owners as well as the Government may lodge appeals against the decisions of this Commission with the Indonesian Supreme Court which will decide definitely and that a procedure — still to be drafted — concerning the payment of compensation will be laid down in a separate Act.

The court found that:

This regulation, which is completely unelaborated and which offers all kinds of evasive possibilities, cannot in itself be considered to offer a sufficient guarantee that the owners of the enterprises concerned will indeed receive any compensation or, at any rate, compensation that can be deemed to be appreciable and, by any criteria, reasonable.

The court also referred to the language in the Preamble to the Act that "this nationalization of Netherlands owned enterprises purports to procure the greatest possible profit for the Indonesian community" and certain public statements by Indonesian officials suggesting that there can be no question of compensation until the West Irian dispute is settled, as further evidence of lack of intention to pay compensation. It was concluded: "In these circumstances a real possibility of compensation cannot be deemed to be present."

It is noteworthy that in the above-quoted passages, the Amsterdam court spoke of "reasonable" standards of compensation or "appreciable" compensation. The decision of the court was based not upon the failure of Indonesia to give "full" or "adequate" compensation but on the find-

214. Id. at 30-31.
215. Id. at 31 (emphasis added).
216. Id.
217. Id.
ing that the Indonesian provisions were so unelaborated as to offer no guarantee that the Dutch owners would receive "any compensation."

The conclusion reached by the German courts, on the other hand, was that the compensation provided in the Indonesian measures did not flout the established international standards. During the proceedings before the Bremen Appellate Court, counsel for the Dutch companies, claiming ownership in the 1958 harvest, repeated the arguments adduced in the Netherlands note of December 18, 1959, purporting to establish the "confiscatory" nature of the Indonesian measures. Counsel for Indonesia countered those arguments by emphasizing Indonesia's intention to make compensation and indicating steps already taken to that end. In this connection the attention of the court was called to the fact that at the time when the Indonesian Naionalization Act was submitted to Parliament for approval its compensation provisions met with considerable resistance. It was maintained that the fact that, despite strong opposition, the Government of Indonesia insisted on the insertion of those provisions is evidence of the genuine desire of that government to make compensation. Finally, mention was made of the failure of the Dutch companies to exercise their right under the Indonesian decrees and file claims with the Indonesian authorities.

The Appellate Court, in finding for Indonesia, relied on a distinction between individual and general expropriations and the proposition that the latter type does not entail obligation to compensate promptly. The court observed:

The Court is fully aware that, at any rate at the time when the expropriation became effective on the promulgation of Act No. 86, no compensation was paid, nor was it even evident when and to what extent it would be paid. In the case of individual expropriations of the customary type, that might be objected to and regarded as a contravention of the rules of international law. In the present case, however, the expropriation of the petitioners represents also a rearrangement of the ownership relationships which has been carried out by a former colony, now independent, with the object of changing the social structure. With regard to such large-scale expropriations the view has often justly been taken in recent times that from the very nature of the matter one cannot apply the same principles as in the case of individual expropriations of the customary type. . . . According to this view, compensation could not be paid immediately and in a lump sum from the material assets, but only from the proceeds of the nationalized enterprises. With regard to timing and amount, the

compensation would have to be adjusted to conditions in the expropriating State.\textsuperscript{219}

\textbf{D. Cuban Expropriations}

Since 1959, the Castro government has carried out a series of expropriations, instituting state control over all major sectors of the Cuban economy.\textsuperscript{220} The first expropriation measures were embodied in the Agrarian Reform Act of May 17, 1959, which provided for the distribution of large landholdings to peasants.\textsuperscript{221} This legislation affected substantial American interests in Cuba as a large portion of land thus expropriated was owned by United States nationals.\textsuperscript{222}

On July 6, 1960, in retaliation against the decision of President Eisenhower to reduce Cuba's sugar quota by 95 percent,\textsuperscript{223} the Castro government passed Nationalization Law No. 851,\textsuperscript{224} nationalizing United States-controlled enterprises located in Cuba. This was an act of reprisal directed exclusively against American interests; and implementing Resolutions Nos. 1 (August 6) and 2 (September 17),\textsuperscript{225} adopted pursuant to the Nationalization Law, brought all the corporations controlled by United States interests under state control. The value of American assets thus expropriated was estimated at $750 million, constituting more than two-thirds of United States private investments in Cuba.\textsuperscript{226}

The task of instituting a planned economy in Cuba was completed on October 13, 1960, with the passage of Laws Nos. 890 and 891.\textsuperscript{227} Under this legislation all major enterprises — commercial, industrial, transportation, and banking concerns — regardless of the nationality of the owners were transferred into state ownership. The laws of October 13 primarily affected Cuban-owned assets as nearly all American interests falling within the language of these decrees had already been seized under earlier statutes.

\textsuperscript{219} Id. at 35.
\textsuperscript{221} Act of May 17, 1959, 2 La Jurisprudencia al Dia (Legislacion) 933 (1959).
\textsuperscript{222} A. Edelmann, Latin American Government and Politics 245 (1965).
\textsuperscript{223} Exec. Proclamation No. 3,355, 3 C.F.R. 80 (1964). The Cuban sugar quota had been set at 3,119,655 tons for 1960. Id.
\textsuperscript{227} Law No. 890, Oct. 13, 1960, 3 La Jurisprudencia al Dia (Legislacion) 1837 (1960); Law No. 891, Oct. 13, 1960, 3 La Jurisprudencia al Dia (Legislacion) 1851 (1960).
The Cuban authorities have reported that the implementation of the Agrarian Reform Act, the Nationalization Law, and the decrees of October 13, have brought all of the sugar industry, 90 percent of industry and mining, 90 percent of the tobacco and coffee plantations, and the totality of the banking concerns under state control.\(^{228}\)

1. The Compensation Provisions in the Agrarian Reform Legislation

The Agrarian Reform Act acknowledged the right of the dispossessed owners to receive indemnity for loss of their property and further stipulated that the sales value of the properties as shown on the tax returns would be used to assess the amount of compensation (article 29). These provisions were implemented by Laws Nos. 576 (September 25) and 588 (October 7).\(^{229}\) The former authorized issuance for compensation purposes of the 20-year Agrarian Reform Bonds for a total amount of 100 million pesos ($100 million) (article 1). It also stipulated that the principal and interest on the bonds would be exempt from national and local taxation (article 2). Law No. 588 specified that compensation would be calculated on the basis of the last sworn statement by the owners of the property prior to October 10, 1958, plus the value of improvements on the property (article 5). Under this decree, pending establishment of Soil Tribunals, the judges in the first instance were vested with jurisdiction over expropriation proceedings (article 11). Their decisions could be appealed to the Court of Constitutional and Social Guarantees whose findings in the matter were final. One writer has reported that in pursuance of this legislation, compensation was assessed at 500 to 1,500 pesos per caballeria.\(^{230}\)

As indicated above, the agrarian legislation affected substantial American interests. Following its adoption an exchange of notes took place between the United States and Cuba, the relevant portions of which may be quoted. The United States in a note of June 11, 1959, observed:

The United States recognizes that under international law a state has the right to take property within its jurisdiction for public purposes in the absence of treaty provisions or other agree-


ment to the contrary; however, this right is coupled with the corresponding obligation on the part of a state that such taking will be accompanied by payment of prompt, adequate, and effective compensation. United States citizens have invested in agricultural and other enterprises in Cuba for many years. This investment has been under several Cuban Constitutions, all of which contained provisions for due compensation in case of expropriation, including the Cuban Constitution of 1940 which provided that should property be expropriated by the state there must be prior payment of the proper indemnification in cash, in the amount judicially determined.

The wording of the Cuban agrarian law gives serious concern to the Government of the United States with regard to the adequacy of the provision for compensation to its citizens whose property may be expropriated. 231

The Cuban Government in a note dated June 15, 1959, replied:

The fundamental concern expressed in the note [of the United States Government] . . . is the form of payment adopted by the revolutionary Government of Cuba to indemnify North American citizens whose property may be expropriated pursuant to the Agrarian Reform Law. It is true that the Constitution of 1940 and the basic law in force provide that the price of expropriations shall be paid in advance and in cash in the amount fixed by the courts. But it is also no less true that the aforesaid form of indemnification is inexorably imposed by events in the public domain: the chaotic economic and financial situation into which the overthrown tyranny plunged the country, and the marked imbalance in the balance of payments between the United States and Cuba, which for us has meant an unfavorable balance of about a billion dollars during the last ten years. It should be noted that, had these events not occurred the Revolutionary Government would have been able to discharge the aforesaid constitutional obligation. 232

In answer to this argument the United States Government wrote:

Your Excellency’s note cites certain circumstances relevant to the carrying out of the agrarian reform which in the opinion of the Government of Cuba will make it difficult to apply the principles of compensation for expropriated property that are recognized in international law and in the Cuban Constitution of 1940. The factors mentioned by your Excellency explaining the inability of the Government of Cuba to apply these principles have been noted by the Government of the United States. It is the opinion of the Government of the United States, however, that the United States.

232. Unpublished Cuban note of June 15, 1959, supplied to this writer by the U.S. Department of State.
States investors, who are not responsible for these factors, should not, in justice be penalized because of them; nor can such factors constitute a valid basis for the expropriation of the property of aliens in disregard of accepted principles of international law relating to the payment of prompt, adequate and effective compensation.\textsuperscript{233}

Thus the United States subscribed again to the proposition that expropriation of foreign property must be accompanied by payment of adequate, prompt, and effective compensation and that such compensation is due regardless of the expropriating state's paying capacity.

2. Compensation for American-Owned Property Nationalized Pursuant to the Law of July 6, 1960

The Nationalization Law of July 6 stipulated that the United States property owners would receive compensation in the form of 30-year bonds, bearing interest at not less than 2 percent per year (article 4). Article 5 added, however, that compensation payments were to be made out of a fund built up of 25 percent of foreign exchange accruing to Cuba each year from sale of sugar to the United States in excess of 3 million Spanish long tons at a price not under 5.75 cents per English pound. This provision made the payment of compensation almost impossible, for even if the United States restored Cuba's sugar quota as it stood prior to President Eisenhower's Proclamation of July 6, this would still be insufficient to build up the fund out of which compensation payments were to be made. United States Ambassador Bonsal, writing to the Cuban Minister of Foreign Affairs, protested that, "The Nationalization Law is . . . confiscatory in that its provisions for compensation for property seized fail to meet the most minimum criteria necessary to assure the payment of prompt, adequate and effective compensation . . ."\textsuperscript{234}

The value of American property interests seized by the Castro government in pursuance of the Agrarian Reform Act and the Nationalization Law has been estimated at $1 billion.\textsuperscript{235} On July 31, 1963, a State Department official reported that "no bonds were ever issued under either law and the Department is not aware that any U. S. citizen ever received payment for his property from the Cuban Government."\textsuperscript{236}

\textsuperscript{233} Unpublished American note of October 15, 1959, supplied to this writer by the U.S. Department of State.


\textsuperscript{235} N.Y. Times, Nov. 14, 1960, at 5, col. 4.

\textsuperscript{236} Letter from R.T. Follestad, Assistant Officer in Charge of Cuban Affairs, Department of State, to this writer, July 31, 1963, on file in the Case-Western Reserve University Law Library.
3. The Compensation Provisions in Laws Nos. 890 and 891

Both of these Laws acknowledged the right of the dispossessed shareholders to receive indemnity. Law No. 890 provided that the Central Council of Planning would submit recommendations concerning the amount and manner of compensation. Under Law No. 891, the National Bank of Cuba was vested with jurisdiction to determine the amount of compensation for each shareholder (article 6). Compensation was to be paid in cash up to $10,000 and in the form of bonds for any amount in excess of that limit. The bonds bore interest at 2 percent per annum and were redeemable in 15 years.

4. Cuban Compensation Provisions Before the American Courts

The most important case to arise in American courts from the Cuban expropriation decrees is Banco Nacional de Cuba v. Sabbatino.287 This case involved an action by Banco Nacional, an instrumentality of the Castro government, to recover the proceeds of 22,000 bags of sugar expropriated under the Nationalization Law of July 6 from Compañía Azucarera Vertientes Camaguey de Cuba (C.A.V.) and sold to Farr, Whitlock & Co., a New York commodity broker.288 The C.A.V. was a corporation organized under Cuban law but controlled principally by American citizens. The question before the courts was whether the sugar at issue had lawfully passed into Cuban ownership by virtue of the Nationalization Law. Both the district court and the court of appeals answered the question in the negative on the ground that the Cuban action violated the rules of international law in regard to expropriation of alien property. On March 22, 1964, the Supreme Court reversed this judgment and remanded the case to the district

288. The facts of this case may be briefly summarized. In 1960 Farr Whitlock negotiated to purchase sugar from C.A.V. Under the contract, payment for the negotiated sugar was to be made in New York upon presentation of the shipping documents. On August 6, 1960, while the negotiated sugar was still in Cuba, the Cuban Government nationalized the property of C.A.V. under the Nationalization Law of July 6, 1960. After the nationalization Farr Whitlock, in order to secure permission to remove the sugar out of Cuba, negotiated an identical contract with the Castro government. Then the sugar was shipped to its destination in Morocco. Meanwhile, on August 16, 1960, the Appellate Division of the New York supreme court, acting under Section 977-b of the New York Civil Practice Act (now codified in N.Y. Bus. Corp. Law §§ 1202, 1203, 1207 & 1218 (McKinney 1963)), appointed a receiver in the person of Mr. Sabbatino to dispose of the local assets of C.A.V. Schwartz v. Compañía Azucarera Vertientes Camaguey de Cuba, 12 App. Div. 2d 506, 207 N.Y.S.2d 288 (1960). Late in August, Société Générale, acting for Cuba, presented the bills of lading together with a sight draft to Farr Whitlock for payment. The latter negotiated the bills of lading to his customer but refused to turn over the proceeds to Société Générale on the ground that Sabbatino claimed them. On October 10, 1960, Banco Nacional, a financial agent of the Cuban Government, commenced this action in the United States District Court for the Southern District of New York seeking damages against Farr Whitlock for conversion of the bills of lading and an injunction against Sabbatino restraining him from exercising jurisdiction over the funds.
court for further proceedings. The Supreme Court's decision did not deal with the question of compensation; it rested on the argument that the act of state doctrine applied to this case and, consequently, barred the United States courts from examining the validity of the Cuban action under international law.\textsuperscript{239}

While the proceedings for the entry of judgment on remand were still pending, Congress enacted into law section 301(d)(4) of the Foreign Assistance Act of 1964, known as the Hickenlooper Amendment.\textsuperscript{240} This Amendment in effect reversed the decision of the Supreme Court in \textit{Sabbatino} by providing that no court in this country should decline to make a determination as to the justice under international law of a foreign act of expropriation unless it is suggested by the President that such determination would embarrass the Executive in its conduct of foreign relations.\textsuperscript{241} Following the enactment of the Hickenlooper Amendment into law, the district court entered judgment against Banco Nacional, holding that the congressional action had removed the bar interposed on Cuban expropriations by the act of state doctrine and that the court was bound by the original determination of the court of appeals as to the question of legality under international law.\textsuperscript{242} This judgment was affirmed by the court of appeals.


\textsuperscript{240} 22 U.S.C. § 2370(c)(2) (1964).

\textsuperscript{241} In explaining the purpose of the Amendment, the Senate Committee Report stated:

The amendment is intended to reverse in part the recent decision of the Supreme Court in \textit{Banco de Nacional de Cuba v. Sabbatino}. The act of state doctrine has been applied by U.S. courts to determine that the actions of a foreign sovereign cannot be challenged in private litigation. The Supreme Court extended this doctrine in the \textit{Sabbatino} decision so as to preclude U.S. courts from inquiring into acts of foreign states, even though these acts had been denounced by the State Department as contrary to international law.

The effect of the amendment is to achieve a reversal of presumptions. Under the \textit{Sabbatino} decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.


The Hickenlooper Amendment as enacted in 1964 was limited in its application to cases in which the proceedings had commenced before January 1, 1966. The Amendment was reenacted in 1965 as part of the Foreign Assistance Act of 1965 without this limitation. 22 U.S.C. § 2370(c)(2) (Supp. III, 1967).

While Sabbatino primarily turned on the question of the applicability of the act of state doctrine to cases arising from the Cuban expropriations, as indicated above, both the district court and the court of appeals, in their original holdings, dealt with the international law issue. These judgments, insofar as related to the question of compensation, are of special interest to our inquiry.

The district court held that the Castro Nationalization Law was invalid because it violated international law in three respects: (1) it was an act of reprisal against the United States and, as such, not motivated by a public purpose; (2) it was discriminatory; and (3) it failed to afford adequate compensation. After analysing the compensation provisions of the Cuban legislation, the court said:

As is evident from the preceding description of the method for compensation, payments of interest on the thirty year bonds is expressly conditioned on United States sugar purchases from Cuba. Indeed, were the sugar quota for Cuba to be restored tomorrow, contributions to the compensation fund, based on the ten year history of sugar purchases from Cuba before the year 1960, would be nonexistent. The defects in the scheme are, however, more fundamental. The condition placed on the payment of interest on the bonds, as well as the uncertainty of payment at maturity, render the bonds unmarketable and valueless. Further, the value of the expropriated property is to be determined solely by appraisers appointed by the Cuban Government, an obviously adverse party to the interests of the persons whose property has been seized. Clearly, this is not adequate compensation within the requirements of international law.243

The court of appeals, while affirming the judgment below, used a different reasoning. It defined the question at issue in the following terms:

[I]t is a violation of international law for a country to fail to pay adequate compensation for the property it seizes from a particular class of aliens, when the purpose for the seizure of the property is to retaliate against the homeland of those aliens and when the result of such seizure is to discriminate against them only.244

Then, upon examination of the relevant rules of international law, the court observed:

Unlike the situation presented by a failure to pay adequate compensation for expropriated property when the expropriation is part


244. 107 F.2d at 864.
of a scheme of general social improvement, confiscation without compensation when the expropriation is an act of reprisal does not have significant support among distinterested international law commentators from any country.\textsuperscript{246}

And finally, it concluded:

Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals, we hold that the decree was in violation of international law.\textsuperscript{246}

The language of the district court seems to suggest that the failure to afford adequate compensation was in itself a sufficient ground for the conclusion that the Cuban statute violated international law. For the court of appeals, on the other hand, what rendered the Castro action internationally illegal was the failure to offer compensation, \textit{combined} with the retaliatory and discriminatory nature of that action. The reluctance of the second circuit to rely on the requirement of compensation for the question of international legality stemmed from its failure to find unanimous support in international practice for the proposition that the expropriating state is obligated to afford full compensation when the expropriation is carried out as part of a general program of social and economic reform. In this connection, the court said:

\[\text{[I]s the failure to provide adequate compensation for the compulsory taking of the property of a domestically chartered corporation owned by alien stockholders a violation of international law? The constitutions of most of the states in the Western Hemisphere contain language which appears to uphold the right of the owner to receive just compensation upon a governmental taking of private property. . . . A number of decisions by international tribunals have upheld the principle that just compensation should be provided. And it appears that most of the writers on the subject have asserted that just compensation for governmental taking is a requirement of international law.}\]

But some writers have asserted that the payment of adequate compensation is not required by international law. . . . Tremendous social and cultural changes are occurring in many parts of the world today. Many countries have acted upon the principle that, in order to carry out desired economic and social reforms of vast magnitude, they must have the right to seize private property without providing compensation for the taking. They argue that

\textsuperscript{245} \textit{Id.} at 866.

\textsuperscript{246} \textit{Id.} at 868.
because of the paucity of funds in their governmental coffers it would be impossible to carry out large-scale measures in the name of social welfare if they had to provide immediate, or even delayed, compensation. . . . It is commonplace in many parts of the world for a country not to pay for what it takes. 247

Indeed, it would be an error to conclude that the court’s reluctance to rely solely on the rules concerning compensation to invalidate the Cuban decree amount to a repudiation of those rules. It appears from the judgment that the court did not find it necessary to resolve the question of compensation as stated in the above-quoted passage because an alternative ground for decision was available. The court said:

Since it is unnecessary for this court in the present case to decide whether a government’s failure, in and of itself, to pay adequate compensation for the property it takes is a breach of international responsibility, we decline at this time to attempt a resolution of that difficult question. 248

The fact still remains that the court deliberately avoided the question of compensation in the context of impersonal and general appropriations for lack of conclusive evidence and for fear of identifying a principle of public policy as a rule of international law. In this connection, it is significant that the court warned the national courts sitting in judgment in issues involving international law against their “nationalistic prejudice” which could affect their decision. One of the reasons why the Second Circuit declined to rely for its findings on the public policy of the forum was stated to be that “reliance upon such a basis for decision results in a nationalistic, or municipal, solution of a problem that is clearly international.” 249 Elsewhere, the court stated:

One pitfall into which we could stumble would be the identification as a fundamental principle of international law of some principle which in truth is only an aspect of the public policy of our own nation and not a principle so cherished by other civilized peoples. In avoiding such an identification we must take a more cosmopolitan view of things and recognize that the rule of law which we municipally announce must be a rule applicable to sovereignties with social and economic patterns very different from our own. 250

It is to be noted, however, that insofar as the United States courts are concerned, the decision of the court of appeals has been for all

247. Id. at 862–64 (footnotes omitted).
248. Id. at 864.
249. Id. at 859.
250. Id. at 861.
practical purposes superseded by the passage of the Hickenlooper Amendment. This Amendment directs the United States courts in cases involving foreign expropriations to apply the principles of international law "including the principles of compensation and the other standards set out in this subsection . . . ."251 The subsection referred to here includes a provision requiring suspension of foreign aid to any country which, having expropriated United States-owned property, "fails . . . to take appropriate steps . . . to discharge its obligations under international law . . . including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law . . . ."252

IV. Conclusion

The court decisions reviewed in part III reflect great hesitancy on the part of municipal courts applying the principles of international law to subscribe to the orthodox position that compensation for expropriated property must be "adequate, prompt, and effective." Nor do the lump-sum agreements negotiated for settlement of claims arising from post-World War II nationalizations afford any basis for asserting that the orthodox theory has been honored by state practice.253 Even the United States, longtime in the forefront of the countries advocating the orthodox position, has recently shown signs of moving in the direction of flexibility. In a speech in 1962, Mr. George Ball, then Under Secretary of State, defined the United States position in the following terms:

The United States has long recognized that any country has the right to expropriate property, including that of Americans, provided it offers just compensation. This means, of course, that the compensation must be reasonably adequate and that payment must be reasonably prompt.254

These developments in judicial and state practice make it indeed doubtful whether the orthodox proposition can be said to be a requirement imposed by public international law. Nor do they indicate any other criterion in light of which the adequacy of a compensation can be

253. The only exception is the compensation settlement negotiated by the A.I.O.C. which, as indicated above, resulted in what may be described as full indemnification covering both the value of the physical assets and loss of prospective profits. It must, however, be noted that this arrangement was made possible thanks to the consortium formula which enabled the A.I.O.C. to receive full compensation without imposing an undue burden on Iran.
tested. All that can be extracted by way of guidance from the material reviewed in this Article is that the expropriating state is obligated to pay some compensation and that the amount of compensation must not be inferior to that afforded nationals of the expropriating state. This situation, however, is no cause for despair. It is submitted that the absence of precise and well defined criteria for testing the adequacy of compensation is by no means due to failure of international law to develop such criteria but is accounted for by the nature of modern expropriations which call for flexible procedures whereby claims and counterclaims raised by a particular expropriation can be equitably adjusted and settled. It is further suggested that the practice of states in concluding global settlements indicates lines along which such flexible procedures may be developed. The following paragraphs represent an attempt to explain and expand on these two propositions.

General expropriations are often accompanied by large-scale changes in the economic, social, and political life of the expropriating state. As such, they are likely to give rise to complex claims and counterclaims which cannot be adjusted by applying rigid standards such as adequate, prompt, and effective compensation. A few examples from the recent experiences will help to illustrate the point. The nationalization of the A.I.O.C. gave rise not only to claims of the company for compensation but also to demands by Iran that such claims be offset against unreasonable profits accruing to the company at the expense of Iran. Iranian officials stated that while the A.I.O.C. was reaping an annual profit of $500 to $550 million, Iran received only $45 million or less than 10 percent in royalties, share of profits, and taxes.255 Similar charges were brought by the Egyptian Government against the S.C.C. President Nasser, in his speech of July 26, 1956, explained that the Suez concession had been negotiated on unequal terms resulting in unreasonable profits for the S.C.C., while Egypt's original 44 percent share in the company was "usurped" by the United Kingdom. Both Cuba and Indonesia raised charges of economic "exploitation" against deprived foreign investors or their home state.

A pattern seems to repeat itself in all the expropriation cases reviewed in this Article. The dispute involves a small underdeveloped country faced with a Western industrialized nation. The latter demands strict compliance with the legal standards which it believes

255. 6 U.N. SCOR 563d meeting 15 (1951). See also Grady, What Went Wrong in Iran, SAT. EVE. POST, Jan. 5, 1952, at 30. He writes that the A.I.O.C. "made net profits of approximately 100,000,000 pounds in 1950. The Iranian Government, relying on the oil for about 43 percent of its income, was receiving 13,000,000 to 15,000,000 pounds a year in royalties ... or about 15 percent of the oil company's net proceeds."
to be still in force; the former, emphasizing the importance on equitable grounds of extra-legal factors, insists that these factors be brought to bear in fixing the terms of compensation. It is not argued here that the charges brought by host countries against foreign investors are always justified; but if they were, then it would seem only fair that they be taken into account in assessing the terms of compensation. This suggests that demands raised in connection with general and impersonal expropriations can best be settled by giving consideration to the equities of the mutual relationship between the host community and the alien owner of expropriated property.\textsuperscript{256} As Professor Friedmann has put it, "the whole problem of the property and contract relations between developed and underdeveloped countries should frankly be regarded as one in which legal, equity and policy considerations are mixed."\textsuperscript{257}

The proposition that the terms of compensation must be fixed in light of the equities of the whole background of foreign investments indicates the need for flexibility. A rigid principle like "full compensation" cannot make allowance for equitable adjustment of claims and counterclaims arising from expropriations. Such adjustment must be effected for each case on an ad hoc basis.\textsuperscript{258} If this is correct, then it follows that what is most needed is not a compensation formula but established diplomatic and arbitral procedures whereby the interests of both parties can reasonably be adjusted. A good deal of progress has already been achieved by the practice of states in concluding lump-sum agreements. These settlement techniques afford the needed flexibility so that all the relevant factors in a given situation can be brought to bear in determining the terms of indemnity. It remains to improve the present situation by providing for compulsory arbitration of claims should diplomatic efforts at settlement fail.\textsuperscript{259} It is true that the under-

\begin{footnotesize}
\begin{enumerate}
\item[258.] This was in fact the consensus which emerged from the International Association of Legal Science held at Rome in 1958 under the auspices of the U.N.E.S.C.O. with participation of representatives from Belgium, Bulgaria, Czechoslovakia, Finland, France, Germany, India, Italy, Lebanon, Poland, Rumania, Sweden, the United Kingdom, the U.S.S.R., the United States, and Yugoslavia. The Association reached agreement that the deprived aliens were entitled to compensation in an amount to be determined as a question of fact in each case. See Note, Rome Conference on International and Comparative Law, 7 Int'l & Comp. L.Q. 585, 586-87 (1958).
\item[259.] In recent years, there have been a number of proposals for the establishment of an arbitral tribunal to settle investment disputes. For example, there is the World Bank proposal for an "International Center for Settlement of Investment Disputes," in 4 Int'l Legal Materials 532 (1965). See also Weston, International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry, 54 Va. L. Rev.
\end{enumerate}
\end{footnotesize}
developed countries — which form the bulk of expropriating states — have displayed reluctance to submit to arbitration, but this attitude appears to be the result of dissatisfaction with the substantive law applied by arbitral tribunals rather than with arbitration itself. The position of Iran in its dispute with the United Kingdom over the A.I.O.C. nationalization is a good case in point. The Iranian Government was first reluctant to submit the matter of compensation to the jurisdiction of the I.C.J., but later agreed to arbitration by the World Court “in case the former company agrees to a basis acceptable to Iran.” Surely here dissatisfaction was not with arbitration as such, but with the substantive rules which, Iran felt, were so heavily weighted against its interests as to make a favorable judgment for the A.I.O.C. very likely. It is believed that the difficulty presented by the expropriating state’s reluctance to submit to arbitration can be removed by asking the arbitral tribunal to apply flexible guidelines which would allow for equitable adjustment of the claims of the recipient country as well as those of the foreign entrepreneur. While it is beyond the scope of the present study to discuss exactly what factors must be brought to bear in establishing the terms of compensation, a few examples may be offered to illustrate the point.

First, there are certain cases where the foreign propertyholder has indulged in practices which can be described as an abuse of property rights. An obvious case is that of a foreign investor who has abused the host country by underestimating the value of this property for tax purposes. It is suggested that, in case of expropriation, such investor is not justified in claiming compensation for the market value of his property, but should be limited to the underestimated value. Another illustration is provided by the absentee landlord whose negligence and disregard for development needs of the host community cause wastage of resources. Dr. Stoll, drawing upon the technical assistance experience of the United Nations in Colombia, deals with the problem of absentee ownership in that country in the following terms:

The phenomenon is rather common: the big landowner does not manage the farm himself but rents it out to tenant farmers. Occasionally, the latter till the land properly, but in the majority of cases, they seek to draw the greatest possible benefit from the land without any productive effort . . . . The result is the increasing deterioration of the properties.

261. Iranian proposal in N.Y. Times, Mar. 21, 1953, at 6, col. 3.
Dr. Stoll also cites the case of some plantation owners in Colombia who purchased land in the departments of Magdalena and Intendencia de la Guajira with the sole intention of preventing the establishment of pilot farms for the training of indigenous tribesmen in the techniques of modern farming. In instances of this sort, the host community would be justified in dispossessing the propertyholders even without payment of compensation.

Apart from cases of abuse of property rights referred to in the preceding paragraph, it is submitted that in all instances where large-scale expropriations are carried out as part of a program of economic and social reform, the tribunal, in determining the compensation terms, must consider the financial capabilities of the expropriating state as reflected in its per capita national income and foreign-exchange earnings. Many writers would argue that financial impossibility is not a valid excuse for nonpayment of adequate compensation. Kissam and Leach, for instance, have written:

Financial difficulties or straitened economic circumstances offer no justification for the repudiation of obligations, either by individuals or by nations. If a State is unable to pay for what it takes, then it has no legal or moral right to take from those who are not nationals of the State. Beneficial as nationalization may ultimately prove to be to a State and to its citizens, there is little to justify placing the burden of a State's economic experimentation upon the shoulders of the foreign investor, who has neither any voice in the decision to indulge in such experimentation, nor any status to enjoy whatever benefits may ultimately be derived therefrom. In short, poverty is no more an excuse for unjust enrichment in the case of a State than it is in the case of an individual.

Such arguments, it is submitted, overlook the fact that one of the major problems facing us today is the economic underdevelopment and poverty of vast regions of the world. It is unreasonable to deny to countries faced with such problems badly needed economic reforms for the simple reason that these countries cannot afford to pay adequate compensation for expropriated alien property. It must be added that the problem of underdeveloped states concerns not only the people who live under those conditions but the entire international community as well. Admittedly, the widening gap between rich and poor countries has introduced an element of tension in world politics which threatens the stability of the international political system.

263. Id.
But apart from such considerations, it is submitted that reasonable standards of the kind advocated here would in the long run provide a more effective protection for the security of foreign investments. For international law, lacking as it does in enforcement machinery, is effective only to the extent that it represents the consensus of the world community. In case of foreign investors, the most reliable protection must be sought, not in the repeated assertions of certain orthodox principles which are now repudiated by the great majority of would-be expropriators as inimical to their needs, but by means of development of practices and standards which would afford reasonable security to the foreign investor without sacrificing the interest of the capital-importing countries in their development.