EXPROPRIATION AND NATIONALIZATION IN DEVELOPING COUNTRIES WITH SPECIAL REFERENCE TO EXPROPRIATIONS IN IRAN

A thesis submitted for the Degree of
Doctor of Philosophy(Ph.D)

H. TALEGHANI

SCHOOL OF LAW

GLASGOW UNIVERSITY

1995

ABSTRACT

The purpose of this thesis is to analyse and clarify the rules of expropriation in international law as are applied to developing States. Special attention has been paid to the 1952 Iranian Oil Nationalizations and the expropriation cases in post-Revolutionary Iran. The approach is to consider and analyse the problem from an international law perspective.

The main thrust of the thesis is that the problem of expropriation in developing States presents an extraordinary difficulty which has caused confusion over the rules of expropriation. Emphasis has been placed on the causes of those difficulties which have troubled international lawyers for many years and created various doctrines, manifested in the divergent practices of States and judicial bodies. The study aims to identify the differences in those rules and the reasons for those differences; and to suggest an appropriate solution based on the principles of international law.

The thesis is divided into four chapters:
Chapter one, after a brief historical survey of the rules and practices, analyses the legal basis of the right of expropriation in international law. Sanctity of treaties and contracts, as a source of disputes between developing countries and aliens, has been discussed. Chapter two analyses the various doctrines on the rules of expropriation. The chapter deals with the conditions which developing States should fulfil in order to expropriate aliens' property according to international law. The role of international agreements in determining the differences on the rules of expropriation has also been indicated. Chapter three deals with the controversial case of the nationalization of the oil industry in Iran. After examining the legal character and validity of those measures, the reasons for all those controversies and confusions have been considered. To develop the argument, the legal problems surrounding the post-Revolution expropriations in Iran have been discussed in chapter four, and the reasons that the Iran-U.S. Claims Tribunal has not reduced the chaos in this field of international law have been given.

The thesis concludes with some recommendations on how future property disputes of aliens with developing States can be avoided or solved.

ACKNOWLEDGEMENT

To carry out this study, there have been some problems, the biggest of which has been that the work was written in a language other than my own and this can still be noticed throughout the text. I must thank Mr. Andrew Devlin who kindly corrected the draft. However, the need for improvements in the style of writing should be acknowledged.

The civil law background of the writer has also affected the way of discussion and raising the issue. The other difficulty was that the full report of the cases, particularly those of the Iran-U.S. Claims Tribunal, was not available.

However, in doing the work successfully, I am deeply indebted to my supervisor Professor John P. Grant, the Dean to the Faculty of Law and Financial Studies, who was more than a supervisor to me. Thanks are also due to him for his encouragements during the research and his excellent supervision.

I would like to thank the staff of the Faculty of Law and Financial Studies for their assistance and the facilities they provided, and the staff of Glasgow University Library, particularly, the inter-library loan office, the law and official publications division and Dr. G. Anderson.

I would also like to thank all those who somehow were helpful throughout the duration of this thesis, particularly those friends in the International Legal Bureau whose providing some materials and valuable remarks were very helpful. I would also like to thank Mr. Mohammad Reza Abbasi, the head of the Iranian National Archive Organisation for having provided me with worthy documents on Iranian Oil Nationalisation.

I would like to thank my sponsor, government of the Islamic Republic of Iran whose financial support made this work possible.

Finally, I would like to thank my family for their encouragement and patience.

TABLE OF CONTENTS

CHAPTER THREE

IRANIAN OIL NATIONALIZATION

CHAPTER FOUR

THE POST-REVOLUTION EXPROPRIATIONS IN IRAN

ABBREVIATIONS

A.B.A.J.	American Bar Association Journal
A.J.C.L.	American Journal of Comparative Law
A.J.I.L.	American Journal of International Law
App.Cas.	Appeal Cases (House of Lords)
App.Div.	Appellate Division (New York) Supreme Court
A.S.I.L.	American Society of International Law
B.F.S.P.	British and Foreign State Papers
B.I.L.S.L.R.	Bureau for International Legal Services Law Review
B.Y.I.L.	British Yearbook of International Law
Cmd	Command Papers
Col.J.I.L.	Columbia Journal of International Law
Harv.I.L.J.	Harvard International Law Journal
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.A.	International Law Association
I.L.M.	International Legal Materials
I.L.Q.	International Law Quarterly
I.L.R.	International Law Reports
Iran-U.S.C.T R.	Iran-United States Claims Tribunal Reports
J.B.L.	Journal of Business Law
J.W.T.L.	Journal of World Trade Law
L.N.T.S.	League of Nations Treaty Series
L.P.I.B.	Law and Policy in International Business
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review
Neth.Y.I.L.	Netherlands Yearbook of International Law
N.Y.S.R.	New York State Reporter
N.Y.U.J.I.L.&Pol.	New York University Journal of International Law and Politics
N.Y.U.L.Rev.	New York University Law Review
P.A.S.I.L.	Proceedings of American Society of International Law
P.C.I.J.	Permanent Court of International Justice
R.I.A.A.	Reports of International Arbitration Awards
U.K.T.S.	United Kingdom Treaty Series
U.N.G.A.O.R.	United Nations General Assembly Official Records
U.N.S.C.	United Nations Security Council
U.N.T.S.	United Nations Treaty Series
Virg.J.I.L.	Virginia Journal of International Law
W.L.R.	Weekly Law Review
Y.C.A.	Yearbook Commercial Arbitration
Y.I.L.C.	Yearbook of International Law Commission

INTRODUCTION

To raise the living standard of peoples, gain satisfactory progress in economic development and in pursuit of national wealth, countries usually admit a foreign investment flow to their societies. For similar reasons, they sometimes wish to expropriate those investments. To do so, States are required to fulfil some conditions in order to prevent any injustice to the deprived individuals. Accordingly, expropriations in developed States have often been practiced without much controversy, and the international rules in this regard have been established through the practice of those States with similar social, ideological and economic structures. The controversy has mostly been where aliens' property had been expropriated in developing States which have had a different approach to the issue of expropriation. As a result, different doctrines, such as 'international minimum standard' and 'national treatment standard', have grown up around the issue of expropriation by developed and developing States. None of those theories are satisfactory and comprehensive, nor able to introduce a formula on expropriation acceptable to all States. In doctrinal terms, they present contradiction and uneasiness, and much confusion has attended their application to different cases. The terms used are imprecise, elastic and are subject to a variety of interpretations.

The practice of States in this regard is not less contradictory. It will be seen that even among developed States the issue of expropriation has sometimes been treated differently. In this thesis, an attempt will be made to provide an analysis of the reasons for those differences and the conditions surrounding the issue of expropriation in each group of States.

While developed States have had little difference of opinion in

dealing with aliens' property, developing States have had many differences in this respect. The reason for all those differences lies in the varied legal characters of aliens' property and their rights in developed and developing States. The advantageous and preferential position of aliens has justified developing States in basing their responsibility towards aliens on their own domestic laws. On the other hand, those differences in legal character of aliens' property in developing States have not been recognized by the investors' States, and therefore any pleading of national treatment standard has been rejected by them.

The confusion over the doctrine is evident from the arguments of each group of States. The problem has been that States have tried to extend the rules of expropriation to other States with different legal relations with the aliens. This confusion is clearly indicated in the Iranian expropriations to which special reference will be made.

The disorder is not only in theory but includes State and judicial practice. Judicial decisions as one of the main sources of international law are diverging and inconclusive. They are sometimes contradictory in regard to even one single case. State practice on the settlement of expropriation disputes is also various. Although it seems impossible to introduce a single rule applicable to all States, the identification of the reasons for all those diversities is fundamental in order to make it possible to establish appropriate universal rules. For this reason, international authorities have to take into account some important facts in their considerations in order to achieve a satisfactory formula or machinery on the issue of expropriation. The study identifies the problems which exist in applying each of the rules and standards to developing States.

The main thrust of this thesis is, therefore, to clarify the reasons for those problems, and find the responsibility of each party to expropriation

disputes in developing States. Therefore, the study stresses the role and the behaviour of aliens in circumstances surrounding expropriation in developing States. The aim of this thesis is to provide some suggestions in order to discourage aliens and their governments from gaining advantageous contractual rights by supporting undemocratic regimes in developing States, infringing the right of peoples to self-determination and possibly endangering international peace. In supporting this theme, the consequences of such behaviour in developing States, particularly in Iran, have been presented.

Therefore, this thesis undertakes to contribute to the issue by discussing some specific problems concerning expropriation measures in developing States and suggests some techniques to formulate the principles and rules of expropriation at a universal level.

This thesis consists of four chapters: Chapter one, after a short survey in history of the rules on expropriation and giving a general picture of the phenomenon, deals with the basic issue of the right to expropriation. The argument is followed by consideration of the related United Nations' Resolutions and their contribution to the rules of expropriation. The chapter also analyses the sanctity of treaties and contracts as one of the sources of disputes between developing countries and aliens. The confusion over the right of a sovereign State to expropriate, and the difference between a lawful measure of expropriation and an unlawful act in breach of contract is explained. The legal character and the validity of contracts in dispute between developed countries and their nationals on one hand and developing State on the other are discussed; and they are analysed in order to identify the crucial points which have been ignored.

Different theories on expropriation of aliens' property are discussed

in chapter two. Certain features of those doctrines are criticised, particularly on the grounds that they have not been acceptable to some States and scholars.

A special emphasis is placed on the conditions which should be fulfilled in the event of expropriation of aliens' property by developing States. They are discussed together with the conditions, which had been asserted traditionally, to develop the argument in this respect.

International agreements relating to expropriation of aliens property are discussed. Those agreements indicate the ultimate solutions which States have chosen to settle the disputes on expropriation of aliens' property. They also illustrate how much the rights and property of aliens has been protected under international law.

The focus is on Iranian expropriations. In chapter three, Nationalization of Iranian Oil Industry is discussed in more detail. We analyse the reasons that the dispute over the measures caused many problems. Most importantly, the reasons that different judicial bodies reached different conclusions is explained. The work further explains the reasons that the measures could not comply with the asserted traditional rules. The role of aliens in the measures of expropriation and the consequence of their behaviour is illustrated.

In the last chapter, a similar approach is made to the Post-Revolution expropriations in Iran. After a look at the background and procedure of the settlement of the disputes, it indicates the confusion over the rules governing the expropriations, and also the contradiction between the chambers of the Iran-United States Claims Settlement Tribunal in applying the rules and reaching conclusions. After introducing the defects of the settlements, the conclusion has been reached that they cannot be

considered as settled international practice, and they do not contribute to international law. It indicates that the differences over the rules of expropriation do not only relate to the merits of the cases or to technical matters such as the calculation of the amount of compensation; the differences are with regard to the questions which are related to the basic principles of international law, such as the right to self-determination. We explain that, where there has been less dispute over those basis principles (in developed States), there has also been less controversy over the rules of expropriation. This shows that the controversy has mostly been between developed and developing States where the basic rights of developing countries and principles of international law have been ignored.

All the above topics are dealt with by a reference to the existing asserted rules of expropriation and, at the end, it concludes that, in considering expropriation measures in developing States, many other facts should be kept in mind. As a special reference of this thesis, the legal relations between Iran and the United States and its nationals, the legitimacy of their conduct, property and rights, and the responsibility of Iran towards the American nationals has been highlighted. Suggestions for a more comprehensive formula are given to indicate that the existing problems can and should be solved by application of the norms and principles of international law and any future dispute be avoided.

CHAPTER ONE

(SECTION ONE)

HISTORICAL BACKGROUND

No complete history of the expropriation of property has been written. The subject is directly connected to the notion of ownership which is influenced by many other branches of human thought, such as religion, philosophy, politics and sociology.[1] Any attempt to outline the historical development of expropriation will involve us with those subjects and elements such as sovereignty which conceptually were quite different from those of today. The notions about "right", "ownership", "property" and "sovereignty" were different, and the concepts have been changing during history. However, those concepts were usually limited to the right of others, of neighbours, of the public and of the State.[2]

The bureaucratic system, the administration, the tax law, definitive State budget and the public properties in 3000 B.C. and earlier make it clear that nationalization and the public sector existed far in history which in turn indicates that in ancient times there was a notion of ownership. But it is obvious that concept of property was not quite as comprehensive as it is today.[3]

Under the Mesopotamia System, the individual merchant acted on his own initiative, but like Egypt under Pharaoh, the entire territory of a

1- Mann, F. A, Outlines of a History of Expropriation, 75 L.Q.R., 1959, p. 188.

2- Diosdi Gyorgy, Ownership in Ancient and Pre-classic Roman Law, Budapest, 1970, pp. 150, 131-132.

3- Loc. cit., pp. 50-1.

city State was the property of the city's god and the ruler, *i.e.*, the ruler had full authority to decide about any property under his domination.[4] More than 2000 B.C., there occurred expropriations by the existing civilizations. The most interesting expropriations were those by the King of Akkad, in 2100 B.C., and by the King of Tello in 2400 B.C., which nationalized large stretches of land while making full compensation.[5] In addition, the kings of the shores of Aegean Sea, in Egypt and throughout Asia had a kind of nationalized industries which supplied the needs of the courts, armed forces and partly of the general use on the city market; and the Crown was one of the main producers and distributors of its own national economy (nationalization of production and distribution). The State perhaps controlled up to 90 per cent of its economic potential. The palaces' influence extended even to control over many banking and other economic affairs.[6]

In the days of rising absolutism, both the granting of concessions and the expropriation of property took the form of unilateral administrative act and the individual was very much at the mercy of State.[7] It was a fundamental tenet of the prevailing political systems that the decision of the executive, particularly the king, as positive law, could not be questioned. The King decided what the public interest required, and there was no court of law which would have had

4- Easton, S. C., The Heritage of the Past from the Earliest Times to 1500, New York, 1964, pp. 58-9; Hawkes J., History of Mankind, Cultural and Scientific Development, vol. 1, Pre-history and the Beginnings of Civilization, London, 1963, p. 597, and chapter IV, part II, and pp. 597-629.

5- Heichelheim F. M., An Ancient Economic History, From the Palaeofithic Age to the Migrations of the germanic, Slavic, and Arabic Nations, vol. 1, Leyden, 1958, pp. 22-26, 173.

6- Loc. cit, pp. 173, 179-180, 184.

7- Starr, C. G, A History of the Ancient World, 3rd edition., Oxford, 1983, pp. 222, 279.

jurisdiction or power to review the reasons for and the justification of the king's determination.

The laws in different systems varied. In Roman law, the right of the sovereign to expropriate in the provinces; was restricted to exceptional cases.[8] In English law, Magna Carta, by its 29th Chapter, guaranteed that "no freeman shall be .....disseized of his freeholds or liberties or free customs .... but .... by the law of the land." In addition, by Chapter 19, a constable or his bailiff was precluded from taking corn or other chattels without payment, and by Chapter 21 no sheriff or bailiff could take without payment horses, carts, wood or other goods necessary for the King's household.[9] The earliest English legislation specifically dealing with expropriation was in 1541. The law was carefully drawn provided that measures should be for public purposes. The law provided compensation to be paid in the case of injury to private owners.[10]

The history of French, German, Austrian and Swiss law has provided many similar examples, particularly since the beginning of the seventeenth century.[11] And in Italy the principle that expropriation presupposes a public interest and involves the duty of paying compensation was well established in the statutes of the medieval cities of Italy and by 1600 became the general law of Italy.[12] In Mediaeval times, the theory was based on positive law; accordingly, the sovereign was the source of, and therefore superior to all positive law, although he was subject to and bound by the rules of natural law. Similarly, the main

8- Schulz F., Principle of Roman Law, Oxford, 1936, p. 161.

9- Mann F. A., Outlines of a History of Expropriation, op. cit., pp. 193-4.

10- 33 Hen. VIII, c. 35. See more in Clifford F., History of Private Bill Legislation, London, 1885, vol. 1, p. 9.

11- Clifford F., History of Private Bill Legislation, op. cit., pp. 203-204; Grieke, Natural Law and the Theory of Society, op. cit., p. 466.

12- Calisse C., A History of Italian Law, New York, 1969, p. 690.

propositions which are set out as the foundation of the classical doctrine are:[13]

1- the institution of property originated in the *Jus Gentium* which was a law that flowed from natural law without any assistance from the State and was common to all races of men;

2- the sovereign could bind himself and his successors to his subjects and to other sovereign rulers by contract, the binding force of that is from natural law (*pacta sunt servanda*).[14] The State could interfere only in the cases of *just cause*, and in such cases compensation was due. Thus, private properties were protected by natural law.

However, the important point is that, if the property was privileged and conceded unilaterally by the State, the rights were regarded as freely revocable for the public welfare without the obligation to compensate the expropriated individual.[15] At the time when the right of expropriation was recognized, the system of personal law changed to the system of territorial law. Consequently, aliens became subject to the local law and their property situated in a State became liable to expropriation.[16]

Vattel is probably the first person in the West to raise the issue in the framework of international law. He, in 1758, spoke of a nation's duty of protecting the property of its members, properties acquired on the basis of natural law (divine law), and not those based on positive law, treaties, privileges and so on.[17] He argued that, within the law of

13- Maitland J., Political Theories of the Middle Ages, Cambridge, 1900, pp. 78-81.

14- Jones has a similar point, see in Historical Introduction to the Theory of Law, Oxford, 1940, p. 102.

15- Loc. cit., p. 157.

16- Starr, C. G, A History of the Ancient World, op. cit., pp. 222, 279.

17- Wheaton H., Classics of International Law, Elements of International Law,

nations, the property of a State's nationals should be seen as belonging to the State. Therefore, it was required that the property of those nationals in a foreign State be given full protection. Vattel believed that the property of an individual does not cease to belong to him on account of his being in a foreign country; it still constitutes a part of the aggregate wealth of his nation.

Following a big change in economic structure of the world in fifteenth century, Western European countries engaged in trade and other business activities in the developing countries, and international trade grew rapidly.[18] Since the Nineteenth Century, they were joined by other industrial States, particularly by the United States and Japan.[19] The kind of economic activities and political treatment of developed countries among themselves varied from those towards other nations. Initially, the activities were limited to trading and shipping with irregular contacts with the native population of coastal points. The desire for greater control over the sources of supply in time led to more control of the coastlines and interior locations. With the growth of nation-States in Western Europe, the charters granted to the monopolies of the commercial era set forth rights and obligations that went far beyond commercial matters and dealt with military, religious, political and colonization functions as well. Those charter companies operated as extensions of the parent State and were delegated broad powers to make war, enter into treaties, and to govern the overseas colonies.[20] International investment was an essential

1866, London, 1936, p. 11.

18- The Problem of International Investment, A Report by a Study Group of Members of the Royal Institution of International Affairs, London, 1937, p. 4.

19- Zink D. W., The Political Risks for Multinational Enterprise in Developing Countries, With a Case Study of Peru, London, 1973, p. 3.

20- The East Indian Company was one of them which governed a vast area in South East of Asia. More in Mikesell R. F., Public International Lending for

condition of these increasing activities. The industrialized States' requirements for reliable sources of raw materials led to direct investment in mine, ranch, plantation, railroad, navigation and other infrastructure facilities to get a higher return than they could obtain at home. These activities were followed with the businesses, trades, insurance, banking, transportation and communication facilities.[21]

While most of the developing countries did not exist up to the World War I, or lacked the power to expropriate aliens' property, the expropriations that took place were few, and in the case of foreign property even less. Such expropriations were almost entirely of an individual nature and for public necessity. There were no complications emanating from, e.g., the nature of State economies, which were, at that time, all based on *laissez-faire* principles.[22] It was in this context that the classic rules of expropriation of private property were formed and came to be incorporated into the sphere of international law.

In the 1920s a new form of taking of property emerged which was totally different from the classic forms of expropriation. It stemmed from a distinctive social and economic view and from a new notion of property which was due to two reasons. One was the changes in the economic order of the world and the other factor was the appearance of socialism and the first socialist State in the world. After the nationalizations associated with the Bolshevik revolution in Russia jurists subscribed to different views.[23] They departed from the traditional

Development, New York, 1966, p. 7 et seq.

21- Mikesell R. F., Public International Lending for Development, op. cit., p. 9; The Problem of International Investment, op. cit., p. 5.

22- Amerasinghe C. F., Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice, 41 I.C.L.Q., 1992, p. 23.

23- See Wortley B. A., Expropriation in Public International Law, Cambridge, 1959, p. 35.

rules. Since then, while the authorities of the Western Capitalist States, which had colonized most of the countries or lands in Asia and Africa, have almost invariably insisted on the international minimum standard, authorities and governments of the communist countries have consistently maintained that international law has no minimum standard, leaving the question to the domestic jurisdiction of States.[24] Jurists from developing countries have expressed a variety of views, though usually of a liberal nature. Some of them state that, whatever the rule of international law has been in the past, the modern law is predicated on the premise that compensation is always a matter entirely within the domestic jurisdiction of the host State.[25] Some other jurists from developing nations, including those from most of the Latin American countries, since the nineteenth century, have believed that all that international law require is that the host State treats aliens in the same way as its own nationals.[26] Some others believe that the law has changed in accordance with social needs.[27]

Meanwhile, the governments of the developed countries have played a strong role in the promotion and dictation of capital outflow, which took place on an immense scale, through the chartered companies. The role was dictated by the governments' foreign policy objectives.[28]

24- See e.g. Makarczyk J., Principles of the New International Economic Order, London, 1988, pp., 232-239.

25- See e.g. Girvan N., Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint, in Lillich R. B., The Valuation of Nationalised Property in International Law, vol. 3, 1975, pp. 149-179.

26- Vicuna O., The International Regulation of Valuation Standards and Processes: A Re-examination of Third World Perspectives, in Lillich R. B., The Valuation of Nationalised Property in International Law, vol. 3, 1975, pp. 131-148.

27- Sornarajah M., Compensation for Expropriation: the Emergence of New Standards, 1979, 13 J.W.T.L., pp. 108, 123-131.

Thus, the economic history of the world for the last 500 years show increasing interactions between States. Those interactions, which had considerable political consequences, play a big role in takings of the property of aliens. Therefore, the major trends can be divided into four historical eras:[29]

1- The commercial era; from the age of the great explorers, 1500 to 1850, the era of the European Industrial Revolution;

2- The exploitative era; from round 1850 until the years just prior to the First World War;

3- The concessionary era; from the period immediately prior to the First World War up until the end of the Second World War;

4- The national era; from the end of the Second World War until the present day.

Expropriation and nationalization in developing countries has occurred mostly after major conflicts when big political changes occurred in the world and there was a correspondingly weakening in the role of the investing States. As a result of these political changes, many developing States did not hesitate to use the opportunity against aliens' property. Expropriation in its highest degree began mostly in third world countries after 1945, when the investing States either were defeated in the Wars or had in some other way lost their ability to control their colonies.

In sum, a glance at history indicates that, although economic systems have varied during history, at all stages the individual owner has been liable to have his property taken from him. At no time and in no State

28- Mikesell K. F., Public International Lending for Development, op. cit., p. 9 et seq.

29- Robinson adds another era that is international era, from 1970 up to the beginning the next century; Robinson R. D., International Business Policy, New York, 1964, pp. 2-3.

has there been any support for the proposition that property may not in any circumstances be taken; that it was in some sense sacrosanct and inviolable. Nor is there any evidence that in reality this was ever doubted. On the contrary, the long struggle with regard to the conditions of and the restrictions upon expropriation could not have occurred if the right to expropriation were not assumed and it was not treated as superior to the right of property.[30]

However, many of the constitutions[31] adopted before and since World War I have provided that property should not be expropriated except in the public interest and according to law, and that expropriation should be accompanied by just compensation unless otherwise provided by national law.[32] The provisions of most of those constitutions envisage the possibility of expropriation without adequate compensation only in cases of agrarian reform. And indeed, a League of Nations Conference on the Codification of International Law (1929-1930) failed to reach any definite conclusion in this regard.[33]

For this apparent lack of unanimity on the rules of expropriation or, more particularly, about the determination of a taking which attracts compensation, it may be concluded that it would not be possible to derive particular rules from long historical evolution. The expropriation

30- Mann F. A., Outlines of a History of Expropriation, op. cit., p. 189.

31- There are more than forty-five written constitutions which support public utility and against payment of compensation. See the list of those constitutions in Mann F. A., Outlines of a History of Expropriation, op. cit., p. 208, note 8.

32- The Civil Code of the Russian Soviet Federal Socialist Republic (1927), Articles 69, 70; The Mexican Constitution (1917), Article 27; The Czechoslovak Constitution (1948), Section 9, Para. 2; the Yugoslav Constitution (1946), Article 18.

33- League of Nations' Conference for the Codification of International Law, vol. III; League of Nations Document C. 75. M. 69, 1929, V. 3, and Document C. 351(c). M. 145 (c), 1930, V. 17.

measures which were taken prior to the Second World War are certainly not conclusive. Equal weight must be given to the reasons given for the justification of the measures or for condemnation of the measure by the investing States. The particular historical facts, by themselves, are thus often of little significance since they were not established as customary international law.

****
****
*****
***
*

(SECTION TWO)

THE RIGHT OF EXPROPRIATION IN INTERNATIONAL LAW

The State frequently encroaches upon private and foreign property as a consequence of the normal functioning of its public services or because it is called upon either to assume possession of certain property in order to place it at the disposal of the public services or the public at large.[1] Sometimes States by expropriation not only modify the economic and social structure, but also exclude private or foreign capital from the national economy. In discussing the legal position of expropriation, reference to its different aspects, which govern the behaviour of States on this issue, is inevitable.[2] The reason is that the motives of developing and developed States are sometimes different and the differences are so immense that it becomes difficult to determine the basic conditions of expropriation.

The complications caused by State succession and the emergence and activities of *de facto* governments makes the issue even more difficult. It becomes more complicated when it happens after a violent political struggle for the general recognition of the novel concept of 'economic self-determination' with all its implications.[3] However, in its legal essence, the act of expropriation is clearly attributable to the sovereignty of the State, belonging to the category of acts which are known as

1- Friedman S., Expropriation in International Law, London, 1953, pp. 1, 5.

2- Baade H. W., Indonesian Nationalisation Measures Before Foreign Courts -A Reply, 54 A.J.I.L., 1960, p. 806.

3- Verzijl J. H. W., International Law in Historical Perspective, vol. 1, Leyden, 1968, pp. 188-9.

"supreme executive acts". It amounts to a unilateral act which does not require the acceptance of anyone, still less agreement of the party interested or affected.[4] Therefore, it would be more correct to speak of expropriation as a unilateral sovereign act.

The concept of State sovereignty is also taken to mean that all States are in principle internally self-governing and externally independent.[5] Consequently, all individuals and property within the territory of a State are under its dominion and rule, and foreign individuals and property fall under the territorial supremacy of a State when they cross its frontier.[6] As a qualification to this principle, international law gives States a limited competence to regulate persons or events outside their territory.[7] The concept of the sovereignty of the State allows the State to adopt in virtue of its own sovereign judgement, any measures which it deems appropriate for its own organization. This becomes evident when all changes in the general political structure of a State and the distribution of political forces by which this structure is maintained results in changes in the system of property.[8] Accordingly, States are free to exercise their powers to the extent of the jurisdiction given to them by international law in whichever

4- Hyde C., International Law, Boston, 1947, vol. 1, p. 650; The Sacrosanctity of the Foreign Act of States, 59 L.Q.R., 1943, pp. 165, 167.

5- Staker C., Public International Law and the Property of Aliens, 58 B.Y.I.L., 1987, p. 151.

6- Oppenheim L. F. L., International Law, vol. 1, 1955, p. 287; Staker C., Public International Law and the Property of Aliens, op. cit., p. 152.

7- *Lotus case*, P.C.I.J., 1927, Series A, No. 10, p. 18; *Island of Palmas case*, (1928), 2 R.I.A.A., pp. 829, 838; see more in Akehurst M., Jurisdiction in International Law, 46 B.Y.I.L., 1972-3, p. 146.

8- The different policies of different political parties when they come to power are a result of a such practice; see more in Bullington J. P., Problems of International Law in the Mexican Constitution of 1917, 21 A.J.I.L., 1927, p. 689.

way they wish.[9] Accordingly, the municipal law in some federations varies from state to state. For example, in the United States of America the ownership of land by foreigners is forbidden in sixteen states and in the District of Colombia.[10] The diversity in the various systems of municipal law is too great to enable one to infer the existence of a general rule or even a general standard of conduct. Clear and cogent evidence is needed to establish that a legislature, sovereign in municipal law, has lost or abandoned in her own particular sphere a right to regulate the destination of a property otherwise than subject to conditions which it does not itself impose.[11] Moreover, municipal laws, even if identical in several systems, cannot by themselves create international law. Equally, any restriction imposed by domestic laws on the governments in order to limit them in expropriation of private properties, cannot be extended into international relation with other States, the limitations which are in the nature of constitutional limitations or arrangements and can be modified domestically without appeal to any external authority.[12]

However, it is impossible to hold that every limitation or alienation of property made by a State can be accepted as being expropriation, even if it is so described.[13] It is not without importance for international law to know whether the expropriation act by a given State which is a member of the international community, is constitutional and in general, if it is consistent with municipal law. The problem which might arise would be

9- Staker C., Public International Law and the Property of Aliens, op. cit., p. 152.

10- Friedman S., Expropriation in International Law, op. cit., p. 112.

11- Williams J. F., International Law and the Property of Aliens, op. cit., pp. 16-17.

12- Williams J. F., International Law and the Property of Aliens, op. cit., p. 23.

13- Peaslea A. J., Constitution of Nations, revised third edition, Netherlands, 1968, passim.

that the same act might be judged by international law according to different and possibly contradictory criteria, depending on whether it concerned foreign nationals or not. The consequence might be that an act regarded as unlawful according to municipal and constitutional law might be recognized as lawful according to international law.

Moreover, the manner in which the question of expropriation or nationalization is raised in international law is not always logical. On the one hand, it is asserted that every State has the sovereign right to nationalize private property, and, on the other hand, it is not clear what is its legal effects and privileges in variance with unlawful confiscation in payment of compensation.[14]

The United Nations, as the prime political and legal international institution, has raised the question of right of expropriation by States and developed the principle of sovereignty over natural resources so as to create a balance between the interests of developed and developing countries. The present-day principle emerged, in the aftermath of the achievement of political independence by many new States, in a series of the resolutions of the General Assembly on sovereignty over natural resources. Political independence did not necessarily bring economic independence for those States, and left them to struggle to safeguard their sovereignty through economic independence. The General Assembly of the United Nations has been the best way for developing States to raise the question. The rise of the principle of sovereignty over natural resources has not been without opposition, and some States have waged a prolonged battle in order to deny the principle of complete sovereignty over the natural resources of the peoples in the former colonies and dependent

14- Akinsania A. A., The Expropriation of Multinational Property in the Third World, 1980, op. cit., pp. 16-18.

territories. This opposition, caused by the certainty of losing some economic advantages, has given rise to a clash between developing countries and the developed States.[15]

The United Nations declared the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.[16] The United Nations also declared economic self-determination as one of the principles of international law in the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations.[17] It was also inserted in the International Covenant on Economic, Social and Cultural Rights, by virtue of that right all people may freely dispose of their natural wealth and resources.[18]

Therefore, the resolutions of the United Nations on sovereignty over natural resources can be considered as one important source of international law on expropriation which determine, on one hand, the right of States to expropriate foreign property and contractual rights, and on the other hand, determine the obligation of the expropriating States towards the expropriated ones.

15- Elian G., The Principle of Sovereignty over Natural Resources, Netherlands 1979, p. 23.

16- Article 1(1) of Resolution 1803(XVII) of 14 Decmber 1962 of the General Assembly of the United Nations

17- The principle of equal rights and self-determination of peoples of Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, in U.N. Resolutions Series 1, G.A., vol. XIII, 1970-1, pp. 339-340.

18- Article 1(2) of International Covenant on Economic, Social and Cultural Rights of 16 December 1966, U.N. Resolutions, Series 1, G.A., vol. 11, 1966-68, p. 165.

The General Assembly of the United Nations has adopted a number of resolutions[19] on sovereignty of States over natural resources. The main point about these resolutions at the beginning was to reaffirm the right of States to expropriate foreign investments. Accordingly, some developing States have taken actions for the recovery and strengthening of sovereignty over their natural resources.[20] Implementing the terms of those resolutions would involve a great conflict of interests between the investors which were not ready to lose their acquired rights in developing countries and which aimed at obtaining the highest possible profit from their investments, and the developing countries which were looking for revindication of their rights and were striving for the rapid growth of their economies. The resolutions of the United Nations on this regard were the best legal means to prevent various forms of direct and sometimes brutal interference of the investors' governments in the internal affairs of the host State, when the great interests of the investors have been at stake.[21]

A new State freed from colonial power, from its links of dependence which had kept it attached to the colonial State, could not consider itself really free unless it could exert the prerogatives of complete sovereignty over the natural as well as other resources of its territory which become national riches and resources of the State.

19- The main resolutions are; 626 (VII) of 1952; 1314 (XIII) of 1958; 1515 (XV) of 1960; 1803 (XVII) of 1962; 2158 (XXI) of 1966; 2386 (XXIII) of 1968; 2692 (XXV) of 1970; 3016 (XXVII) of 1972; 3171 (XXVIII) of 1973 and 3281 (XXIX) of 1974 of the G.A. of the United Nations.

20- The Latin American States were the pioneers to take action in this regard; the Law for Recovering Petroleum of July 24, 1971 in Venezuela, the bill on the nationalisation of mineral deposits in Costa Rica and Argentina, and the establishment of the Latin American Economic System are some examples.

21- Elian G., The Principle of Sovereignty over Natural Resources, op. cit., p. 143.

During the process of its development, the principle was understood by different States in different ways. During this period, there was a gradual shift from the notion that the concept was the corollary to the political and legal call for decolonization and self-determination to the notion that it was representative of the political demand for a new international economic order (NIEO).[22]

A study of the resolutions of the General Assembly of the United Nations indicates that the evolution and development of the concept of permanent sovereignty over natural resources and the trends of States in this regard can be divided into three stages:[23]

1 - During the first stage, from 1952 to 1962, the emphasis was on the formulation of the rights of peoples to use and exploit their natural resources as a right "inherent in their sovereignty". The recognition of this right later developed through the debates connected with the draft covenants on Human Rights of 1966.[24] The Special Commission on permanent sovereignty after Resolution 1314 (XII) of December 12, 1958, was established to suggest any recommendations necessary for strengthening the concept of permanent sovereignty of peoples over their national wealth and resources as a basic constituent of the right to self-determination.[25]

22- Visser F., The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests, 21 Comparative International Law Journal of South Africa, 1988, p. 78.

23- Visser has divided the development into two periods and Chowdhury into four stages. However, the division of those development is the subject of controversy.

24- Paragraph 3 of the Resolution 626 of the G.A., U.N. Resolutions, Series 1, G.A., vol. 4, 1952-53, p. 106; Article 1 (1) of the Covenant on Economic, Social and Cultural Rights and on Civil and Political Rights, op. cit.; see also in K. Hossain, Legal Aspects of the New International Economic Order, op. cit., p. 3.

2 - During the second stage which started from 1962, the landmark resolution 1803 (XVII) was adopted. Its principles were reiterated and reaffirmed in a number of other resolutions.[26] The right of expropriation inserted in the resolution was not challenged[27] and in 1972, the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD) in Resolution 88 (XII) of 19 October reaffirmed the sovereign right of all countries freely to dispose of their natural resources for the benefit of national development and stated that:

> "in the application of this principle, such measures of nationalization as states may adopt in order to recover their natural resources, are the expression of a sovereign power, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts, without prejudice to what is set forth in the General Assembly resolution 1803 (XVII)."[28]

During this stage, Resolution 3171 (XXVIII) of 17 December 1973 made a significant contribution to the development of the principle of sovereignty over natural resources. It stated that the application of the principle of nationalization carried out by States is an expression of their sovereignty in order to safeguard their natural resources.[29] Resolution 3171 (XXVIII) and the UNCTAD resolution purported to abolish the right of diplomatic protection. From the language of the UNCTAD resolution and resolution 3171 (XXVIII) it is apparent that the supporters intended to absolve themselves from potential international responsibility

25- Para. 2 of the Resolution 1803 (XVII) of 1962 of the U.N.General Assembly, U.N Resolutions, Series 1, G.A., vol. 9, 1962-63, p. 107.

26- Notably in 8 of the resolutions mentioned earlier in this section.

27- Alfanso Garsia R., The Charter of Economic Rights and Duties of States, P. A.S.I.L., 1975, pp. 230-231.

28- T. D. B. Resolution 88 (13th. Sess.) UNCTAD Doc. TL/B/421. 1972.

29- Para. 3 of the Resolution 3171 (XXVIII) 17 December 1973, of the General Assembly of the U.N, U.N Resolutions, Series 1, G.A., vol. 14, 1972-74, p. 422.

by inserting the provision that any dispute concerning a State's nationalization of foreign-owned property falls within the sole jurisdiction of the courts of that State and were to be resolved in accordance with the national legislation of that State.[30] Accordingly, developing States, in most of the cases involving nationalization of foreign property, have declined to submit the dispute to international arbitration.[31] Moreover, many of those States which voted for the UNCTAD resolution and Resolution 3171 (XXVIII), refused to ratify the World Bank Convention on the Settlement of Investment Disputes.[32]

During this stage, with much greater emphasis in Resolution 2158 (XXI) of 25 November 1966, the U.N. General Assembly tried to strengthen the ability of the host States to undertake the process of development of their natural resources.[33]

Sovereignty as manifested in the Resolutions of the U.N. General Assembly on Permanent Sovereignty over Natural Resources was sometimes used by States as evidence of proof in some cases to defend the expropriatory measures. One of the eminent cases is that of the Iranian nationalization of oil industry. The validity of the Iranian Nationalization Law, enacted in 1951, was challenged in some municipal courts, on the

30- 1, U.N. Doc. TD/B/423, 1973, p. 1475; Resolution 3171(XXVIII), Series 1, G.A., vol. 14, 1972-74, p. 422.

31- Amerasinghe C. F., The Quantum of Compensation for Nationalised Property, in Lillich R. B., The Valuation of Nationalized Property in International Law, vol. III, op. cit., p. 107.

32- Lillich R. B., The Valuation of Nationalized Property in International Law, vol. III, op. cit., p. 194.

33- In the third stage, it was reafirmed that every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever, Article 1, Resolution 3281(XXIX) of 12 December 1974 of G.A. of the United Nations.

ground that the act was incompatible with the rules of international law. However, some other courts upheld the validity of such law by expressly referring to the resolution of the U.N. General Assembly adopted in 1952. That resolution recognized that the right to nationalize natural resources as inherent in the State itself.[34]

In some cases such as *BP v. Libya* (1974), the arbitrator did not touch upon the question of permanent sovereignty over natural resources, but judged the case on the basis of the validity of contracts under international law.[35] Similarly, in *Texaco/ Calasiatic v. Libya* (1977), the arbitrator found that, according to the principle of sanctity of contracts, the concession constituted a binding obligation under international law and that therefore Libya was bound to respect its contractual engagement. The arbitrator rejected Libya's claim that formulation of permanent sovereignty confirmed rights of all States to nationalize foreign investments.[36]

Later, in 1978, in *Liamco v. Libya,* a different position was taken. In this case, the arbitrator, discussing whether a State can be justified in nationalizing petroleum concessions against its own contractual agreements, relied on the Resolutions of the U.N. General Assembly, particularly Resolutions 1803 and 3281 which adopted the Charter, and recognized the legal effect of those resolutions as evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources.[37] Similarly, in the controversial case

34- Eden Court considered the case as illegal, but Japanies and Italian courts judged in contrary, 20 I.L.R., 1953, p. 313; 22 I.L.R., 1955, p. 40; for more information in this regard see Chapter 3 on nationalisation of Iranian oil industry.

35- *BP v. Libya,* 53 I.L.R., 1979, pp. 327, 329, 335.

36- *Texaco v. Libya,* 53 I.L.R., 1979, pp. 485-491, 511.

37- *Liamco v. Libya* (1981), 20 I.L.M., pp. 102-3.

of *Texaco* v. *Libya* (Topco), professor Dupuy decided that:

> "[t]he right of State to nationalize is unquestionable today ..... The exercise of the national sovereignty to nationalise is regarded as the expression of the State's territorial sovereignty. It is an essential prerogative of sovereign for the constitutional authorities of the State to choose and built freely an economic and social system."[38]

Meanwhile, the voting patterns displayed in Resolution 3281 (XXIX) illustrate that the 1974 Charter did not enjoy the majority support of the developed countries.[39] Provisions of Article 2 of the Charter were the main obstacle in the way of consensus.[40] The developed States, emphasizing the provisions of General Assembly Resolution 1803 (XVII), believed that the obligation of States under their agreements should be fulfilled in good faith, and the dispute settlement procedures contained in the agreements should be respected.[41] Accordingly, the arbitrators in *Texaco* and *Aminoil* cases opined that the resolutions adopted after 1962, notably the Resolution 3171 (XXVIII) and Article 2 (2)(c) of the Charter, proclaim political rather than valid legal principles, and did not consider them as customary international law. Equally, there was no consensus on the resolution 1803 (XVII) except that, it secured the viewpoint of developed countries more than the resolution 3171 (XXVIII). France and South Africa had voted against it.[42]

However, developed countries retreated from their traditional position by proposing an alternative provision to be inserted in the Charter which reads, "Each state *has the right to nationalize, expropriate*

38- *Texaco v. Libya*, 17 I.L.M., 1978, p. 20.

39- Art. 2(1) of the Charter, 9 against, 3 abstaining; Art. 2(2)(a), 10 against, 4 abstaining; Art. 2(2)(b), 4 against, 6 abstaining, and Art. 2(2)(c), 16 against, 6 abstaining.

40- 29 U.N.G.A.O.R.C. 2 (1638th. intg), 382-3, U.N. Doc. A/C., 2/SR 1938 (1974).

41- 29 U.N.G.A.O.R. Annexes (agenda item 48) I at 3 U.N. Doc. A/9946 (1974).

42- *Texaco v. Libya*, 17 I.L.M., 1978, p. 30.

or acquisition foreign property for a public purpose, provided that just compensation in the light of all relevant circumstances shall be paid."[43]

While developing countries have not had the bargaining power enough to demand their asserted rights against the investor States, at all the meetings of the developing countries' representatives organized in the world since the sixth special session of the United Nations General Assembly (May, 1974) adopted its documents, the full and permanent sovereign right of each State over natural resources has been acknowledged and the need to set up a new international economic order has emerged as a unanimous desideratum of those States.[44] But, the position of developing countries in negotiations with foreign investors is so weak that, according to the former-Secretary General of the United Nations, the governments of developing countries do not always manage to realize their rights fully.[45] The result does not seem much different even when they knew their rights, due to the type of relations which exist between the developing and developed countries.

Thus, the Declaration adopted in February 1975 by the Dakar Conference of developing countries, provided that developing countries could never reach full and total economic emancipation except through recovering and controlling their natural resources and wealth as well as the means for economic, development, with a view to ensuring the economic, social and cultural progress of their peoples.[46]

Therefore, nowadays, the sovereign right to expropriation is

43- Emphasis added. Quotation from the remarks by Charles N. Brower, former acting legal adviser Dept. of state, in P.A.S.I.L., 1975, p. 233.

44- Elian G., The Principle of Sovereignty Over Natural Resources, op. cit., p. 27.

45- U.N. Document E/5425.

46- U.N. Document E/AC/62/6 of April 15, 1975.

supposed to be no longer controversial. While developing countries are still vulnerable to exercise their right of expropriation, the controversy has remained, however, over the right to expropriate contractual rights of aliens and the obligations and conditions that are attached to this sovereign right. Therefore, the definition of the precise scope of the principle of sovereignty and its implications remain important. The reason is the progressive nature of the development of the principle from which rules can be derived to safeguard the interests of developing countries involved in expropriation of their natural resources and foreign investments.[47]

****
****
*****
***
*

47- Chowdhury S. R., Permanent Sovereignty Over Natural Resources, in Hossein K and Chowdhury S. R., (editors.), Permanent Sovereignty Over Natural Resources in International Law, London, 1980, pp. 33-43.

(SECTION THREE)

SANCTITY OF TREATIES AND CONTRACTS AND EXPROPRIATION OF ALIENS' CONTRACTUAL RIGHTS

In an age in which the trading activities of States are increasing, and economic progress of underdeveloped countries has become the object of international and national concern, the rights and expectations of the alien investors in many countries have suffered an alarming setback which has raised the issue of State responsibility for losses arising out of contractual relations between States and aliens.[1]

Difficulties, for the purposes of international law and the world community, may result from the change in the political sovereignty over a particular territorial entity. For example, questions arise as to how far a new State is bound by the treaties and contracts concluded by the previous sovereign of the territory? What happens to the public property of the previous sovereign, and to what extent is the new authority liable for the debts and obligations arising from the contracts concluded by the old?[2]

The importance of the issue rests, on one hand, on the realities that Sanctity of treaties and contract contradicts the right of States to expropriate aliens' property. On the other hand, most of the bilateral treaties between States, particularly between developed and developing States, have political implications and are mostly not in the interest of the

1- Mann F. A., State Contracts and State Responsibility, A.J.I.L., 1960, p. 572.

2- Shaw M. N., International Law, third edition, Cambridge, 1991, p. 604.

weaker States.

Accordingly, in the decolonization process a new theory of "clean state" emerged to excuse the new States from the obligations created by the predecessor sovereign in the absence of the will and probably against the interests of those people.[3] This rule was applied to Czechoslovakia, Finland and the other States which emerged after the First World War, and it still applies to intensely "personal treaties" such as treaties of alliance and treaties entailing membership of the international organizations.[4]

A regime may change through a *coup d'etat* or a revolution which involve either denying of the right of people to self-determination or applying that right. It is vital to clarify the situation, because different rules of law would apply to each of them.

Treaties create the largest part of the international rules on the international obligations and the rights of a sovereign. The other parts are either relatively straight-forward or unimportant. The real uncertainty concerns the public policy of the new State or regime which was highly topical in an era of decolonization.[5]

While there is an argument to the effect that a newly independent State does not succeed to the treaties of its predecessor,[6] most of the States which have become independent since the Second World War have accepted rights and obligations under most of the treaties made by the former colonial powers, but their reasons for doing so are hard to

3- Loc. cit.; see also O' connell D. P., State Succession in Municipal Law and International Law, vol. 2, Cambridge, 1967, p. 25.

4- Akehurst M., A Modern Introduction to International Law, 6th edition, London, 1987, p. 162.

5- Verbit G. P., State Succession in the New Nations, P.A.S.I.L., 1966, pp. 119-124.

6- Loc. cit.

discover. Until it becomes clear why they have accepted rights and obligations under such treaties, it is impossible to deduce a rule of customary law from their practice.[7] Doing so would fail to account for the sizeable minority of cases in which newly independent States have refused to be bound by their predecessors' treaties.[8] There is a theory which argues that new States are more likely to succeed to "law-making treaties" than to "contract treaties".[9] But the accepted principle of international law, both conventional and customary, is that a State is not bound without its consent (autonomy of will). This principle has been expressed in conventions, mentioned by the Permanent Court of International Justice,[10] practiced and has acquired *opinio juris*.[11]

Consent is the accepted basis of obligations and the rules of law binding upon States derive from their own free will to regulate their relations with coexisting independent communities or with a view to achieving common aims.[12] Of course, consent may take various forms. There is little to be gained from discussion about the different methods in which true consent can be obtained and to what extent implied consent falls with in the concept of consent. But broadly speaking, everybody understands what consent means, and it is a common knowledge that people under undemocratic regimes are unable to consent.[13]

7- Verbit G. P., State Succession in the New Nations, op. cit., PP. 124

8- O'Connell D. P., State Succeion in Municipal Law and International Law, op. cit., p. 223.

9- Jenks C. W., State Succession in Respect of Law-Making Treaties, 29 B.Y.I.L., 1952, pp. 105-144.

10- *Lotus case*,(1927), P.C.I.J., Series A, No. 10, 1927, p. 35.

11- Loc. cit.; Leo Gross and Louis B. Sohn, The Demand For Economic Justice, P.A.S.I.L., 1981, pp. 186, 193.

12- *Lotus Case*, P.C.I.J., op. cit., p. 18.

13- Khorshid Salman, Justice and the New International Economic Order, Kamal Hossain, Legal Aspects of the New International Economic Order, Oxford, 1980, pp. 108-109.

The general principle is that a party to a contract is bound to respect its consent expressed in an agreement in good faith.[14] When this principle is applied to States, the element of consent must be constituted by the will of the people rather than a signature of an undemocratic dependent government or a dictator, who is not authorised by his nation to undertake any obligation.[15] This kind of consent is basic to enable States, in any particular way, as Sohn states, to make fully binding treaties, accept responsibility and enshrine in a system of international co-operation. They can use their will to create new rules of international law, ratifying treaties which limit their powers.[16]

Similarly, in private international law of contract, mistake, misrepresentation, fraud, coercion, governments interventions, legislation and similar defects of consent in contracts would influence the validity of the contracts. It has been proposed that such defects should be treated along the same lines as a lack of full capacity.[17]

In the past, developing countries, if not fully dependent on developed States, have often been at a considerable disadvantage in negotiating contractual arrangements as a result of severe international

14- Nwogugu E.I., The Legal Problems of Foreign Investment in Developing Countries, Manchester University Press, 1965, p. 185.

15- Article 21 (3) of Universal Declaration of Human Rights expressly states that "[t]he will of the people shall be the basis of the authority of government, this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." The recent referendum of Denmark and Norway on the Maastricht Treaty and the obligations of the Government of those countries toward the other members of the EC are examples; see more in Salman Khorshid, Justice and the New International Economic Order, op. cit.

16- Teson R.F., Interdependence, Consent, and the Basis of International Obligation, P.A.S.I.L.,1989, p. 562; and Leo Gross and Sohn L. B., The Demand for Economic Justice, op. cit, pp. 193-4.

17- Wolff M., Private International Law, Second edition, Oxford, 1950, p. 442.

asymmetries in the political and economic balance of power which enabled developed countries to impose restraints on their ability adequately to protect their own interests. It has frequently happened that as countries have developed politically and economically, they have found that arrangements negotiated in the past and under very different conditions have left a pattern of control or authorised aliens some behaviour over a country's land or other natural resources that is no longer acceptable.[18] Perhaps the largest and, in many ways, the most important nationalizations arise from a perceived imbalance of bargaining power in mining activities, of which recent history of the international oil companies in the Middle East provides dramatic examples.[19]

Therefore, as a fundamental right, consent which usually derives from the idea of sovereignty, the right to self-determination or State autonomy, becomes the proper source of international obligations. Accordingly, only if a State is free or autonomous, or sovereign can it be obliged through its voluntary submission, that is through agreement or contract.[20] This principle is not open to doubt and implies the existence of a body of public international law which is to rule the contractual agreements between international persons. No international lawyer will experience any difficulty on this score.[21] Without representing the bulk

18- Rees J. and Odell P., The International Oil Industry; An Interdisciplinary Perspective, London, 1987, p. 142.

19- Edith Penrose, George Joffe, and Paul Stevens, Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, in 55 M.L.R., 1992, p. 353.

20- Article 51 of the Vienna Convention on the law of treaties deals with the special case where the expression of a state's consent to be bound by a treaty has been procured by the coercion of its representative and provides that the expression of consent in such a situation is without any legal effect; see more on the issue in Sinclair I.M., The Vienna Convention on the Law of Treaties, second edition, Manchester University press, 1984, pp. 172-181.

of a society it is impossible to implement this principle and secure the interests of that society.[22] The reality of the most of the developing countries is that they usually are not the representative of their nation and they cannot implement the consent of their nations fully in their international relations.

As far as the issue of expropriation is concerned, there have been numerous treaties between States and many contracts between States and aliens dealing with the question. For the latter, there are no international law rules of contract law,[23] and the legal positions of the two categories are different.

Such a legal position of State contracts was probably a reason that obliged the United Kingdom, in the *Anglo-Iranian Oil Co. Case*, to emphasise *inter alia* the notion that, if the grantor State has expressly undertaken not to terminate the concession unilaterally, the termination of such a contract would be unlawful.[24] Thus, expropriation of State contract is far from the general notion of breach of contract, even if a predecessor State or a previous government engage itself, by a contract not to do so.[25] Therefore, it is necessary to survey the legal position of State contracts and treaties between State in regard to the issue of expropriation.

21- Mann F. A., Studies in International Law, Oxford, 1973, p. 212.

22- It is a common principle of civilized nations which has been recognized as a source of international law.

23- There are some international bodies such as ICC which have played a significant role in unifying the form of international contracts, but they have not been proceed through treaties, obligatory to States; Bowett D. W., State Contracts with Aliens, 59 B.Y.I.L., 1988, p. 51.

24- P.C.I.J., Pleadings 81, pp. 87-92.

25- De Arechaga E. J., Application of the Rules of State Responsibility to the Nationalisation of Foreign-owned Property, in Kamal Hossain, Legal Aspects of the New International Economic Order, Oxford, 1980, p. 221.

1 - TREATIES BETWEEN STATES

Treaties between States generally comprise a part of international law. In so far as they relate to expropriation, they could be divided into four groups.

1 - In the first group of treaties States are to comply with international law by providing for payment of fair compensation on expropriation, which payment may, in some cases, have to be made in advance. The position of foreigners was regulated by conventions in accordance with international law.[26] For example, the Treaty of Lausanne[27] of July 24, 1923, between the Principle Allied Powers, Greece, Romania and Yugoslavia on the one hand, and Turkey on the other, as well as the Conventions between Turkey and Switzerland of 1930,[28] Austria of 1924,[29] Bulgaria of 1925,[30] Poland of 1931[31] and Sweden of 1928[32] provided that the property of foreigners might not be expropriated except

26- Friedman S., Expropriation in International Law, London, 1953, pp. 99-100.

27- Article 6 of the treaty of Lausanne on July 24, 1923, in U.K.T.S., No. 16 (1923),P. 145.

28- Article 5, Convention of Establishment Between Switzerland and Turky of December 13, 1930, 129 L.N.T.S., p. 335.

29- Article 8, Convention Respecting Conditions of Residence of Austrian Nationals in Turky and of Turkish Nationals in Austia of January 28, 1924, No. 822, 32 L.N.T.S., p. 309.

30- Article 8, Convention respecting Condition of Residence of October 18, 1925, Between Bulgaria and Turky,No. 1281, 54 L.N.T.S., p. 141.

31- Article 7, Convention Respecting Conditions of Residence, August 29, 1931, No. 3339, 144 L.N.T.S., p. 373.

32- Article 6, Convention of Commerce and Navigation of February 4, 1928, No. 1994, 88 L.N.T.S., pp. 159, 161.

for reasons of public interest recognized by law and in return for fair compensation to be paid in advance. Similar provisions were included in Article 8 of the Convention between Poland and Turkey in 1923 respecting conditions of residence and business and in Article 1 of the Treaty of Friendship, Commerce and Consular Rights between Germany and the United States of America in the same year.[33]

In the Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic, with reference to requirement by international law to secure and protect the nationals of each of the contracting parties, it was stated that the property of nationals, corporations and associations of either High Contracting Party should not be taken except in accordance with due process of law and not without the prompt payment of just and effective compensation.[34] The Treaty of Amity between Iran and the United States is one of these treaties through which the property of the nationals of each High Contracting Parties were to be treated according to international law.[35]

In some of these treaties, without particularly invoking international law as a principle for regulating the conduct of the parties in their mutual relations, provided that expropriation may only carried out on payment of just or fair and equitable compensation. For example, the Convention between Albania and Italy of 1926 as well as in the Convention of Commerce, Navigation and Establishment between France and Greece of 1929,[36] provided that property of nationals of each of the contracting

33- 118, 122 B.F.S.P. (1923), p. 983, (1925), p. 807.

34- Article 5(2) of Treaty of Friendship, Commerce and Navigation Between U.S. and Italy of February 2, 1948, Treaties and International Acts, Series 1965,

35- See the discussion on the treaty of Amity Between Iran and U.S. in the last chapter on "post-Revolution Expropriations in Iran".

36- Article 21 of Convention of Commerce, Navigation and Establishment

parties in the territory of the other might only be expropriated for a legally recognized public purpose and on payment of just compensation.[37] Similarly, the contractual rights of nationals were secured in the Treaty of Commerce, Establishment and Navigation of March 2, 1959, between the United Kingdom and Iran[38] provided in Article 8 for "constant and complete protection and security" for the persons and property of nationals and properties of the parties. Article 8(2) provided that the parties should accord fair and equitable treatment to such nationals and companies and to the related property and enterprises; should refrain from applying unreasonable or discriminatory measures that might impair their rights and interests; and should ensure that their contractual rights are afforded effective means of enforcement in conformity with the applicable laws. Each Party also undertook to ensure equitable treatment for the nationals and companies of the other Party in the matter of expropriation and to make prompt and adequate compensation.[39]

2 - The second group of the treaties of the later date contemplates the possibility of expropriation being carried out regarding the particular activities due to the establishment of a monopoly which would affect the foreign trade of a particular State. In such cases, the parties were to be sure that the monopolized institution should grant the trade of the other contracting parties fair and equitable treatment, influenced solely by

Between France and Greece of March 11, 1929, 95 L.N.T.S., 1929, p. 417.

37- See also 122 B.F.S.P. (1925), p. 16.; Treaty of Commerce and Navigation between Italy and the U.S.S.R. of 1924, Art. 6, 120 (B.F.S.P.) (1924), p. 659. The Agreement between Germany and the U.S.S.R. of 1925, 122 B.F.S.P. (1925), p. 707.

38- Cmnd. 698, Iran, No. I (1959).

39- Loc. cit.

considerations appropriate to private commerce. As an example, the commercial treaty between the United States and Sweden, as well as treaties between the United States and numerous other countries among which those concluded with Canada, Ecuador, Salvador, Finland, Honduras, the Netherlands, Switzerland, the United Kingdom and Brazil deserve special mention.[40]

3 - The third group of treaties simply admits the legality of past expropriations even without compensation. The example is the Treaty of Rapallo of 1922 between Germany and Russia.[41]

These treaties do not deal with the question in a uniform manner. However, they are supposed to be binding by reason of the fact that they were agreed by States which were subject of international law. Therefore, subject to international law, they could include anything in which the contracting parties found necessary. The geographical distribution of the contracting parties clearly shows that provisions protecting private property against measures of expropriation mostly figure in treaties between States possessing similar institutions. Where the States' institutions differ, as in the case of the Soviet Union, these protective rules are abandoned and the expropriatory measures have been expressly affirmed in the relations of the Soviet Union with certain States.[42]

The important point is that, in relations between developed and developing countries, the rules of law were developed by the powerful States in order primarily to promote their own interests, while the developing countries in earlier decades were mostly either colonies and

40- 2 Hackworth, Green Haywood, Digest of International law, Washington, U.S. Government Printing Office, p. 67.

41- 118 B.F.S.P. (1923), p. 586.

42- Friedman S., Expropriation in International Law, London, 1953, p. 101.

dependencies of developed States or they were politically and militarily weak and provided important sources of raw materials and perhaps labour to those powers. However, when States are involved in a treaty prohibiting the respected States to expropriate the properties of the nationals of each other, they create a different kind of legal relationship between themselves which varies from the obligations that arise from a contract between a State and an alien.[43]

As it was mentioned earlier, developing countries are unable to implement their complete sovereignty and exercise their free will in their international relations, and they do not have a strong position in all affairs, specially in trade and economy.[44] Therefore, when they get an excuse, they encroach the properties belonging to the powerful States or their nationals which they think that they are privileged.[45] In doing so, developing States are aware that, if a State limited its right to nationalize the property of nationals of another State by the terms of an international agreement, but, nevertheless took such property rights in a nationalization measure without any convincing reason, it commits an international illegal act. As it was mentioned in *Chorzow Factory* case, the act is illegal even if adequate compensation is paid for the taken property.[46] It is wrong, it is supposed, because the State without any duress divested itself from the power to exercise the right.[47]

In the case of the *Chorzow Factory* the Permanent Court of International Justice determined that compensation should be paid to

43- Jessup P.C., Non-Universal International Law, 12 Col.J.I.L., 1973, p. 419.

44- The bargaining power of developing countries.

45- Most of the nationalisations throughout the word have happened after radical changes in the developing countries toward more independence.

46- *Chorzow Factory* case, P.C.I.J., Series A, No. 17, p. 46.

47- White G., Nationalisation of Foreign Property, New York, 1961, p. 154.

Germany for the injury to the property of the German nationals resulting from Poland's breach of the Geneva Convention, and stated that the act of Poland constituted breach of the Convention rather than expropriation which was lawful act. It was a seizure of property, rights and interests which were secured by a treaty between the two States and could not be expropriated except under certain conditions fixed by Article 7 of the Convention.[48] In its judgement the Court stated that reparation for an act contrary to international law should as far as possible eradicate all the consequences of the act and restore the *status quo ante*. The injured State was entitled to restitution of the property or, if that were not possible, to payment of a sum corresponding to the value which such a restitution would bear, and also to the award of damages for any loss sustained which would not be covered by restitution in kind or payment in place of it.[49]

There are not many examples of nationalization in breach of treaties in force between States. Still, there are some cases which have occurred on the international scene. Turkey and Hungary signed a treaty on December 20, 1926, protecting the property of their nationals in the territory of each other.[50] Article 7 of the Convention provided that such property might not be expropriated except for reasons of public interest recognized by law and in return for fair compensation to be paid in advance. In fact, none of the Hungarian nationalization decrees provided for compensation to be paid in advance. In most cases the decrees went no further than a recognition that some compensation would be paid in the future in accordance with ministerial regulations.[51] Of the three treaties entered into by Romania dealing with expropriation, two lay down a

48- *Chorzow Factory* case, op. cit., p. 46.

49- Loc. cit., p. 47.

50- Convention Regarding Conditions of Residence, December 20, 1926, Between Hungary and Turky, 72 L.N.T.S., (1928), No. 1696, p. 245.

51- White G., Nationalisation of Foreign Property, op. cit., p. 185.

standard of national treatment,[52] and the third, with Switzerland,[53] provides that in the matter of measures of expropriation for purposes of public utility or of general concern nationals of the contracting parties are to receive no less favourable treatment than that granted to the nationals of any other country. The protection afforded by these treaties, with regard to the Eastern European nationalizations which occurred irrespective of the nationality of the former owner, is without effect. For, under communist ideology, little protection is to be given to private individuals, nationals or aliens. Poland and Czechoslovakia in 1947 concluded a treaty of commerce to protect their nationals' property against any action violating the right of ownership or use of property unless it similarly subjects to the same restrictions the property, rights or interests of its own nationals.[54]

There were different conclusions in the cases of *Mavrommatis Palestine Concessions, Some Forests in Central Rhodopia* and the Case of *Certain German Interests in Polish Upper Silesia.* In the first case,[55] Greece claimed that Britain, as the mandatory power in Palestine, was liable to make reparations for loss caused to its national, M. Mavrommatis, which loss arose from the refusal of Britain to respect the Palestine concessions of Mavrommatis as required by Article 9 of Protocol XII annexed to the Peace Treaty of Lausanne of 1923.[56] The

52- Article 3 of Greece/Romania, Convention of Establishment of August 11, 1931, 130 L.N.T.S., 1933, No. 2982, p. 73; Article 3 of Yugoslavia/ Romania, Treaty of Establishment, Commerce and Navigation of May 13, 1937, 197 L.N.T.S., 1939, No. 4611, pp. 147, 149.

53- Article 6, Convention Regarding Conditions of Residence and Business Between Romania and Switzerland of July 19, 1933, 152 L.N.T.S. 1934, p. 93.

54- Article 1, 2, 3, of Treaty of Commerce 4 July 1947 Between Polish Republic and Czechoslovak Republic, 85 U.N.T.S., No. 1146, p. 212, 214.

55- *Mavrommatis Case,* P.C.I.J., Series A, No. 5, p. 6.

Permanent Court of International Justice found that Protocol XII, relating to certain concessions granted in the Ottoman Empire, obliged Britain to respect and protect concessions subsisting at the conclusion of the protocol. Consequently, the Court held that the mere grant by Britain of a new concession, giving the new concessionaire a right to demand the expropriation of existing concessions conflicting with his own, was contrary to the protocol, and thus violated international law.[57]

In the case of *Some Forests in Central Rhodopia* (*Greece* V. *Bulgaria*), Greece claimed that Bulgaria violated article 181 of the Treaty of Neuilly,1919,[58] which confirmed previous treaties conferring special protection on private property rights in parts of Bulgaria. The arbitrator, Osten Unden, held Bulgaria responsible to Greece for failing to respect the acquired rights of Greek nationals as required by the treaty. He found that, as a reparation for this breach of international obligation, an indemnity was due to Greece.[59]

One of the most important and oft-mentioned cases on the breach of a treaty is the celebrated case of *Certain German Interests in the Polish Upper Silesia*. After the First World War, as the result of some changes in the boundaries of Germany and Poland, the two countries concluded the Geneva Convention of 1922 to regulate private property or interests in Upper Silesia.[60] According to the convention, each party was required to recognize and respect property rights acquired by private and juristic

56- Loc. cit.

57- Loc. cit., pp. 45, 51.

58- Arbitration Under Article 181 of the Treaty of Neailly, Preliminary Question, Greece v. Bulgaria, 6 I.L.R., 1931-2, p. 391; See the translated text from French in 28 A.J.I.L., 1934, p. 760.

59- 28 A.J.I.L., op. cit., pp. 802,807.

60- Certain German Interests in Polish Upper Silesia, 25 August, 1925, 3 I.L.R., 1925-26, p. 426.

persons before the transfer of sovereignty. In respect to Polish Upper Silesia, the right was given to Poland to expropriate German-owned property subject to special conditions. But it was prohibited from liquidating the property rights and interests of German nationals or companies in Polish Upper Silesia.[61] Nonetheless, Poland by legislation deprived some German nationals of their property in contravention of the Treaty. The Permanent Court of International Justice in its judgement of 25 May 1926 declared Polish law to be incompatible with the regime established by the Geneva Convention.[62] Responsibility for breach of such a treaty was, the Court argued, that international law involves an obligation to make reparation in an adequate form. Therefore, reparation is the indispensable complement of a failure to apply a convention without the necessity of being mentioned in the convention itself.[63] The latest of this group of treaties is the Treaty of Amity between Iran and the United States which will be discussed in more details in chapter four.

4 - The other group of treaties which ought to be mentioned are investment treaties. There has been a question whether the repetition of the formula in those treaties can show a kind of State practice, and therefore, establish customary international rules on the issue of expropriation.[64] To create international customary law, it is necessary that the parties to such treaties, in entering into them, must actually intend

61- Judgement No. 7 (merits), P.C.I.J., Series A, No. 7, pp. 20-1.

62- Loc. cit., p. 24.

63- Chorzow Factory (Jurisdiction) case, P.C.I.J., Series A, No. 9 (Judgement No. 8), p. 21.

64- Peters P., Schrijver N. J. and De Waart P. J. I. M., Foreign Investment and State Practice, in Hossain K. and Chowdhry S. R.(editors.), Permanent Sovereignty Over Natural Resources in International Law, London, 1984, p. 111; Robinson D. R., Expropriation in the Restatement (revised), 78 A.J.I.L., 1984, p. 177.

to express that particular view, and more importantly must exercise the same elsewhere in the absence of such treaty obligations. In other words, it must be accompanied by *opinio juris*.[65] International practice indicates that this is not the case with respect to investment treaties. The vote to the U.N. General Assembly Resolutions on Permanent Sovereignty Over Natural Resources indicates that many States, which agreed to the terms of investment treaties to extend advantageous treatment to foreign investors, were not in fact favourable.[66]

The effect of such treaties in making norms of international law has been doubted by some international lawyers.[67] They have likely been the only way to receive foreign investment and conclusion of those treaties seem have been inevitable rather than being legally desirable. Therefore, there is no convincing evidence to indicate that the terms incorporated in such treaties are declaratory of international law. Moreover, the very existence of these treaties is a sign that the rules of expropriation of aliens' property, particularly the question of payment of compensation, have not been accepted as customary international law by the international community, otherwise a mere reference to the rules of international law would have been sufficient.

65- Akehurst M., Custom as a Source of International Law, 47 B.Y.I.L., 1974-75, pp. 4, 43; see also Parry and Grant, Encyclopaedic Dictionary of International Law, London, 1986, pp. 81-2.

66- For example, the vote to the Charter of NIEO indicates that about 120 States voted to the provisions which were not favourable to such investment guarantees.

67- Francioni F., Compensation for Nationalisation of Foreign Property: The Borderline Between Law and Equity, 24 I.C.L.Q., 1975, p. 264; Dolzer R., New Foundations of the Law of Expropriation of foreign Property, 75 A.J.I.L., 1981, p. 557, 566; Voss J., The Protection and Promotion of foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies, 31 I.C.L.Q., 1982, p. 686; Asante S. K. B., International Law and Foreign Investment: A Reappraisal, 37 I.C.L.Q, 1988, p. 208.

2 - CONTRACTS BETWEEN STATES AND ALIENS

There is no doubt that international law has the capacity to develop the rules of contracts between States and aliens through bilateral and multilateral treaties but, as was mentioned earlier, at present there are no international rules of contract law governing the relations of States and aliens.[68] The reason is that, when a State enters into a contract with a private person who is a national of another State, if that person alleges that the contracting State has failed to perform its obligations under the contract, the national must exhaust his remedies before local courts before the alien's government can espouse the claim in an international tribunal. The claimant State will have to allege and prove a cause of action under international law and cannot allege a breach of international duty, if any, arising under municipal law.[69]

Industrialized States, emphasizing the obligations of States to fulfil such contracts, argue that the text of the Resolution 1803 of 1962 places on the same footing inter-State agreements and those concluded by a State with private foreign companies.[70]

Developing countries, while not denying the general duty of all

68- Bowett D. W., State Contracts with Aliens, op. cit., p. 54.

69- The rule does not apply where there is a special agreement between the party States or dispute is submitted to an international tribunal by way of compromise. See the Serbian and Brazilian Loan Cases, P.C.I.J., Series A, Nos. 14, 15.

70- De Arechaga E. J., Application of the Rules of State Responsibility to the Nationalisation of Foreign-owned Property, op. cit., p. 228.

States to fulfil their obligations in good faith, consider that such agreements are not international agreements, since they were not concluded between States and they do not have international status, because private companies are not subjects of international law, a view supported in the *Anglo-Iranian Oil Co.* case by the International Court of Justice.[71]

However, the question arises, if there is no firmly established international law in this field, what is meant by references to international law in such contracts? Similar to the *Anglo-Iranian Oil Company* case, in the case of *Serbian Loans,* the Permanent Court of International Justice, dealing with the issue stated that:

> "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[72]

In clause 28 of the Libyan concession to the Topco Company, it was provided that;

> "This concession shall be governed by and interpreted in accordance with the principles of the law of libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals."[73]

There seems to be a contradiction in the statement, when coincidence between the Libyan law of contract and international law is impossible; Libyan law governs the contractual relations in a single society, while international law contains no rules about contracts. It may be argued, as has been forwarded by some legal commentators,[74] that international

71- The Anglo-Iranian Oil Company case will be discussed in a separate chapter; see I.C.J. Reports, 1952, p. 113.

72- *Serbian Loans Case,* 1929, P.C.I.J., Collection of Judgements, Series A, Nos. 20/21, p. 41.

73- Award on the Merits in Dispute between Topco/California Asiatic Oil Company and the Government of Libya,17 I.L.M., 1978, p. 11; Texaco v. Libya, 53 I.L.R., 1979, p. 404.

law, while containing no rules about private law contracts, does contain rules about treaties which can be used by analogy, including the fundamental rule of *pacta sunt servanda*.[75]

In the *Topco case*, the arbitrator Dupuy proposed that some of the State contracts or concessions, by virtue of their special features such as the length of term, governance of international law to certain aspects of the agreements, provision for international arbitration therein, having a State as a party and strategic importance of their subject matter, might be assimilated to an international agreement, and international principles such as the rule of *pacta sunt servanda* apply to them.[76]

This kind of analogy does not seem appropriate, and many writers[77] have rejected this idea. For, an investment contract between a State and a private entity is not a treaty and there are a lot of differences between an agreement under international law between two equal, sovereign States and a contract between a State and a private party governed by the State's own law or public policy. The difference is that a State cannot use its own municipal law to vary its treaty obligations toward another State, but with a private law contract, States commonly assert that right.[78] Perhaps it was such a difference which caused contradictory arbitrations in the Libyan Nationalization Cases. In *Texaco*

74- Jennings R. Y., State Contracts in International Law, 37 B.Y.I.L., 1961, p. 156; see also Paasivirta E., Internationalization and Stabilization of Contracts Versus State Sovereignty, 60 B.Y.I.L.,1989, p. 315.

75- Bowett D. W., State Contracts with Aliens, op. cit., p. 54.

76- *Topco case*, 17 I.L.M., 1978, p. 17.

77- Friedman S., Expropriation in International Law, op. cit., pp. 140-42; Higgins R., The Taking of Property by the State, op. cit., p. 308; White G., Nationalisation of Foreign Property, op. cit., p. 90; De Arechaga E. J., Application of the Rules of State Responsibility to the Nationalisation of Foreign-owned Property, op. cit., pp. 190-91.

78- Bowett D. W., State Contracts with Aliens, op. cit., p. 55.

v. *Libya* case, Dupuy argued that, as a consequence of the illegality of the act (breach of contract), restitution would be the primary remedy, and compensation would serve as a secondary remedy if restitution were not possible.[79] This course was not exactly followed by Lagergren as arbitrator in *BP* v. *Libya,*[80] and the argument of Mahmassani as arbitrator in the *Liamco* case was quite different.[81] The latter case based his judgement on the rules of expropriation. Consequently, different judgements were made for those nearly similar cases, and less compensation was decided to be paid for the case of *Liamco v. Libya.*

In the *Aminoil case,* the tribunal did not pay attention to such contentions and held that concession contracts in recent years have undergone changes to the effect that the State party can interfere with them without the fear of its action being branded unlawful.[82]

Similarly in the *Amco Asia Corp* v. *Indonesia,* the Tribunal was hesitant about granting a remedy in restitution. The case concerned a claim that the Indonesian Government had unlawfully revoked an investment license granted to the alien corporation and the Tribunal said:

> "It is obvious that this Tribunal cannot substitute itself for the Indonesian Government, in order to cancel the revocation and restore the licence.,...., and it is more than doubtful that this kind of *restitution in integrum* could be ordered against a sovereign state."[83]

Similar confusion was apparent in the case of the *Democratic Republic of the Congo* v. *Venne* where the Supreme Court of Canada rejected the decision of the lower courts. Venne, an architect, claimed to have been retained by the Congo Government to prepare plans and

79- *Texaco v. Libya,* (B- Principles of International Law with Respect to Restitutio in Integrum), 53 I.L.R., 1979, pp. 497- 508.

80- Loc. cit., pp. 329-330.

81- *Liamco v. Libya,* 62 I.L.R., pp. 143-4.

82- *Aminoil v. Kuwait,* 66 I.L.R., 1984, p. 591.

83- *Amco Asia Co. ET. AL v. Indonesia,* 24 I.L.M., (1985), p. 1032, para 202.

sketches for the Congo Pavilion, but the Government had decided not to proceed. The Government sought to plead sovereign immunity, but the lower courts dismissed this plea on the ground that the contract was a private commercial transaction and not an act of State. The Supreme Court, by majority, allowed the Governments appeal.[84]

Therefore, in situations where a State expropriates the subject of contract or any other commercial enterprise which has to operate within that State's territory, the likelihood of restitution as remedy for the expropriation is remote.[85]

Therefore, the treatment of a lawful expropriation under international law as breach of contract and therefore, as an international wrong, would have been both confusing and irrelevant.[86] The reason is that a contract between an alien and a national of a State can be frustrated by interference of the authorities of that State, but it is illegal when the contract is between a State and an alien. There is, after all, a distinction between the breach or repudiation of a concession agreement and its termination for purposes of nationalization. The *pacta sunt servanda* rule clearly applies to breach of contract. An investor has a right to expect normal performance of an agreement, and a host State should be responsible if it fails to perform or repudiates its obligations.[87] But, if the authority to nationalize private property is an attribute of sovereignty, such principles as "good will" cannot be applied to agreements which are incompatible with that implied power.[88]

84- Supreme Court of Canada, 1971, S.C.R., p. 997.

85- Bowett D. W., State Contracts with Aliens, op. cit., p. 60.

86- Mann F. A., State Contracts and State Responsibility, 54 A.J.I.L., 1960, p. 576.

87- Lillich R. B., The Valuation of Nationalised Property in International Law, op. cit., Vol. 3, p. 58.

In the *Shufeldt's* v. *Guatemala,* the Arbitrator Sir Herbert Sisnett asked himself whether an "injustice" had been committed against an alien subject, in which case the Government of Guatemala ought to make compensation for the injuries.[89] Accordingly, he said:

> "What does the word "right" in this question mean? It can only mean an equitable right of which international law takes cognizance. It can not mean legal right enforceable only in keeping with Guatemalan law."[90]

Similarly, the International Court of Justice in the Iranian Oil Nationalizations declared that the 1933 Agreement was nothing more than a concessionary contract between a government and an alien corporation to which the United Kingdom was not a party and which did not in any way regulate the relations between the two governments. Iran had promised[91] to negotiate with the company, but it was never considered as a treaty by which Iran was bound *vis-a-vis* the United Kingdom.[92]

Hyde holds to the more radical view that a State may, in the exercise of its power as a sovereign, alter or destroy its contractual obligations and so pursue a course in relation to its undertakings that is not only harmful to the alien, but also at variance with the theory on which the arrangement was concluded.[93] This, of course, is not a convincing assertion. For no government would suggest that it has a legal right to breach a contract, but the right of expropriation is considered to be in the form of modifying or ending the contract for a good cause which involves the interest of the

88- Loc. cit.

89- *Shufeldt Claim* (U.S.A. v. Guatemala), 2 R.I.A.A., Loc. cit., p. 1095.

90- Loc cit., p. 1098.

91- Hyde believes that if the breach of contract does not require a denial of justice it is doubtful whether a promise by a contracting state with respect to an alien is generally looked upon as amounting to international illegal conduct raising international responsibility, in International Law, 1945, p. 988.

92- *Anglo-Iranian Oil Company Case,* I.C.J. Reports of Judgements (1952), pp. 112-113.

93- Hyde, International Law, op. cit., p. 991.

public.

Some of the contracts involving the property of aliens are more distinctive. For example, in the case of *Suez Canal Company*, importance was not only attached to the property of aliens but also to the violation of the Constantinople Treaty. The Governments of France, the United Kingdom and the United States were more concerned with the freedom of navigation with which, *inter alia,* that treaty was concerned. Management of the canal by the Company would guarantee the freedom of navigation. Therefore, they did not question Egypt's right under appropriate conditions to nationalize assets.[94] However, the Suez Canal Company and the Governments of France and the United Kingdom maintained that the Egyptian Nationalization Law of 1956 violated the Constantinople Convention of 1888,[95] because the Convention incorporated the concessions granted to the company. Although the income of the Company was considerable, the Governments of France, the United Kingdom and the United States, emphasized the right of the Company to prevent the effect of Egyptian political instability on the navigation through the Canal and the freedom of navigation.[96] Egypt believed that the Convention did not ratify the Company's concessions and that the regime of free navigation established by the Firman in 1866 was of a unilateral nature based on tolerance and it did not impose any international obligation upon Egypt.[97] Huang, with a view to discovering the intention of the parties respecting the Company and its

94- Wortley B.A., Expropriation in Public International Law, Cambridge, 1959, p. 71.

95- Statement to the U.N. Security Council, October 1956. U.N. Doc. S/P. V. 735.

96- White G., Nationalisation of Foreign Property, op. cit., p. 158.

97- U.N. Doc. S/P. V. 736, PP. 1, *et seq.*

concessions, has found considerable evidence in support of the Egyptian contention that the concessions were mentioned solely as a record of historical fact and not by way of confirming obligations on Egypt.[98] The absence of an express provision in the Convention prepared by the Sub-commission of the Suez Canal International Commission which was set up for this purpose, containing an undertaking by Egypt to uphold the concessions, shows that the Company's rights as being classified under private law were not protected by it. Egypt retained her sovereign right to terminate the concessions subject to the payment of adequate compensation.[99] In fact, the dispute between the parties was a political matter to secure the future freedom of navigation through the chanal which were not necessarily desirable by Egypt. All the subsequent disputes and conflicts were to secure those interests, even at the cost of waging a war.

This distinction has been recognized in the award in *Amco Asia* v. *Indonesia* in which the Tribunal said:

> "However, it [the relationship established between Amco Asia and Indonesia] is not *identical* to a private law contract, due to the fact that the State is entitled to withdraw the approval it granted *for reasons which could not be invoked by a private contracting entity, and/or to decide and implement the withdrawal by utilizing procedures which are different from those which can and have to be utilized by private entity.*"[100]

The Tribunal referred expressly to the State's right to nationalize, recognized in international law, as typical of the exceptional powers of a

98- Huang T. T. F., Some International and Legal Aspects of the Suez Canal Question, 51 A.J.I.L., 1957, pp. 282-283.

99- White G., Nationalisation of Foreign Property, op. cit., p. 160.

100- *Amco Asia Co and Others v. The Republic of Indonesia*ICSID Award of 20 November 1984, in 24 I.L.M., (1985), p. 1029. This award was annulled on 16 May 1986 by an *ad hoc* committee, but on the basis of an erroneous valuation of Amco's investment, and not on the point argued above, see 25 I.L.M., (1986), p. 1439.

State party to terminate contracts.[101]

The consequence of this distinction is that, whereas in a contract between private parties the grounds for termination is limited, in a public contract the State party has very wide sovereign or prerogative powers to vary or terminate the contract in the public interest.

This view is supported by the American Law Institute in its recent Restatement of the Foreign Relations Law of the United States:

> "A state party to a contract with a foreign national is liable for a repudiation or breach of that contract under *applicable national law*, but not every repudiation or breach by a state of a contract with a foreign national constitutes a violation of international law"[102]

In expropriation, even if the subject is a contract or concession, the consent of a party who is affected by the measures or prejudiced by it can have no legal effect on the validity of the expropriation either in municipal law or international law, and can have no influence whatever on its execution. That is why it is erroneous to draw any parallel with the law of contract and to think that the opposition or the attitude of the party who is affected by expropriation can have any legal effect on the validity of the act. As happened in the majority of cases, measures of expropriation have modified or suppressed legal relations which had formerly subsisted between the party affected by expropriation and the expropriating State.[103]

Accordingly, the legal systems of the leading capitalist States like France, West Germany, Italy, the UK and the USA show that those governments have the prerogative to terminate the contract unilaterally, when the public interest so requires. This is a widespread feature of

---

101- Loc. cit.

102- Restatement of the Law, The Foreign Relations Law of the United States, vol. 2, 1987, p. 201.

103- Katzarov K., The Validity of the Act of Nationalisation in International Law, 22 M.L.R., 1959, p. 641.

national systems of procurement, and is evidently considered necessary in order to maintain the freedom of action of public authorities.[104] The Supreme Court of the USA went further to defend the right of the government to terminate the contract unilaterally by saying that:

> "the taking of private property for public use upon just compensation is so often necessary for the performance of governmental functions that the power is deemed essential to the life of the State. It can not be surrendered, and if attempted to be contracted away, *it may be resumed at will.*"[105]

Similarly, in the law of England where the Crown acts in an executive capacity to vary or terminate a contract, its action is deemed to be lawful, and not a breach of contract.[106]

> "..... a public contract is construed as being impliedly subject to the exercise by the governmental authority of its general powers and discretion in the public interest. Action taken by the Crown or other public authority in the proper performance of its functions and for a 'general executive purpose' will accordingly not constitute a breach of contract, even if it impedes or frustrates performance by the contractor."[107]

As it was in the cases of *Ayr Harbour Trustees* v. *Oswald* and *Czarnikow* v. *Rolimpex,*[108] where a contract is governed by English Law,[109] Such a contract is always subject to future legislation, and neither

104- Bowett D. W., State Contracts with Aliens, op. cit., p. 55; see also in International Encyclopaedia of Comparative Law vol. 2, Contracts in General, ch. 4, Public Contracts, p. 40.

105- Emphasis added. *state of Georgia* v. *City of Chatanooga,*(1924), U.S. Supreme Court Reports, 68 Law ed.m book 68, 1925, p. 799. See generally McAllister, 'U.S. Constitutional Law and its Relation to a Contract between a State and a Foreign National', Rights and Duties of Private Investors Abroad (1965), pp. 249-51.

106- Guest A. G., The Common Law Library, No. 1, Chitty on Contracts, 26th ed., vol. 1, General Principles, para. 709.

107- Loc. cit.

108- *Ayr Harbour Trustees* v. *Oswald* (1883), 8 Appeal. Cases. 623 (HL); *Czarnikow* v. *Rolimpex*, (1977), 3 W.L.R., 686.

109- It seems all contracts made by the Government of the UK, to be performed within the UK, will be governed by English Law.

a local authority nor central Government may by a contractual term or a stabilization clause exclude the operation of a future statute. A government cannot fetter its duty to act for the public good. It cannot bind itself by contract not to perform its public duties.

In English law, not only it is impossible to insert a stabilization clause against future legislation, but it is also impossible for any English court to challenge the supremacy of Parliament or to assert that Parliament was not acting in public good.[110]

In the recent past, the British Government has altered the terms of its contracts with foreign corporations over the development of North Sea oil, thus demonstrating that the idea of government power to vary contracts with foreigners particularly in the domain of petroleum concessions is not only asserted by developing countries. It became clear that countries, like the UK and Norway, are no more willing than OPEC Member Countries to stick rigidly to contracts that they deem unreasonably disadvantageous and there is no absolute constitutional protection in either country for the principle of *pacta sunt servanda.*[111]

The Petroleum and Submarine Pipe Lines Act of 1975 made substantial changes to the terms of all existing production licenses, introducing, without compensation, new obligations, particularly in regard to development programmes and depletion, and much stricter limitations on assignments. In facing predictable Parliamentary criticism that the Act displayed a disrespect for the United Kingdom's contractual obligations and for the rule of law, and even constituted an illegal expropriation of license rights in international law, ministers consistently professed to see

110- Halsbury's Laws of England, 4th ed., vol. 8, para. 609; Guest A. G., The Common Law, op. cit., para. 709.

111- Daintith and Gault, *pacta sunt servanda* and the Licensing and Taxation of North Sea Oil Production, Cambrian Law Review, 8 (1977), pp. 28, 42.

no difference between what the Act was doing and the alteration of regulatory or fiscal measures with the effect of making contracts more onerous.[112]

The UK Government formally rejected any suggestion of impropriety or even a duty to compensate, where the contracts concerned could not be considered as disadvantageous to the Britain.[113] In addressing Parliament, Anthony Wedgwood Benn, the UK Secretary of State for Energy, said that the change in the legal framework that is available to Governments and is regularly used by a whole host of environmental, health, tax and other measures which are taken by any responsible government, does not include the provision to compensate as a result.[114]

In the *Khemco case* before the Iran-U.S. Claims Tribunal, the issue of sanctity of contracts was raised. The claimant contended that the Khemco Agreement was an economic development agreement and belonged to a specific category of international contracts. The claimant also contended that such contracts by their nature require to be insulated from the disruptive effects of changing municipal law, and the law from which they derive their binding force is international law. The practical consequences of this analysis, according to the claimant, would be that the rule of *pacta sunt servanda* would govern the contract.[115] The Tribunal

112- Daintith and Willoughby, A Manual of United Kingdom Oil and Gas Law, London, 1984, p. 29.

113- British is not in a position that can be considered as obliged to submit to the terms of the companies.

114- Hansard, HC Debs. (5th series), vol. 5 col. 1167 (1975), Report of Standing Committee D on Petroleum and Submarine Pipelines Bill.

115- *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran,* National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Limited, Award No. 310-56-3, dated 14 July, 1987, reprinted in 15 Iran-US C.T.R., para. 149.

rejected this contention which attempts to equate the principle of respect for contracts which was embodied in the Claims Settlement Declaration between Iran and the United States, with the principle of *pacta sunt servanda*, and held that:

> "In no legal system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good."[116]

Meanwhile, in the *Klockner v. Cameroon case*, the ICSID Tribunal declared that there does not even exist a special category of contracts called economic development agreements.[117]

It was the weak position of such contracts which allowed the OPEC countries to intervene in oil agreements, changing the price of oil, reviewing the terms of the agreements, increasing the tax and changing the conditions of the agreements. The principle of *pacta sunt servanda* was breached apparently to make the agreements more equitable. In June 1968, OPEC issued a resolution in which it proposed a number of suggestions for member States to pursue a policy which could lead them to operate their oil industries without any help of aliens. The Resolution,[118] by noting the principle of permanent and inalienable right of States to use and exploit their natural resources cited in the U.N.General Assembly Resolution 2158, recommended that:

> "1- Members should try, as far as possible, to explore and exploit their hydrocarbon resources by themselves.
> 2- If foreign capital was needed for this purpose, members could enter into contractual arrangements with foreign investors, the terms of which would insure the partnership of the State in all parts of the operations.

116- *Khemco case*, op. cit., para. 178.

117- Paulsson C., The ICSID Klockner v. Cameroun Award: The Duties of Partners in North-south Economic Development Agreements, 1 Journal of International Arbitration, 1984, p. 157.

118- Resolution No. XVI 90, adopted by OPEC on 24 and 25 June, 1968, see in OPEC Official Resolutions and Press Releases, 1960-1983, 2nd edition, Oxford, 1984, p. 61.

3- As to the existing contracts which did not contain such partnership provisions, the State could demand *modification to that effect, invoking the principle of changed circumstances.*[119]

The member States tried to alter their contracts with international oil companies, or attempted to take over their oil industry. Iraqi measures of 1972, Libyan takings of 1971-73, and the Venezuelan nationalization of 1976 are somehow the effect of the OPEC collective decisions. Moreover, it was confirmed that the compensation to be paid to the oil companies should be based on *net book value of the assets taken* and refused to consider any other basis for compensation.[120]

No serious legal challenge has been mounted against the decision of the OPEC members to change the contracts' terms. As was mentioned in the Resolution 122 of the OPEC, the changes imposed on the oil companies resulted from the constant increase of inflation in Western countries or devaluation of dollar which had had the effect of reducing the purchasing power of the OPEC members. While before the establishment of OPEC there was not such an automatic increase in the incomes for the reasons mentioned, the changes requested by the OPEC members seem contrary to the stability of the contracts, but it was not considered against the principles of international law. The OPEC members had agreed on the terms of those contracts on the basis of the existing circumstances, and changing the terms of the contracts on the basis of change of circumstances is a practice established as being acceptable under all major legal systems as well as international law.[121]

The OPEC members believed that it would not be contrary to the

119- Emphasis added, Loc. cit.

120- Resolution No. XVI 90, adopted by OPEC on 24 and 25 June, op. cit., p. 101.

121- Amin S. H., Remedies for Breach of Contract in Islamic and Iranian Law, Glasgow, 1984, p. 19.

U.N. Charter and international rules to adopt legislation by each member State to oblige the oil companies to submit to their lawful demands; that is to change the terms of their agreements with those companies. While the company's countries as the consumers of OPEC oil had an interest in the existing agreements, they did not attempt to bring any legal action against the OPEC countries and accordingly the companies agreed on different occasions to change the terms of the contracts.

There is, therefore, overwhelming authority for the proposition that agreements between States and aliens are not treaties, nor may they be assimilated to treaties. As was discussed above, international law and the international community have recognized as a fundamental right the right of every State to expropriate the contractual rights of aliens. The reasons behind the moves to subject a contract to international law or general principles of law and to stabilize the contract are to ensure that the State's termination of the contract can be characterized as unlawful. The consequence is that, if the dispute is taken out of the context of expropriation, and simply dealt with as a case of breach of a contractual undertaking, the finding of breach would lead to damages for the breach, demanding a higher award than might be expected by way of compensation for a lawful expropriation.[122] The failure to separate these two approaches from a solution to the various legal problems involved in such cases will cause more confusion in this field.[123]

Thus, this is not an absolute rule which can be applied to all contracts. For example, it could not be asserted that the treaties between the USSR nationals or Government and the Marxist Government of Afghanistan, which was in reality only a puppet regime ought to be

122- Bowett D. W., State Contracts with Aliens, op. cit., p. 59.

123- Verzijl H.W., International Law in Historical Perspective, vol. I, General Subjects, A.W. Sijthoff-Leyden 1968, p. 190.

respected by a democratic government in Kabul, since such treaties lack the necessary element of free will on the part of Afghan people.

Moreover, it has been recognized internationally that a State can pass general legislation for the protection of public health, public safety or general welfare for purposes falling within the "police power" without involving the taking of property.[124] No person has a vested right to insist that it shall remain unchanged for his benefit.[125] However, the right is limited to the rightful exercise of the power when a contract is detrimental to the welfare or security of the State, which must be judged with reference to the circumstances of the moment.

3 - SANCTITY OF TREATIES AND CONTRACTS UNDER ISLAMIC AND IRANIAN LAWS

The meaning of terms and the approach adopted in international islamic law is somewhat different. The notion of sovereignty in islamic law is different from that which is accepted the non-islamic ones. It is not limited to geographical boundaries, language, race, colour or historical heritage. It is based on the teachings of Quran and the acts of the Maasoumin (S.A.S). In Quran we read, "Verily, this nation of yours constitutes one nation....."[126] In the Treaty between prophet Mohammed

124- Mann F. A., State Contracts and State Responsibility, op. cit, p. 584.

125- Loc. cit.

126- Quran, 21: 92 and 23: 52.

(S.A.S) and non-muslims of Madineh, muslims amongst the Quraysh and the people of Yathreb and those who may follow and join them constituted as one nation.[127] Accordingly, all muslims and non-muslims within the Islamic State's boundaries will be in an equal position and have equal rights. The islamic State moreover has a duty to protect their lives and properties, similar to the modern laws of most countries.

With regard to the non-muslims, islamic law has divided them into two groups.

1 - Those who settled within the territory of islamic State and are called *Ahl al Zimmeh*. They formerly became subjects of the islamic State by a contract called *Aqd al Zimmeh*. Traditionally, once this contract was concluded, the parties became fully entitled to equal and reciprocal rights and duties, and they were regarded as full subjects of the islamic State. They were protected by getting a kind of tax called *Jeziya*.[128] The contract of *Aqd al zimmeh* to give non-muslims protection and equal rights has to be concluded only by the State and it is the right of the islamic State to grant this status to any non-muslim who apply for it. However, in modern times, non-muslims have received treatment equal with muslims in the new-born Islamic Republic of Iran.[129]

2 - Those who enter the islamic State for a limited time are subject to the regulations and conditions upon which the permission is granted. According to the contract, they can visit or do business even if they are

127- Declaration of Madinah, Verse 9.

128- This equal right of protection was achieved against paying "jeziya" which was much less than the payments of the muslims as zicat, khoms, and extra taxes if necessary; Currently in Iran, they are living as religious minorities which have equal right with muslims and in some aspects, for example representatives in the parliament ,they are enjoying more advantages.

129- Principles 19-26 of the Constitution of the Islamic Republic of Iran.

subjects of a belligerent State. The sanctity of treaties and contracts in islam is of a great importance. Without making any separation between State and the nationals, Quran states that, "O ye who believe! fulfil your contracts".[130] In islamic international law, with its special approach, the contract can be between the islamic State and an alien or another State. Quran gives treaties and contracts full sanctity and considers them as the covenants of God which must be fulfilled.[131]

However, the doctrine of the sanctity of treaties is subject to some conditions. They must be fulfilled as long as the non-muslims are true in their intention.[132] The islamic State is not obliged to fulfil the undertakings made by the non-muslim governments, except when they have been approved by islamic authorities. That was the approach towards treaties and contracts adopted by the pre-revolution regime in Iran.

Therefore, it could be concluded that contracts are the subject of international law when they are concluded by States in order to regulate relations between themselves. Nationals of such States and their properties may be the subject of such treaties. Exceptions should be made in the cases where the contracts are made between unequal States, under the superiority of the powerful one with different capacities in international relations especially in political and economic areas. Where the weaker States could not act in accordance with their own free will, the contract would lack the most essential element which legitimizes any contract.

Changes in the sovereignty of States raise fundamental questions as to the legitimacy of some international contracts especially in cases where

130- Quran, 5: 1.

131- Quran, 6: 152.

132- Quran, 9: 7.

aliens have been an effective cause of those changes; and also where developing countries with many dependencies and deficiencies have concluded contracts with the subjects of a powerful dominant States, like those of colonial territories which brought the doctrine of "clean state". The principle has been accepted both in international and customary law, and international lawyers mostly have agreed on it. Lacking the requisite will, the capacity of such States to enter international obligations is questionable. That said, a party to a contract is bound to respect its consent expressed in the agreement in good faith. Nevertheless, contracts between unequal States are productive of different types of legal relationships from those to which the contract between such States and aliens. Some international tribunals have made a similar distinction between such treaties, and have referred expressly to the right of the States to nationalize the property of aliens. There are numerous treaties between States dealing with the question of expropriation. Whatever their content, they do not show that aliens have become the subject of public international law because the contracting States can include anything within such treaties. General principles of law recognized in Article 38 of the Statute of the International Court of Justice do not add anything to the reality that aliens are not as yet the subjects of international law. There are not many examples of nationalization in breach of treaties in force between States, while there are numerous nationalizations in breach of contracts between States and aliens. In such a case, if the State to which the alien belongs espouses his claim before an international tribunal, the claimant State will have to allege and prove a cause of action under international law and cannot allege a breach of duty arising under municipal law. Any analogy in this respect would be irrelevant.

Therefore, in expropriation of the contractual rights of individuals,

to treat a mere breach of contract as an international wrong would have been both confusing and unnecessary. Instead, a formula should be introduce to define the rights of States to modify or end contracts as takings of property and not as breach of contracts.

Breaching the contract in force between State and aliens has become the practice of even some developed States, as the act of a responsible government toward the nation. Therefore, any plea to breach of contract in this regard is a deviation from the rules of the sovereign right to expropriation. Then again, the sanctity of contracts as a preventive element for nationalization of the property of aliens is becoming everyday less important and any attempt to internationalize their sanctity seems without any legal foundation. To put an end to this confusion and ambiguity over State contracts it is necessary to define and agree on the principles and rules of those contracts through a multilateral treaty.

****
****
****
*****
***
*

CHAPTER TWO

(SECTION ONE)

THEORIES ON THE LAW OF EXPROPRIATION

1 - THE DOCTRINE OF INTERNATIONAL MINIMUM STANDARD

The doctrine of "international minimum standard" developed from the notion of the sanctity of an individual and his property. According to this doctrine, aliens living or working or running a business in the sovereign territory of a host country must not be treated below the international minimum standard of justice or civilization. The doctrine rose in the Western countries on the classical concept of "*Laissez Faire*", and the inviolability of the individual and his property. Therefore, it was necessary that the property of the nationals in the foreign State be protected. This principle has no application to a State's expropriation of its own nationals' property but is designed instead to protect foreign investors or property owners from oppression or ill treatment.

The theory of international minimum standard was first expressly formulated in 1910 by the former U.S. secretary of state, Elihu Root. Before that time, an international standard had *de facto* played a role in State practice.[1]

According to the international minimum standard, any arbitrary act of a State against property of aliens is an express violation of international

1- Moore J. A., A Digest of International Law, Washington, 1906, vol. VI, pp. 252, 312, 321, 700, 725, 770.

law which leads to international responsibility of the expropriating State. As a consequence, when the level of national treatment falls below the international minimum standard, the aliens' home State would have the right to intervene through diplomatic protection.

Oppenheim considers the standard as a well established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations and insists that there exists a minimum standard of civilization in this respect.[2] Any failure of measuring up to that standard incurs international liability.

However, he admits that the rule is not absolute and is affected by two factors: the first is that the law of most States permits far-reaching interference with private property in connection with taxation, measures of policing, public health and public utility. The second is in the case of fundamental changes in the political system or economic structure of the State of far-reaching social reforms which entail interference on a large scale with private property. While the terms used are not precise and defined, Oppenheim does not make it clear how and to what extent these factors affect the international minimum standard. Nor does he recommend equal treatment of aliens with nationals of the expropriating State. Thus, he seeks the solution in granting partial compensation to aliens.[3]

Without giving a precise definition of the international minimum standard, many writers including Fachiri[4] and Hyde[5] have argued that in the event that the conduct of the authorities of a State falls below

2- Oppenheim L. F. L., International Law: a treatise, vol. I: Peace, 8th edition, London, 1955, p. 350

3- Loc. cit., p. 352.

4- Fachiri A. P., International Law and the Property of Aliens, 10 B.Y.I.L., 1929, p. 33.

5- Hyde, International Law, 1945, 2nd ed., p. 710.

minimum standard, the aliens' State is entitled to intervene on their behalf and secure their rights by diplomatic means. This view could be understood when international law has grown up among communities with a similar civilization which share common attitudes and adhere to certain basic values.[6] But, the Soviet Union and Mexican declarations on expropriation of foreign properties and the conduct of the other Latin American States in the first quarter of the century indicated an identical resistance toward an incorporation of the standard.

Up to the First World War, the international minimum standard was considered a part of positive international law and could not be seriously challenged.[7] But then several coincidental historical events placed the traditional position of the standard in jeopardy. The Hague Conference, composed of the countries mostly involved in capital investments, failed to reach an agreement on the issue, there being an almost even split over the doctrine.[8] The doctrine has been further weakened since the Second World War by expropriations which occurred in Eastern European countries, Iran, Egypt, Cuba, Libya and some other developing countries without payment of prompt or full compensation. Japan which supported the international minimum standard in the Hague Conference in 1930, rejected the principle in the Asian African Legal Consultative Committee which drafted a convention in 1961 that provides for payment of compensation for expropriation of foreign property in accordance with local laws, regulations and orders.[9]

6- Loc. cit.

7- Lissitzyn O. J., International Law, Today and Tomorrow, New York, 1965, pp. 76-7.

8- Hackworth G. H., Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners, 24, A.J.I.L., 1930, pp. 500-516.

9- Asian African Legal Consultative Committee Reports, 3rd sess., 1960 from p.

Moreover, some jurists from less developed nations in the International Law Commission and in literature have expressed the view that the international minimum standard of treatment of aliens, or at least the requirement of prompt, adequate and effective compensation, is not or should not be a general binding norm of international law.[10] This was the general attitude of the majority of the members of the United Nations which represented a serious threat to the interests of foreign investors in this group of the countries.[11]

The capital exporting countries have defended the legal content of the international minimum standard of treatment of aliens by reference to what are regarded today as basic human rights, while the less developed countries have regarded the standard as an imposition by the more powerful States. The latter have sometimes employed coercive measures, including military force, not only to enforce their interpretation of the international minimum standard, but also to obtain some concessions and other special privileges for their nationals, and to intervene in the domestic affairs of weaker States. The controversy over the standard has been so heated that a Mexican diplomat has attacked the doctrine as merely a "legal garb" that served to cloak and protect the imperialistic interests of the international oligarchy during the nineteenth and the first part of the twentieth century.[12]

While the capital exporting countries still adhere to traditional rules

83; 4th sess., 1961, pp. 43, 46, 49, 141-142.

10- Y.I.L.C., 1957, (New York, U.N. 1958), vol. 1, pp. 155, 159-160; Y.I.L.C., 1959, vol. 1, p. 151; Y.I.L.C., 1960, vol. 1, p. 264; Roy G., Is the Law of Responsibility of States for Injuries to Aliens Part of Universal International Law? 55 A.J.I.L., 1961, p. 866.

11- Lissitzyn O. J., International Law, Today and Tomorrow, op. cit., p. 79.

12- Castaneda J., The Underdeveloped Nations and the Development of International Law, 15 International Organisation, 1961, p. 38.

for protection of foreign property, there remains the question of the way to put the rules into concrete action. The difficulty is with the abstractness and vagueness of the issue which can be interpreted differently in various societies. Eagleton suggests that the indefiniteness of the standard is a source of possible abuse. To counteract this possibility, he suggests that one should look for "a more precise statement of what is expected of the host State, and a more impartial interpretation and enforcement of the requirements, by the community of nations."[13]

The international minimum standard doctrine has been developed when developed countries' political and economic system dominated the world. But, over the years, it has changed gradually to take into account the views of communist as well as new and developing countries on the taking of property. Thus, the international minimum standard has had to give way to an emerging body of principles that at least reflect the common interests of the world community. This trend has been seeking the achievement of what Weston and Dawson have described as "a creative, equitable and effective balance between demands for both socio-economic reform and private profit."[14]

However, the international minimum standard rules would be valuable as international law when they, as Falk observes, achieve the capacity to satisfy the particular interests of participants as the community of nations. To become a part of international law, there has to be evidence that the relevant rules have been accepted by States in their international practice, and any plea to municipal law is irrelevant.[15]

13- Eagleton C., Responsibility of States in International Law, New York, 1970, p. 86.

14- University of Chicago Law Review, 1963, pp. 63, 76.

15- There are some constitutions which reserve the legal possibility of expropriation of private property without any compensation. Some of them are: German Constitution,1919, Art. 153; Czechoslovak Constitution, 1920, Art.

Schwarzenberger, as a supporter of the international minimum standard doctrine, suggests that the development of the doctrine was assisted by the conclusion of treaties specially providing for the treatment of foreigners.[16] According to him, the friendly European powers, at the earliest stage of their economic relations, included a clause providing for this standard in treaties between themselves. But, he admits that later they found it unnecessary to include the clause in treaties with each other. He points out that receiving of this standard of treatment in "less civilized" States might be open to question and the clause would be inserted in treaties with them.[17] However, an examination of the fundamental laws of all nations which were the elder members of the family of nations indicate that, at the time when the standard was the sole contender, there was not uniform national legislation in force even in civilized nations. That is even more obvious in regard to payment of compensation by the expropriating States to the individuals affected by the measures.[18]

109; Constitution of the Spanish Republic,1931; Friedman also does not consider municipal laws as evidence of international law. See Friedman S., Expropriation in International Law, London, 1953, pp. 111-115.

16- Schwarzenberger G., The Protection of British Property Abroad, 5 Current Legal Problems, 1952, London, pp. 303-4.

17- Loc. cit.

18- Art. 5 of Law Concerning the General Rights of Citizens, Fundamental Laws of 21 December, 1867 of Austria and Section 365 of Austrian Civil Code; Art. 11 of Constitution of 7 February, 1831 of Belgium; Section 17 of Constitution of 24 February, 1891 of Brazil; Arts. 67, 68 of Constitution of 16/18 April 1879, with amendments of 15/27, May, 1893, and 11/24 July, 1911 of Bulgaria; Art. 6 of Provisional Constitution of 11 March, 1912 of china; Art. 15 of Constitution of 8 June, 1917 of Costa Rica; Arts. 10, 32, 33 of Constitution of 21 February, 1901 of Cuba;Art. 545 of French Civil Code; Article 153 of the Constitution of Germany; Art. 29 of Great Charter of Liberties of 11 February, 1225 of Great Britain; Art. 17 of Constitution of 1/14 June, 1911 of Greece; Art. 28 of Constitution of 11 December, 1879 of Guatemala; Art. 14 of Constitution of 12 June, 1918 of Haiti; Art. 67 of Constitution of 14 October, 1894 of Honduras; Art. 29 of Fundamental Statute

With such a record, it is surprising that some eminent writers such as Schwarzerberger and Bellot extent the international minimum standard to all countries and consider it as a part of general international law, while at the same time they admit that only the major capital-exporting countries have rigidly adhered to the doctrine. There are some cases which show that even Western countries sometimes did not apply this standard in their respective societies or in their international relations. Thus, the authorities cited in support of the rule, as Williams[19] states, are not conclusive and decisive enough to prove them as universal rules.

This becomes more obvious when one finds that developed countries, as sponsors of the rules, failed to apply them. Representatives of Sweden in the Council of Europe, rejecting the idea of full compensation, argued that the Universal Declaration of Human Rights was successful because it was not enforceable. And the U.K. argued that the right to own property was an economic and social right and rejected its inclusion in the convention.[20] These arguments together with the cases

of 4 March, 1848 of Italy; Art. 27 of Constitution of 11 February, 1889 of Japan; Section 8 of Constitution of 26 July, 1847, as amended 7 May, 1907 of Liberia; Art. 16 of Constitution of 17 October, 1868 of Luxemburg; Art. 27 of Constitution of 1857 and Art. 27 of Constitution of 1917 of Mexico; Arts. 205, 206, 207 of Constitution of 6/19 December, 1905 of Montenegro; Art. 57 of Constitution of 10 November, 1911 of Nicaragua; Sec. 105 of Constitution of Norway; Arts. 42, 44 of Constitution of 13 February, 1904 of Panama; Arts. 6, 9, 15, 16, 17 of Supplementary Constitutional Law of 7 October, 1907 of Iran; Arts. 3, 23, 25 of Constitution of 21 August, 1911 of Portugal; Arts. 7, 11, 17, 19 of Constitution of 30 June/12 July, 1866, as amended 13/25 October, 1879, and 8/20 June 1884 of Romania; Art. 35 of Fundamental Laws of 23 April/6 May, 1906 of Russia; Art. 21 of Constitution of 23 December, 1876, as amended in 1909 of Turkey; Fifth Amendment of Constitution of 17 September, 1787 of United States of America.

19- Williams J. F., International Law and the Property of Aliens, 9 B.Y.I.L., 1928, pp. 1-14.

20- British Yearbook on European Convention on Human Rights (Eur. Comm'n H. R.), 1960, p. 394.

such as *Lithgow v. United Kingdom* and *Gudmundson v. Iceland* are an indication of some uncertainties which surround the international minimum standard in the West.[21] Moreover, in the debates on the European Convention on Human Rights, France and the U.K. found that a definition of the right to property comprising in all cases the principle of compensation in the event of private property being acquired by the State was unacceptable.[22] Yet it may be noticed that Article II of the French Civil Code reflects discrimination in favour of French nationals. Thus, foreigners could enjoy the same civil rights in France only through treaties with the nations to which they belong.[23]

The uncertainty and doubt surrounding the international minimum standard was reflected in the *Neer Case* of 1926, in which it was stated that;

> ".....an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."[24]

In this case, the American commissioner admitted that standards differ considerably among members of the family of nations, all of which are equal under international law.[25]

It is obvious that the international minimum standard cannot readily be applied to nations which have had no role in the creation and development of those international rules. Although expressed as a

21- Loc. cit.

22- Council of Europe, Collected Edition of the Travaux Preparatories of the European Convention on Human Rights, No. 7, 1985, p. 250.

23- Borchard E. M., The Diplomatic Protection of citizens Abroad, New York, 1927, p. 36.

24- *U.S.* v. *Mexico* (General Claims Commission), Reports of International Arbitration Awards, (IV), 1974, pp. 61-2.

25- Loc. cit., p. 65.

responsibility of all nation States, the international minimum standard, which was consolidated and systematized in the 19th century, does not reflect the will and interest of the majority of the nations which achieved their independence in the mid-twentieth century. Its application seeks to protect the unilateral interest of the capital exporting States. The international minimum standard rules were established not merely without reference to small States, but often against their interests.[26] Indeed much of the international law in this area, particularly with reference to expropriation, developed purely in response to the requirements of the Western business community.[27]

Basically, the law of State responsibility on treatment of aliens, according to minimum standard rules, is not only the product of the conscious activity of the European mind, but also, as Verzijl wrote in 1955, draws its essence from a common source of European origin.[28] Consequently, many writers, without examining those European-influenced rules to see if they still remain in the common interest of the contemporary world community, have generalized their dislike of those rules governing expropriation to the point that they refused to accept the entire corpus of the law. As Lillich points out, they have "thrown the baby out with the bath water."[29]

The theory of minimum standard is concerned with the attitude of a

26- In this regard the statement of Dr. Padilla Nervo of Mexico is outstanding, see in Summery Records of the 413th Meeting (1957), International Yearbook of International Law, Comm'n 155, U.N. Doc. A/C, No. 4, Ser. A/1957.

27- Lissitzyn O. J., International Law in a Divided World, No. 542, International Conciliation, 1963, p. 58.

28- Verzijl, Western European Influence on the Foundation of International Law, International Relations, No. 4, October 1955, p. 137.

29- Lillich R. B., The Current Status of the Law of State Responsibility of Injuries to Aliens in International Law, 1939, 51, 54.

State towards foreign nationals rather than its own nationals.[30] The theory has looked at the questions of expropriation and nationalization from the point of view of the violation of the rights of foreign nationals.[31] Thus, attention has come to be focused upon the concept of what are called fundamental rights; that is rights which everyone is entitled to enjoy, even outside his own country. It is in this regard assumed that the protection of the rights of property follows the individual outside his own country.

The real controversy over the minimum standard rule began after the First World War. Nationalizations in the Soviet Union and in Mexico played an important role in this regard. In the former country, expropriation was the basis of the Communist Revolution with the doctrine of taking of properties not only without compensation, but also as suppression of the capitalists. The United States protested on behalf of the fourteen Allied and Associated Powers and six neutral States on the basis of the international minimum standard. Those States considered the decrees as confiscatory, without effect and illegal.[32] They maintained their rights and reserved such remedies by way of retorsion and reprisal as were available to them, and passed a resolution at the Brussels Conference on Russia of October 1921 to emphasise that forcible expropriation and nationalizations without any compensation in which foreigners are interested was totally at variance with the practice of civilized States.[33]

30- Donan N., Postwar Nationalisation of Foreign Property in Europe, 8 Columbia Law Review, 1948, p. 1127.

31- Loc. cit.; Schwarzenberger G., The Protection of British Property Abroad, op. cit., pp. 298-9.

32- Wortly B. A., Expropriation in Public International Law, Cambridge, 1959, p. 61.

33- Mc Nair A. D., International Law Opinions, 1959, vol. 1, p. 9.

However, the sponsors of the international minimum standard did not continue to insist on the principles of "just, adequate and effective" compensation, but the Soviet Union accepted in treaties made from 1918 to 1925 to provide compensation for expropriation of aliens' property.[34] Nevertheless, it was a sign that the international minimum standard was become increasingly problematic. The capital exporting States with liberal economies as the guardians of capitalist economic principles and free enterprise sanctity could not continue as before to construe restrictively the related principles of the international minimum standard.[35] On the other hand, in the leading cases of expropriations, in Mexico and Rusia, there was a refusal to implement the minimum standard rules, and the claimant States, one after another, ceased to press their claims arising out of the Soviet socialization measures. Indeed, they either renounced their claims expressly, as in the case of Germany, or implicitly as in the cases of U.S. and France.[36]

The sponsors of international minimum standard rules deviated from the international minimum standard by inserting the "national clause" in the Declaration on International Investment and Multinational Enterprises adopted by OECD Ministers in June 1976.[37] Accordingly,

34- Wortly B. A., Expropriation in Public International Law, op. cit., p. 61; some of the treaties made between the U.S.S.R. and the expropriated ones are: Additional Convention to the Russo-German Treaty of Brest-Litovsk, March 3, 1918, Art. 16(2); Russo-German Financial Convention of August 17, 1918, Art. 11; Russo-German Treaty of October 12, 1925, Art. 8; Russo-Astrian-Hungarian Additional Convention to the Treaty of Brest-Livosk, Art. 5; Russo-Italian Treaty of March 7, 1924, Arts. 6(5), 10.

35- Schwarzenberger G., Foreign Investment and International Law, London, 1969, pp. 23-4.

36- Hudson M. O., The Seventeenth Year of the Permanent Court of International Justice, 33 A.J.I.L., 1939, pp. 2-10.

37- The Declaration is composed of four sections: the National Treatment instrument; the Guidelines for multinational enterprises; an instrument on incentives and disincentives to national investment; and an instrument on

the member countries, which are mostly Western countries, agreed to accord to foreign-controlled enterprises operating in their territories no less favour than that accorded in like situations to domestic enterprises. The instrument provides an operative framework for notifying, examining, and gradually rolling back measures in OECD member countries which impose discriminatory restrictions on foreign-controlled enterprises contrary to the national treatment principle.

The national treatment instrument by the OECD is a clear departure from the international minimum standard by the sponsors of the theory. The instrument implies that the OECD member States had treated aliens in a discriminatory manner, and the member States undertook through the Declaration to refrain from such measures. It further means that the theory, to become international law, needs to be agreed between States through conventions or declarations. However, there is no such an instrument to indicate that the international minimum standard has been agreed as such between all States, particularly between developing and developed countries. Even among the OECD countries, the request to examine ways of further strengthening the existing instrument by avoiding the introduction of new measures or practices contrary to the national treatment principle was not fully welcomed. Most of the OECD members not only refused to implement the international minimum standard, but also declined to treat foreign investments according to their own national law.[38]

conflicting requirements; National Treatment for Foreign Controlled Enterprises of the 1976 Declaration on International Investment and Multinational Enterprises, and the Third Revised Decision on National Treatment adopted by the OECD Council in December 1991, in National Treatment for Foreign Controlled Enterprises, OECD, Paris, 1993, pp. 9, 13.

38- The list of those States in National Treatment for Foreign Controlled Enterprises, OECD, Paris, op. cit., pp. 6-7.

A category of measures was introduced as pressure on the member countries to reduce the number and scope of their restrictions upon aliens. These measures were decided to be implemented according to the conditions governing each member State.[39] The approach of the Revised Decision Council of the OECD has been to discourage the member States from adding to their national treatment exceptions. The positive conclusion arrived at by the Committee in 1991 was that the regulations and practices of the member States pertaining to foreign investments has been increasingly aligned with the principle of national treatment.[40] Therefore, the experience of the OECD indicates that the rules as hitherto applied by its members are contrary to the principles of international minimum standard. One of the reasons is probably that the members of the OECD are not in an equal degree of development, and any national treatment (equal treatment) would tend to damage their respective economic interests.[41]

Therefore, any attempt to implement the international minimum standard in developing countries would increasingly damage their economic interests, and it is obvious that those countries would resist the application of that standard.

39- Loc. cit., p. 10.

40- Loc. cit., p. 18.

41- Membership of the countries such as Greece, Iceland, Ireland, Portugal, Spain, Turkey in compare with Japan, United States, Germany and others could be the reason for some problems which the Organisation is confronting.

2 - THE DOCTRINE OF NATIONAL TREATMENT

The doctrine of international minimum standard has been challenged by another theory, favouring the "national treatment standard". This was, in fact, initially at least, the prevalent theory in the Latin American countries under the influence of the Calvo doctrine. The doctrine of national treatment, in fact, was a response to the practice of diplomatic (and sometimes military) intervention of developed countries, in order to restrict or eliminate diplomatic protection by powerful countries. The doctrine originated as a defensive reaction to the admitted abuses of diplomatic protection and to the norms of international law which were considered as discriminatory against smaller States.[42] Further, to prevent the implementation of the international minimum standard rules, in almost all cases involving the nationalization of foreign property in developing States, offers of international arbitration have been rejected by those States.[43]

Therefore, the national treatment rules which were based on the Calvo doctrine comprised two principles; firstly, the principle of non-intervention, according to which sovereign States enjoy the freedom from any kind of foreign intervention whether by force or diplomatic means; and secondly, the principle of equality of treatment between nationals and

42- Guha R., Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law, 55 A.J.I.L., 1961, p. 866; Orrego Vicuna F., The International Regulation of Valuation Standards and Process: A Reexamination of Third World Perspective, in Lillich R. B., The Valuation of Nationalised Property in International Law, vol. III, Chap. 4, p. 131; Freeman A. V., The International Responsibility of States for Denial of Justice, op. cit., p. 462;

43- Amerasinghe C. F., The Quantum of Compensation for Nationalised Property, in Lillich R. B., The Valuation of Nationalised Property in International Law, vol. III, Chp. IV, p. 107.

foreigners.

According to the latter principle, no State is obliged to treat foreigners more favourably than its own nationals. Therefore, aliens could bring their claims only before the local authorities.[44] The Calvo doctrine, contrary to the international minimum standard, constituted a maximum standard of national treatment. Consequently, it failed to gain recognition in the Western countries which economically and politically dominated the world. By inserting provisions in their constitutions and by municipal law, the Latin American countries tried to implement the doctrine. In their concession agreements and contracts with other countries, they tried to maintain the doctrine through the medium of the so-called Calvo clause.[45]

Mexico inserted an article in its constitution which emphasized the equal treatment of aliens with nationals with the proviso that they could acquire property only if they agree to renounce any protection of their home government in property matters.[46] Mexico invoked the Calvo doctrine as a response to the U.S. claim that considered the expropriations in Mexico as illegal. Mexico stated that;

> "the jurisdiction of the States within the limits of the national territory is applicable to all the inhabitants. Nationals and foreigners who are under the same protection of the national legislation and authorities the foreigners cannot claim rights different from or more extensive than nationals. 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 enquire the payment to its nationals, independently of what Mexico may decide to do with regard to its 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 land holders, it demands, in

44- Bring O. E., The Impact of Developing States on International Customary Law, 24 Scandinavian Studies in Law, 1980, p. 112.

45- Freeman A. V., The International Responsibility of States for Denial of Justice, London, 1938, p. 457.

46- Article 27 of Mexican Constitution of 1917.

reality a special privileged treatment which no one is receiving in Mexico."[47]

With the decline of the colonialist system, particularly in the post-1945 era, the Calvo doctrine was invoked by the third world countries, and the cardinal principle that the State may only take private property for value was ignored in practice and disputed in theory. Moreover, some States defended the idea of the equality of nationals and aliens at international conferences.[48]

However, there was no doubt that the taking State had a right to take property for public use,[49] or that it might have an original and exclusive title to certain kinds of property, such as mineral resources within its territory. However, it was also accepted that, although the international minimum standard had received wide support in legal writings and in juridical practice, the exact content of the standard in respect of protection of property had never been fully established.[50] That this was so was demonstrated by the failure of the Hague Codification Conference in 1930 to reach an agreement on State responsibility.[51] In that Conference, there was a clear distinction between the capital-exporting and capital-importing countries. While the former sought the recognition of the responsibility of States in the case of damages to the person or property of aliens, the latter opposed any better treatment than the

47- Hackworth G. H., Digest of International Law, Washington, U.S. Government Printing Office, 1942, vol. III, p. 658.

48- League of Nations' International Conference on the Treatment of Foreigners; Preparatory Documents, November 5, 1929, (C.I.T.E.1C.36.M.21, 1929, II), and Proceedings Geneva, 1930, (C.97.M.23, 1930,II).

49- Mexican Note to the U.S. of August 3, 1938, A Foreign Office Paper Release.

50- Bring O. E., The Impact of Developing States on International Customary Law, op. cit., pp. 103-4.

51- Hackworth G.H., Responsibility of State for Damages Caused in Their Territory to the Person or Property of Foreigners, 24 A.J. I. L, 1930, pp. 515-516; some of the Latin American States and the Soviet Union did not participate in the vote in the Hague Conference.

nationals of the country being given to foreigners on the ground that foreigners, before going to a country, generally satisfy themselves as to climatic conditions and they should likewise satisfy themselves with regard to the international conditions and treatment to be accorded to them.[52] The Mexican Government in a note to the U.S. stated that:

> "There does not exist in international law any principle universally accepted by countries ..... that would render obligatory the giving of adequate compensation for expropriation of a general and impersonal character; that nevertheless an obligation to indemnify the owners of expropriated property did arise under Mexican law, which itself determined the time and manner of payment; and that social progress sought impartially as between national and alien, cannot be held by the impossibility of paying immediately the value of the properties taken."[53]

The practice of States did not help to improve and strengthen either of the theories. For example, in the expropriation dispute between Mexico and Britain,[54] each party defended one of the theories. Ultimately, following an agreement in 1946, the Mexican Government paid compensation plus interest. The practice was in conformity with traditional rule of international minimum standard, but the compensation was paid on condition that the agreement was not to be regarded as in any respect a precedent for any future dispute, claim, or arbitration arising between the two Governments. Therefore, the Mexican expropriations

52- Hackworth G. H., Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners, 24 A.J.I.L., 1930, op. cit., pp. 513-14.

53- Mexican Note to the U. S. of August 3, 1938 op. cit.; Article 27 of the Mexican Constitution provides that, private property shall not be expropriated except for reasons of public utility and subject to indemnification. It allocated to the public sector which was "inalienable" and "imprescriptible", exploitable only by government concession and had specified the condition that the concessionaire in foreigner, should not invoke the diplomatic protection of his government in the case of forfeiture; More details in Fawcett M. A., Some Foreign Effects of Nationalisation of Property, 27 B.Y.I.L., 1950, p. 355-375.

54- *Mexican Eagle Company Case,* Cmd, 5758 of 1938.

gave rise to a deep controversy with regard to the legal basis for the duty of paying prompt, adequate, and effective compensation.[55] The events in Mexico, according to Ambassador Robles, the permanent representative of Mexico to the United Nations in 1974, had shown that investors did not consider whether the territorial State was willing to accept international means other than national arrangements, or whether it claimed exclusive jurisdiction of national law to be decisive. The reason, it was suggested, was that, although Mexico never accepted any investment guarantee agreement and maintained in its constitution the Calvo clause, there are so many transnational corporations and private investors interested in investing there and preparing to do so.[56]

While there is no international convention binding on States on treatment of aliens, the capital-exporting States have considered international minimum standard rule as a duty derived from a universally recognized rule of international law. On the other hand, capital-importing countries favoured adequate indemnification, but only in obedience to their own laws. The position of developing countries, as is reflected in the Mexican note to the U.S., is that there is no international rule universally accepted in theory or carried out in practice, particularly on paying immediate or even deferred compensation.[57]

There were a number of cases, mostly involving American and British nationals, which were resolved through agreements or arbitration, and resulted in the payment of full compensation.[58] But, there are some

55- Cmd. 6768 of 1946; President Cardenas in his speech of September 10, 1938 attacked the indemnity principle as capable of leading to war, New York Times, September 11, 1938, p. 1; more in Kunz J. L., The Mexican Expropriation, Contemporary Law Pamphlets Series 5, No. 1, International Law Series, New York University, 1940 (Re. 1976), p. 25.

56- Remarks by Ambassador Alfonso Garcia Robles, P.A.S.I.L., 1975, p. 231.

57- President Cardenas' speech of 10, 1938, op. cit., p. 26.

other cases in which payment of compensation was regarded as "an act of grace". Non-payment of compensation has not been only restricted to developing States. In the U.S., the police power in the Constitution has been used to suppress or control by licensing such enterprises as the liquor trade, pool halls and lotteries. No compensation was paid for those put out of business.[59]

Therefore, as some writers observed,[60] there has been no consensus on the treatment of aliens and no general customary rule of international law on expropriation could be extracted from the existing theories. The rules of law binding upon States emanate from the free exercise of their sovereign will as expressed in conventions or generally accepted usages. They are established in order to regulate the relations between the coexisting independent communities with a view to the achievement of common aims.[61] Accordingly, it is very doubtful that the rules arising from these opposing theories will always reflect the free exercise of the sovereign will of all nations, particularly those from developing countries. Moreover, the will expressed through most of the developing countries, with undemocratic regimes are not much reliable to

58- Some of those cases are: *Sicilian Sulphur Monopoly,* 1836; *George King,* 1853; *Janas King,* 1853; *Henry Savage,* 1852; *Delagoa Bay Railway Concession,* 1903; *Italian and Uruguayan Insurance Monopolies,* 1911-20; *Portuguese Religious Properties,* 1913; see more in 10 B.Y.I.L., 1929, pp. 32-55.

59- Fawcett J. E. S., The Legal Character of International Agreements, 27 B.Y.I.L., 1950, p. 357.

60- Kunz J. L., The Mexican Expropriations, op. cit., pp. 11-12; Hackworth G. H., Responsibility of States for Damages Caused in Their Territory to the Person or Property of foreigners, op. cit., A.J.I.L., 1930, p. 521; Salgado R. A., Protection of Nationals' Rights to Property Under the European Convention on Human Rights: 27 Virginia Journal of International Law, 1987, p. 873.

61- *The Lotus Case,* P.C.I.J., Series A. No. 10, 1927, p. 18.

be creative of international law.

Thus, the rules of expropriation might be derived from international treaties, if any, or from particular customary international law in force between certain States, but they are not in any way common to all States. Some writers agree with this view, except that they distinguish between isolated cases of expropriation directed against an alien, and general social reforms, applying to nationals and aliens alike.[62]

However, to implement a rule of international law, it seems crucial to find an answer to the question that, if States have not the same freedom to deal by law with the property of aliens as with the property of their own nationals, by what act or omission of their own have they been deprived of it? For example, where property belongs to a State's subject, the parliament of that State would be entitled by virtue of its sovereign right to expropriate the property at any time and in whatever manner it pleased. By the application of minimum standard rules, if the subject of a State were to transfer property to an alien, the parliament of that State or the government would lose a portion of its former power. Thus, the State would suffer, in the language of Williams,[63] an abridgement of its authority by the act of a third party.

It is obvious that a State cannot legislate on all issues for her own nationals and aliens alike. For example, national legislation and regulations on exchange control cannot be applied to nationals and aliens equally. The reason is simply that this kind of equality of treatment would, in fact, be damaging aliens much more than nationals. With regard to most important issues such as those concerning the economic

62- Brownlie I., Principles of Public International Law, Fourth edition, Oxford, 1990, pp. 525, 536.

63- Williams J. F., International Law and the Property of Aliens, op. cit., p. 15.

and political affairs of a country, aliens will normally be less able to voice their opposition to national legislation, being unable to take part in the election process. Clearly, this makes them generally more vulnerable to domestic legislation.[64] Accordingly, the concerns of nationals and aliens may be different in the legislation, as European Court of Human Rights noted, "a legitimate reason for requiring nationals to bear a greater burden in the public interest that non-nationals" may exist.[65]

This reasoning cannot be used for developing countries. For, in some developing States, the real voice belongs to aliens rather than the nationals of those countries. This was the position of Mexico which accordingly argued in her note, not only that the agrarian reform should be applied to citizens and aliens without discrimination, but also that the doctrine of equality between nationals and foreigners stood against the so-called privileged position of aliens. As authority, Mexico cited the Convention of the Second Pan-American Conference 1902, and article 9 of the Montevideo Convention of the Seventh Conference (1933) and the Calvo doctrine as a positive norm of particular inter-American international law.[66]

In sum, the two main theories on expropriation of aliens' property reflect two completely different views which are based on different economic and political systems of States. They have been developed with regard to the particular legal circumstances prevailing in certain States and accordingly neither of them could be implemented universally so as to provide a safeguard for the interests of all of the international

64- Salgado R. A., Protection of Nationals' Rights to Property Under the European Convention on Human Rights, 1987, op. cit., p. 904.

65- Loc. cit.

66- See the position of Latin American States, including Mexico, on treatment of Aliens in Borchard E. The "Committee of Experts" at the Lima Conference, A.J.I.L., 1939, pp. 269-282.

community. Each of the economic systems demands varied economic relations with other States, determined by their economic systems. Therefore, any analogy of the legal relations between developing and developed countries in this regard is irrelevant and misleading. That is why treaties between particular States have been concluded in order to secure for aliens what they were entitled to. However, neither of these theories would alone be sufficient to bring justice and prosperity to the international community, nor moreover has either been incorporated in international law so as to have direct effect on the legislative competence of a State within the domestic sphere. Meanwhile, one cannot merely presume that any State has by implication surrendered a portion of its legislative power. It seems unlikely that any State would ever leave its law at the mercy of the argument of diplomatists or the reasoning of the learned. The lack of a uniform national legislation, even among the civilized nations, particularly with regard to the issue of compensation,[67] is clear evidence of this assertion. The lack of a uniform approach is further demonstrated by the fact that, in some legal systems, the inviolable character of private property is affirmed, while in others the concept of private property is considered an undesirable one which ought not to be countenanced.[68]

67- See Note 19 Supra.

68- Loc. cit.

3 - THE THEORY OF ACQUIRED RIGHTS

The concept of acquired or vested rights deals specifically with the sanctity of property rights obtained under a particular system of law which is threatened by a later change of *lex situs*. Once property rights have been acquired under the existing law, they cannot be arbitrarily revoked as a result of subsequent changes within that legal system without the obligation to make reparation.[69] The concept of acquired rights is closely linked with the rule of non-retroactivity of laws, the purpose of which is to retain public confidence in law and social order, the rule being recognized in almost all legal systems.[70]

The United Nations International Law Commission which dealt with this question came to the conclusion that respect for acquired rights constitutes one of the main principles of international law governing the treatment of aliens.[71] Also, the Permanent Court of International Justice in its judgement in the *German Interests in Polish Upper Silesia Case*, has said: "the principle of respect for vested rights forms part of generally accepted international law".[72]

However, it is difficult to assert that it has still a principle of law imposing on States international obligation in violation of their legislative and sovereign prerogatives. According to this view, if a State's legislation may legitimately restrict rights of nationals, it is inconceivable that aliens might be protected against such legislation on the basis of the theory of acquired rights.[73] Moreover, revolutions and change of regimes might

69- Kronfol Z. A., Protection of Foreign Investment, Netherlands, 1972, p. 19.

70- Kaeckenbeek G., The Protection of Vested Rights in International Law, 17 B.Y.I.L., 1936, p. 3; see also Liamco Award, op. cit., p. 171.

71- II Y.I.L.C., 1959, (ACN.4/SER.A/1959/ADD.1), New York, 1960, p. 3.

72- *German Interests in Polish Upper Silesia Case*, P. C. I. J., Series A, No. 7, p. 42.

easily alter any such rights. The theory is based on private ownership, and as Judge Arechaga has held:

> "The very basis of this traditional doctrine ..... which is predicated on the existence of an unlawful act, is removed once it is realized that the acquired right to private property, in particular private ownership of the means of industrial production, is no longer protected by contemporary international law."[74]

Among the writers who have doubted the place of the theory of acquired rights in international law are Friedman,[75] Garcia Amador,[76] Foighel[77] and Brownlie.[78] Some of them believe that not only is the theory obscure, ambiguous and indefinable, but it is also unsupported by the international judicial decisions.[79] Brownlie states that there is no evidence that the principle of acquired rights has the particular consequences contended for, and exponents of acquire rights doctrine commonly give it a modified form which leaves room for exercise of local legislative competence.[80]

Moreover, the value of acquired rights in municipal law is restricted to times of calm and ordinary circumstances. The new economic orders which occur after revolutions and social disturbances easily alter such rights to the extent they are in conflict with the public

73- Francioni F., Compensation for Nationalization of Foreign Property: The Borderline between Law and Equity, 24 I.C.L.Q., 1975, p. 260.

74- De Arechaga E. J., State Responsibility for the Nationalization of Foreign Property, 11 N.Y.U.J. I. L. & Pol., 1978, p. 181.

75- Friedman S., Expropriation in International Law, op. cit., p. 126.

76- Garcia Amador F. V., The Proposed New International Economic Order: A New Approach to the Law Governing Nationalisation and Compensation, 16 Lawyer of the Americas, 1984, pp. 5-7.

77- Foighel I., Nationalization, A Study in the Protection of Alien Property in International Law, London, 1957, pp. 53-4.

78- Brownlie I., Principles of Public International Law, op. cit., pp. 657-8.

79- Friedman S., Expropriation in International Law, op. cit.

80- Brownlie I., Principles of Public International Law, op. cit.

aims of such movements. Accordingly, it is suggested that the theory might have had some effect in this respect "when private ownership was the only conceivable postulate of socio-economic organization".[81] It would seem to follow that the theory cannot provide a reliable legal basis for the determination of the duty of States, particularly developing States, to compensate for their expropriated property.

4 - THEORY OF UNJUST ENRICHMENT

The theory of unjust enrichment is a principle of municipal law, and as with the theory of acquired rights, it is recognized in most legal systems. Indeed, many writers accept that it is a general principle of international law.[82] This theory presents the most equitable principle which prevents enrichment of one party at the expense of the others. Eduardo Jimenez De Arechaga, the former President of the International Court of Justice, holds in this regard that:

> "The principle which constitutes the legal foundation of the practice actually followed by States ..... is to be found in the doctrine of unjust enrichment. If the nationalizing State were to grant no compensation when nationalizing alien property, it would enrich itself without justification at the expense of a foreign State - a distinct political, economic and social community. Through the exercise of its sovereign right, the nationalizing State would be depriving an alien community of the wealth represented by the

81- Francioni F., Compensation for Nationalization of Foreign Property: the Borderland Between Law and Equity, 24 I.C.L.Q., 1975, p. 262.

82- Schwarzenberger G., International Law, vol. I, 3rd ed., london, 1957, p. 577; Friedman W., The Use of 'General Principles' in the Development of International Law, 57 A.J.I.L., 1963, p. 295; McNair A. D., The General Principles of Law Recognised by Civilized Nations, 33 B.Y.I.L. 1957, p. 11; De Arechaga E. J., International Law in the Past Third of Century, 1978, p. 299 et seq.

investment it has made on foreign soil. The nationalizing State would be taking undue advantage of the fact that economic resources originating in another State had penetrated its territorial domain. This principle signifies that it is not the elements of the loss suffered by the expropriated individual owner, but rather the enrichment, the beneficial gain which has been obtained by the nationalizing State, which must be taken into account. Any measure which results in a transfer of wealth in favour of the nationalizing State or one of its agents gives rise to a duty to compensate."[83]

He believes that what makes the doctrine relevant to nationalization is its equitable foundation which requires the taking into account of all the circumstances of each specific situation and the balancing of the claims of the dispossessed alien with the undue advantages that he may have enjoyed prior to nationalization. According to him:

"the principle of unjust enrichment would take into account the undue enrichment gained by foreign companies during a period of monopoly or of highly privileged economic position, as, for instance, during a period of colonial domination."[84]

The theory has been supported by some other writers. Fatouros holds that in case of lawful measures the chief ground on which compensation is found is the general principle of law condemning unjust enrichment.[85] However, the interpretation of the concept seems to have differed from State to State. Developed States search for its application in payment of compensation to their nationals by the expropriating States. Developing States, on the other hand, interpret it so as to prevent more exploitation of their natural resources. Application of the principle can prevent one party from becoming unjustly enriched, while at the same time preventing the other party being unjustly deprived. Therefore, the

83- De Arechaga E. J., International Law in the Past Third of Century, op. cit., p. 182.

84- Loc. cit., p. 193; a similalr idea was expressed by Friedman W., The Use of "General Principles" in the Development of International Law, 57 A.J.I.L., 1963, p. 289.

85- Fatouros A. A., Government Guarantees to Foreign Investors, op. cit., p. 308.

principle tends to create a balance between the interests of the parties involved in expropriation of property. The equitable character of the principle can provide a proper legal foundation for the duty of a State to compensate aliens in case of a lawful expropriation. On the other hand, it can prevent aliens from exploitation of the resources of the host State.

5 - THE THEORY OF HUMAN RIGHTS

Human rights have been usually involved in the context of other than specifically economic issues. However, economic and property rights form a part of human rights and the relation of human rights to the issue of expropriation and compensation has been discussed by some writers. Article 17(2) of the Universal Declaration on Human Rights states that, "No one shall be arbitrarily deprived of his property".[86] The subject is dealt with in more detail in the European and other regional Conventions of Human Rights.[87]

Article 1 of Protocol No. 1 the European Convention on Human Rights states that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[88]

86- United Nations General Assembly Resolution No. 217 (III), December 10, 1948, U. N. Resolutions, Series 1, G. A., vol. 11, 1948-49, p. 138.

87- Art. 1 of European Convention of Human Rights of November 4, 1950, in 213 U.N.T.S., 1955, p. 262; Art. 21 of American Convention on Human Rights, 9 I.L.M., 1970, p. 106; Art. 14 of African Charter on Human and Peoples Rights, 21 I.L.M., 1982, p. 61.

88- Loc. cit.

Garcia Amador, the special Rapporter to the International Law Commission, used the law of human rights to bridge the gap between the international minimum standard and the national treatment theories.[89] Lillich, like Brownlie,[90] McDougal,[91] Waldock,[92] Amerasinghe,[93] Jessup,[94] and Morphy,[95] has tried to support the idea and defend it as a highly promising basis for the development of the law on State responsibility for injuries to aliens.[96] Using human rights as the legal basis for the law of State responsibility for injuries to aliens seems ideal. In fact, where the concept of human rights is recognized in its most complete sense, the law regarding treatment of aliens in this regard is theoretically superfluous.[97]

However, human rights are directly dependent upon the very basic principle of self-determination on which each State has established its economic system. Any treatment of aliens' property should also take into account the rights of the expropriating nation. To do that, the role of those properties in that society, and the degree to which the presence of those properties have brought about the necessity for the changes in the

89- II Y.I.L.C., 1957, p. 112.

90- Brownlie I., Principles of Public International Law, op. cit., p. 527.

91- McDougal M. S., Lasswell H. D., Chen L., Human Rights and World Public Order, Yale University Press, New Haven, 1980, p. 765.

92- Waldock H., Human Rights in Contemporary International Law and the Significance of the European Convention, in The European Convention on Human Rights, British Institute of International and Comparative Law, series No. 5, 1965, pp. 2-3.

93- Amerasinghe C. F., State Responsibility for Injuries to Aliens, op. cit., pp. 278-81.

94- Jessup P. C., A Modern Law of Nations, New York, 1948, pp. 101-3.

95- Murphy C. F., State Responsibility for Injuries to Aliens, 41 N.Y.U.L.Rev., 1966, pp. 128-130.

96- Lillich R. B., International Law of State Responsibility for Injuries to Aliens, University Press of Virginia, 1983, pp. 26-29.

97- Amerasinghe C. F., State Responsibility for Injuries to Aliens, op. cit., p. 5.

prevailing economic system should be considered. This is particularly so where the foreign property belongs to multinational companies which have been the subject of the bitter criticism for their violations of the human rights by supporting undemocratic regimes in developing States. The application of the human rights theory can be useful if it is used to protect the rights of all sides involved in expropriation of property. As far as developing countries are concerned, taking into account the behaviour of the aliens in that respect creates a sound basis for the rules of human rights to be applied and used as a legal basis in relation to the taking of aliens property.

Therefore, to achieve a common approach, and a basis for lasting international rules, the international community needs to lay down a comprehensive doctrine based on the human rights principles which will be adopted by all members of the international community and which have become the legal conscience of human being.

(SECTION TWO)

THE CONDITIONS OF EXPROPRIATION OF ALIENS' PROPERTY UNDER INTERNATIONAL LAW

There is little doubt today that a State has a general right to nationalize foreign owned property.[1] This right, which is a reflection of the territorial sovereignty of State, has been recognized in all legal systems, and may therefore be regarded as a general principle of law. It follows that the right of the State to expropriate private property, national or alien, is indisputable in the present state of international law.[2]

However, disagreement begins to arise when any attempt is made to determine the conditions under which nationalizations may be carried out. Traditionally, it has generally been accepted that, where a State has decided to nationalize the property of aliens, three conditions ought to be fulfilled:

1. There is no discrimination.

1- *Liamco case,* 20 I.L.M. 1981, pp. 49-51; *Texaco case,* 17 I.L.M. at 21, para. 59; *B. P. Exploration case,* 53 I.L.R. at 353; U.N. Resolution 1803 (XVII), Art. 4.

2- Brownlie I., Principles of Public International Law, 4th ed., Oxford, 1990, op. cit., p. 531-2; Verwey W. D., and Schrijver N. J., The Taking of Foreign Property Under International Law: a New Legal Perspective 15 Neth.Y.I.L., 1984, pp. 7-9; White G., Nationalization of Foreign Property, op. cit., p. 4; Garcia Amador F. V., Fourth Report to the International Law Commission on the Subject of the Responsibility of States for Injuries Caused in its Territory to the Persons or Property of Aliens", 1959, U.N. Doc. No. A/CN. 4/119, Y.I.L.C., vol. II, 1959, p. 11; Sigmund P. E., Multinationals in Latin America, the Politics of Nationalisation, Madison, 1980, p. 50.

2. There is a public purpose.

3. There is prompt, adequate and effective compensation.[3]

There has however been some controversy over the application of these conditions, particularly in respect to developing countries. There some elements peculiar to these countries which make an already complicated situation even more so. The political and economic dependencies of developing countries to some developed States, together with the huge social, economical and political problems in these countries are the paramount fears of the foreign investors that they will lose their investment as a result of political changes of those States. specially if those investors are considered in the nationalizing country as one of the sources of those difficulties, while the investors are not impressed by the suggestions that their loss are for the common good or a just reason.[4]

With respect to the conditions of expropriation, attention has always been directed toward the actions of the nationalizing States without any reference to the duties and responsibilities of the aliens, and specially of their respective governments, towards the host States under international law. However, the differences in scholarly opinions and international awards, together with the variety of the agreements between the expropriating and the expropriated parties, indicate that a proper classification of the cases according to different conditions governing each group of the cases is essential. Those differences comprise some legal conditions which result from the economic and political relations of the parties, and include the behaviour of the alien investors and the changing economic circumstances, in particular the changes that have been brought about by the increasingly integrated world economy of international

3- White G., Nationalisation of Foreign Property, op. cit., pp. 5-9,

4- De Lupis I. D., Finance and Protection of Investments in Developing Countries, Second Edition, G. Britain, 1987, p. 67.

finance and multinational corporations.

In this section, we will examine those conditions to see how they can be applied to different groups of the countries, in particular, to developing countries.

1 - THE PRINCIPLE OF NON-DISCRIMINATION

Until 1939, it was generally asserted that a measure of expropriation which discriminated against aliens as such was contrary to international law.[5] Taking the property of aliens for the sole reason that it was owned by aliens furnished a valid ground of complaint against the taking State, quite apart from the question of compensation.[6] This remained the position even if the measure allegedly formed part of a programme of general reform and provided that the particular decree was directed only against foreigners.[7]

The rule of non-discrimination was essentially based on the principle of the equality of treatment between nationals and foreigners, and was first established in order to protect foreigners against any decision not based on the public policy of governments of the host countries, gradually becoming an established rule between the Western countries.[8] Although developing countries lacked equal bargaining

5- White G., Nationalisation of Foreign Property, op. cit., p. 5.

6- Fischer-Williams, International Law and the Property of Aliens, 9 B.Y.I.L., 1928, p. 28.

7- Herz J. H., Expropriation of Foreign Property, 35 A.J.I.L., 1941, p. 249.

8- Francioni F., Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity, 24 I.C.L.Q., 1975, p. 269.

power in economic and political relations with the developed States, the rule was extended to them. On the other hand, the governments in the developing countries, whether from pressure, ignorance, eager necessity or corruption, have frequently been willing to submit to agreements which were not in the public interest. Consequently, when the privileges and rights granted to foreigners come by a later generation, or by a different government, to be looked on as against the public interest and as a means by which foreigners gained an undue profit from the depletion of the natural resources of the country, it is difficult to resist the demand for expropriation as a remedy for these unacceptable situations, even though it is discriminatory against the nationals of a certain country.[9]

Then again, it was in the interest of the sponsors of the rule of non-discrimination to secure the investments of their nationals which had been endangered as the result of political instability of the expropriating States resulted from the political influence of the investors' government. On the other hand, the investors' governments knew that as the result of their behaviour in their colonies whenever those colonies get the chance, they would end the privileged positions of the former colonial power and its nationals. Naturally, the expropriation measures would be discriminatory against certain States, but not in a negative sense. The rule of non-discrimination was to be applied to prevent injustice against aliens, but in developing States it has been used in order to end the discriminatory relations between those countries with the alien investors.[10]

At the same time, it is difficult for the developing countries to put their economic relations with the governments of the investor countries at

9- Penrose E., Joffe G & Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, 55 M.L.R., 1992, p. 357.

10- Nationalisation in the the new independent countries and in the countries with quasi-colonial relations mostly are of this kind.

risk.[11] The developing countries have always been at a considerable disadvantage in relations with the developed countries. This political and economic imbalance limited the ability of the third world countries to adequately protect their own interests. Therefore, these countries were unable to declare, defend and insist on their positions until they had developed politically and economically and recognized that arrangements negotiated in past had been unjustly advantageous to the nationals of one or more countries and encroach those property.[12] This reality caused a dramatic change in the practice of the developing countries in the post-World War II era, when Western countries had come out of the war unable, economically and politically, to sustain their colonial empires. However, the developed countries continued to assert the rule of international minimum standard established between themselves.

State practice has been uncertain and there is no settled standard to determine when and where there exists discrimination that could render the State's action unlawful. Among the earliest assertions of the rule in post-war State practice, the Swiss Federal Minister, M. Petitpierre, in 1947 in protest against the Czechoslovak measures stated:

> "We can take no steps against the principle of nationalisation, since nationalisation is a domestic measure taken by a state within the framework of its own sovereignty, and we must accept it as long as this measure affects the citizens of the country as well as foreign inhabitants. We must, however, protest when there is discrimination against Swiss citizens."[13]

Also, the United States on September 7, 1948 protested to the

11- Generally see Penrose E., Joffe G & Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, op. cit., pp. 351-367.

12- Penrose E., Joffe G & Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, op. cit., p. 353.

13- Quoted in Briggs, The Law of Nations, 2nd ed., New York, 1952, p. 568.

Romanian Government against its discriminatory treatment, by which exempted Soviet-owned enterprises from expropriation, in the following terms:

> "While the United States Government has consistently recognised the right of a sovereign power to expropriate property subject to its jurisdiction and belonging to American nationals, the United States has likewise refused to recognise the validity of such expropriations in cases where they are discriminatory by nature and effect....."[14]

However, if expropriation were carried out in a non-discriminatory manner as between aliens and the nationals of the expropriating country, the investors would still prefer to judge it in connection with other conditions based on the rules of the international minimum standard. Minimum standard rules are more concerned with the consequence of the measure rather than the application of the rules. Accordingly, it is irrelevant, without payment of compensation, if one asserts the rule of non-discrimination in measures of expropriation. It is likely that the assertion of the rule of non-discrimination would not be encouraging to States to expropriate aliens' property. As a result, aliens would benefit from the application of this principle. However, the rule has never been a strict one and has been mitigated over time. The rule of non-discrimination helps these countries to prevent the expropriating State from depriving them of their highly preferred position in the country.

In other words, the rule of non-discrimination means that expropriation must be general in its scope and not directed only against foreigners.[15] However, a State cannot refrain from nationalization just because such a measure would affect only certain foreign-owned property. Cases may arise in which a measure of expropriation only

14- Dept. of State Bulletin, vol. 19, 1948, p. 408.

15- De Lupis I. D., Finance and Protection of Investments in Developing Countries, op. cit., p. 68.

affects foreign nationals, because, for example, there is only one enterprise of the kind in question and that is owned by foreigners.[16] As Brownlie observed, the test of discrimination is the intention of the government. The fact that only foreigners are affected may be accidental, and if the taking is based on economic and social policies, it will not be deemed to be directed against particular groups simply because they own the property involved.[17]

While in *Topco* case it was stated that the measures were discriminatory against the company,[18] the tribunal in *Liamco* case rejected the claimants' contentions and regarded the Libyan motive as a policy of nationalization which was intended to preserve the ownership of its oil. The tribunal also stated that motives are indifferent to international law.[19] The *Aminoil* Award followed the same track. While, a Japanese concern in the same sector was apparently left free to operate, the Arbitral Tribunal in rejecting the discrimination claim held:

> "It is generally known that all Middle Eastern States belonging to OPEC (as well as other producing countries) have always considered that their overall petroleum policy must, in its final phase, result in the nationalisation of the whole local petroleum industry ..... The Tribunal does not see why a Government that was pursuing a coherent policy of nationalisation should not have been entitled to do so progressively. ..... It has never for a single moment been suggested that it was because of the American nationality of the Company that the Decree Law was applied to Aminoil's concession. Next and above all, there were adequate reasons for not nationalising Arabian Oil."[20]

In the *Anglo-Iranian Oil Company* case, the International Court of

16- Argument of the United Kingdom in the Iranian Oil Nationalisation, I.C.J. Pleadings 1952, pp. 96-8.

17- Brownlie I., Principles of Public International Law, op. cit., p. 538, footnote 99.

18- *Topco case,* 53 I.L.R., p. 390.

19- *Liamco Award,* in 62 I.L.R., 1982, p. 194.

20- Arbitration between the Government of Kuwait and the American Independent oil company (Aminoil), 21 I.L.M., 1982, p. 1019.

Justice held itself to have no jurisdiction to judge, and so did not decide, whether the Iranian Nationalization was discriminatory or not, and whether such discriminatory effect would be contrary to international law. In that case, the U.K. argued that the Iranian Nationalization Act of 1 May 1951 was directed exclusively against the Anglo-Iranian Oil Company.[21] In fact, the Company was the only concessionaire for the exploration and exploitation of the Iranian oil, and the U.K maintained that belief in spite of this fact and of the language of the Nationalization Act which spoke of nationalization of the oil industry throughout Iran and was, therefore, general in character. According to the U.K., the generality of the language could not be regarded as being decisive for the purpose of determining whether it is, in fact, discriminatory against foreigners.[22] That being the case, if a country through contract or concession were to grant a sector of her economy to a foreigner, she would be forbidden from expropriating those properties, because it would be discriminatory against that contractor or concessionaire. Such a rule would limit the sovereign right of that country to decide the options suitable for its development. It is obvious that a State cannot refrain from nationalization measures which are of vital importance just because such a measure would affect only certain foreign-owned property. Indeed, if such a measure is dictated by overwhelming considerations of public utility and general welfare, that measure cannot be said to be directed against or discriminatory against foreigners. In such cases, the fact that the expropriation affects foreigners is only in a sense, accidental.[23]

Literally, the term "discrimination" is used when the action targets

21- *AIOC case,* I.C.J. Pleadings, 1952, pp. 96-8.

22- Loc cit.

23- This fact was recognised by the United Kingdom and was pointed to in its argument. *AIOC case,* I.C.J. Pleadings, 1952, pp. 96-8; this case will be discussed in the next chapter.

one or more among a particular group, and is directed against them. When there are no other entities, the application of the concept of discrimination is meaningless. Therefore, in the *SUPOR* case, the Civil Court of Rome held that the Iranian Law was not discriminatory,[24] In the *Rose Mary* case before the Court of Aden it was held that the Iranian Law was contrary to international law, not because it was discriminatory, but on the ground that there were no provisions for compensation.[25]

Moreover, the very recent authoritative decision in the *Khemco* case rejected the argument that the Iranian Government's action in expropriating Amoco's interest in Khemco petrochemical complex was discriminatory since another joint venture in the same sector, namely the Iran-Japan Petrochemical Company, was not expropriated. In line with the decision of *Aminoil,* the Tribunal hold that:

> "The Tribunal finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or both may justify such a difference of treatment."[26]

In the case of the Indonesian nationalization of tobacco enterprises before the Court of Amsterdam and the Court of Bremen two different decisions were made. It is an undisputed fact that the Nationalization Act was directed against Dutch enterprises and not against Indonesians and other foreigners. Accordingly, the Court of Amsterdam[27] held that the

24- *AIOC v. SUPOR.*, Civil Court of Rome, 22 I.L.R., 1955, pp. 32-33.

25- *Anglo-Iranian Oil Company* v. *Jaffrate* (the Rose Mary), 20 I.L.R., 1953, p. 317; and see De Lupis I. D., Finance and Protection of Investments in Developing Countries, op. cit., pp. 95-7.

26- *Khemco case* (Amoco International Finance Corp.) v. *Iran*, Award No. 310-56-3, 14 July, 1987, 15 Iran-U.S.C.T.R., p. 233. Factual details of the case, see Chapter 4 on post-Revolution Expropriations, p. 385.

27- 6 Netherlands International Law Review, 1959, pp. 140, 156 278, 285; see also Domke M., Indonesian Nationalisation Measures Before Foreign Courts,

Indonesian law was discriminatory as an additional and aggravating factor which invalidated the act of nationalization under international law. This is a correct position if it be taken in regard to the case of individual expropriations in the usual situation of the countries with equal bargaining power. The Indonesian nationalization, like most of those in the third world countries, was not a usual kind of expropriation. Therefore, the Bremen Court of Appeals found that:

> "The equality concept means only that equals must be treated equally and that the different treatment of unequals is admissible..... for the statement to be objective, it is sufficient that the attitude of the former colonial people toward its colonial master is of course different from that toward other foreigners."[28]

Because of the privileged position of the Netherlands' companies in Indonesia, the Court also found that the Indonesian law was not discriminatory.[29] In addition, the expropriation of the Dutch companies constituted at the same time a shifting of proprietary relations which was affected by a former colony after its independence in order to change the social structure. Therefore, by the nature of the matter alone, the general principles of the conventional type are not applicable, and the same principles cannot prevail for such overall expropriations.

The principle of non-discrimination is generally accepted in international law to prevent any injustice against aliens. But, if the principle cannot provide such a result, or conversely, if applying the rule would cause injustice and discrimination, it would contravene the purpose of international law. Therefore, it appears unlikely that a nationalization would be contrary to international law if there is a patent public purpose

54 A.J.I.L., 1960, p. 308.

28- N.V. Verenigle Deli-Maatschapijen and N.V. Senembah-Maatchapij v. Deutsch Indonesische Tabak-Handelsgesellschaft m.b.H., 1 U. 159/1959.

29- Loc. cit.; among the foreign enterprises was the swiss-owned Tjinta Radja Tobaco concession.

even if the expropriating measures are exclusively directed against aliens. The public purpose of nationalization, specially in developing countries, is of paramount importance and such valid purpose together with other international principles, such as "national security" and "self-determination", appear to outweigh the necessity of non-discrimination in some of the cases.

In the very recent Iran-United State disputes, the Tribunal did not deem the discriminatory taking of the U.S. nationals' property by Iran as illegal. In most of those cases, the Tribunal simply ignored this principle, although Iran had quite openly expropriated all the property of U.S. nationals, while leaving the property of other nationals wholly or partially intact.[30] Therefore, the Tribunal should have found a good cause not to give any weight to the non-discrimination principle.

In the developed countries there is a good cause not to discriminate against a particular alien or State and they should comply with the principle of non-discrimination. But, as in a country like Afghanistan, they nationalize in a manner discriminatory against the privileged properties and contractual rights of the Soviet Union, the expropriating measures should not be considered as illegal discriminatory acts against international law.

The rule that there must be no discrimination and that nationalization laws must have a general scope to be valid under international law is obviously borrowed from national law.[31] There, it is usually of great importance to assess whether or not the legislator had a particular property in mind when making a law for its expropriation. But

30- More see in chapter 4 on post-Revolution Expropriations.

31- De Lupis I. D., Finance and Protection of Investments in Developing Countries, op. cit., pp. 70-1.

in the international community, considering the pattern of foreign investment in other countries, it seems that, more often, natural resources are exploited by foreign enterprises in developing countries. Any nationalizing measures of such enterprises are then likely to be discriminatory.

Therefore, in any sector of the economy where it is more common for both nationals and aliens to carry on business with an equal position, the rule of non-discrimination may be of importance. But, in the sectors such as natural resources, there is no such equal practice due to the lack of finance and equipment by nationals. Moreover, nationalization is not only regarded as the nationalist formula for speedy and fundamental economic changes, but also reflects the desire of previously dependent peoples for economic independence and economic development. Thus, most developing countries, in expropriating alien-owned enterprises, merely want to ensure national control over the main sectors of the economy.[32] To secure their independence and national integrity,[33] they want national control over the industries vital to national security.[34] To obtain that, it may be necessary to expropriate property solely belonging to aliens. Moreover, when foreign investors are in a clearly advantageous position as against the nationals of the expropriating State, by reason of their political, military and economical privileges, the application of the rule of non-discrimination would itself be discriminatory against the nationals of the expropriating State.

Meanwhile, as was mentioned earlier, a person cannot assert that the rule of non-discrimination would always necessarily bring justice to both

32- The principle of the right of sovereignty of nations.

33- The principle of self-determination.

34- Akinsania, A. A., The Expropriation of Multinational Property in the Third World, Praeger. 1980, p. 78.

aliens and nationals. For example, if aliens were not be compensated for their deprived property, merely because the nationals were not to be compensated, this non-discrimination would itself be discriminatory against aliens. The reason, as was mentioned earlier[35] is that aliens usually do not get any advantage from the nationalization measures while nationals are the beneficiaries of the measures in the society. Accordingly, some factors are pointed out which justified discrimination on compensation in the context of nationalizations. It is argued that non-nationals are unable to voice their opposition to nationalization legislation, because they are unable to take part in the election process.[36] In most of the developing countries, this reality is vice versa, *i.e.*, under the autocrats and puppet regimes it is the nationals who do not have any voice and need protection against the privileged foreigners who have the real political influence on the host governments.

The principle of non-discrimination, as with other principles relating to the nationalization of property, has not been adopted by all countries, particularly where the measures taken have affected the property rights of aliens of one nationality and not those of other nationalities who also own property rights of the kind specified in the measure. Thus, the rule of non-discrimination has been violated and ignored many times by non-Western countries. For example, a feature of the measures taken in Czechoslovakia, Poland and Romania was the express reference to property and rights belonging to the German Reich or to German nationals, and in the case of Czechoslovakia, to the property and rights of the Hungarian State and of Hungarian nationals as well. It is very doubtful that the legality of the measures could be questioned. For,

35- 102 European Court on Human Rights, Ser. A, op. cit.

36- Loc. cit., p. 48.

although they were discriminatory, they occurred under the Article 29 of the Peace Treaty with Hungary to which Czechoslovakia was a party as one of the Allied and Associated Powers.[37]

Apart from this discrimination against German and Hungarian property, the eastern European nationalization measures contained few examples of provisions referring specifically to alien property. To satisfy the rule of non-discrimination against aliens, it is enough only to apply the measure equally to nationals. Generally, the rule of non-discrimination does not establish the most important and vital facet of rules of expropriation.[38]

Therefore, the application of the rule of non-discrimination depending as it does on the conditions, such as the nature of economic and political relations pertaining between the parties, may vary. Equality of treatment needs equality of the conditions, otherwise, it might itself be discriminatory.

What constitutes illegal discrimination in general is the aspect of expropriation that has generated much discussion in the United Nations: racial discrimination and human rights.

In the Preamble to the Charter of the UN, member states reaffirmed faith in fundamental human rights, in the equal rights of men and women and of nations, large and small. The Charter contains a significant number of references to human rights and fundamental freedom for all based on respect for the principle of equal rights, without distinction as to

37- Treaty of Peace Betweeb Union of Soviet Socialist Republics, U.K., U.S., Australia, ByeloRusian Soviet Socialist Republic, et., and Hungary, Paris, 10 February 1947, 41 U.N.T.S., p. 135.

38- It is possible that an expropriation measure be non-discriminatory but still be considered confiscatory because of the non-payment of compensation; The example are the Easter European takings; the most important and vital principle is the rule of payment compensation.

race, sex, language or religion.[39] These provisions have provided the background to a substantial body of multinational conventions and practice by the organs of the United Nations.[40] For example, the UN General Assembly Declaration of Human Rights of December 19, 1948, even though it might not be considered legally binding on member States, set forth a comprehensive list of rights and that to some extent has affected the content of national law and has occasionally been expressly invoked by tribunals.[41]

The Declaration has also frequently been invoked by the General Assembly as a code of conduct and as a basis for appeals urging member States to respect human rights. Some of the provisions of the Declaration constitute general principles of law,[42] and these have inspired a number of important conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedom with its protocols,[43] the International Covenant on Economic, Social, and Cultural Rights,[44] the International Covenant on Civil and Political Rights,[45] and the International Convention on the Elimination of All Forms of Racial Discrimination.[46]

All these covenants and conventions have the legal force as treaties

39- Article 55 of the Charter of the United Nations.

40- Brownlie I., Principles of Public International Law, op. cit., p. 578.

41- *Danzing Railway Official* case, P.C.I.J., Series B, No. 15, 1928.

42- Akinsania A. A., The Expropriation of Multinational Property in the Third World, Praeger, 1980, p. 24.

43- The European Convention on Human Rights, Rome 4 November 1950.

44- International Covenant on Economic, Social and Cultural Rights of 16 December 1966, U.N. Resolutions, Series 1, G.A., vol. 11, 1966-68, op. cit., p. 165.

45- International Convention on Civil and Political Rights of16 December 1966, op. cit.

46- Resolution 1904(XVIII) of 20 November 1963, 3 I.L.M., 1964, p. 164.

for the parties to them, and constitute a detailed codification of human rights. The basic principle of these codes is that these rights are to be exercised under a guarantee of non-discrimination. For example, the International Covenant on Civil and Political Rights states that each State party to that covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in that covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[47] In addition, it was provided in the International Convention on the Elimination of All Forms of Racial Discrimination that, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedom in the political, economic, social, cultural or any other field of public life.[48]

But, as far as developing countries are concerned, a body of law has emerged as a part of, and a complement to, the objectives stated in the Preamble to the Charter of the United Nations in order to promote social progress and better standards of life. In Article 1 of that Charter, it has been emphasized that it is the purpose of the United Nations namely , to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character.[49] A survey, as the UN Secretary-General emphasized the increasingly compulsory nature of

47- Article 2(1) of the International Covenant on Civil and Political Rights of 16 December 1966, op. cit.

48- Article 1(1) of Resolution 1904(XVIII) of 20 November 1963, op. cit.

49- Survey of international law prepared by the Secretary General of the UN in response to a request made by the UN International Law Commission. 2 Y.I.L.C. (part 2), 1971, pp. 34-35.

cooperation for development, viewed as a primary responsibility of the developed countries, it becomes a duty correlative to the right claimed by the developing countries to preferential treatment.[50]

Article 17 of the NIEO Charter in this regard states that international cooperation for development is the shared goal and common duty of all States. Accordingly, every State should cooperate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives.[51] The Charter also provides that developed countries should grant and extend generalized non-reciprocal and non-discriminatory tariff preferences to developing countries with a view to accelerating the economic growth of these countries and bridging the economic gap between developed and developing countries.[52] It was on account of these considerations and the realities of our time that developed countries agreed to grant preferential treatment to developing countries in international trade.[53]

In sum, the principle of the respect for and protection of human rights, including the principle of non-discrimination, based on the UN Charter, especially Articles 55 and 56, the practice of the organs of the

50- Garcia-Amador, F. V., The Proposed New International Economic Order: A New Approach to the Law Governing Nationalisation and Compensation, 16 A.J.I.L., 1984, pp. 16-17.

51- Resolution 3281(XXIX) on Charter of Economic Rights and Duties of States, op. cit., pp. 303-304.

52- Articles 18 & 19 of G. A. Resolution 3281, op. cit., p. 304; Preferential treatment of the developing countries is further recognised in Articles 8, 9, and 11 of that resolution.

53- The waiver of reciprocity in Article XXIII.1 of the 1965 GATT Protocol; The establishment of the system of tariff preferences by the Lome Convention; The U.S. Foreign Trade Act of 1974.

United Nations, the Universal Declaration of Human Rights and the European Convention on Human Rights, certainly have become a recognized legal principle.[54] Therefore, the right of a sovereign State to expropriate foreign-owned property is limited by the rule of non-discrimination as far as it does not prevent the development of States. However, it would not be against the rule to end the discriminatory presence of a group of aliens in that society. Meanwhile, the new concept of international cooperation for development and the claim of the developing countries to preferential treatment is gradually eliminating the traditional principles of non-discrimination and reciprocity which have been two essential elements of the old most-favoured-nation clause.[55]

It has been an international experience that, whenever satisfactory compensation has been paid, all claims on the existence of discrimination and lack of public purpose have simply vanished. This has been acknowledged by the American Law Institute in its recent Restatement that:

> " ..... a program of taking that did not meet the requirements of equal treatment and public purpose but did provide just compensation ..... might not in fact be successfully challenged."[56]

54- Brownlie I., Principles of Public International Law, op. cit., p. 572.

55- Garcia-Amador, F. V., The Proposed New International Economic Order: A New Approach to the Law Governing Nationalisation and Compensation, 16 A.J.I.L., 1984, op. cit., pp. 19-20.

56- Restatement of the Law, Third, Foreign Relations Law of the United States, vol. 2, The American Law Institute, Washington D. C., 1986, p. 200.

2 - THE PRINCIPLE OF PUBLIC UTILITY

The task of each government is often stated to be the engineering of public affairs of the country. nationalization and expropriation are generally recognized as the exercise of the sovereign right of a State to control natural resources and other assets located in its territory even if they belong to foreigners.[57] This recognition is therefore qualified to the extent that the property has to be taken for a public purpose or in the public interest.

The purpose of taking the aliens' property is directly related to the motives of the expropriating State. The traditional rules of nationalization recognized the measures as legitimate only when they were for a public purpose or public utility. Public utility seems to cover situations in which economic necessity has obliged the government of a State to take over private property. Expropriation by a government is usually for public use as the result of the performance of its duties toward the nation. But recent cases[58] reject the idea that public purpose is still the exclusive basis for nationalization upon which a State could rely.

Public utility has been used to limit the State's sovereign right to take the property of aliens, but as Domke noted:

> "in modern times, there are few limits upon to what a state may legitimately consider necessary for general benefit. If there are no other reasons, the state can always rely on the needs of the national economy or on the requirements of social welfare."[59]

There is not an exact definition of the term "public utility" in

57- White G., Nationalisation of Foreign Property, op. cit., pp. 35-38; Domke M., Foreign Nationalisations, 55 A.J.I.L., 1961, p. 590.

58- Penrose E., Joffe G., Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, 55 M.L.R., No. 1992, p. 358.

59- Domke M., Foreign Nationalisations, op. cit., pp. 590-91.

international law, especially in distinction with private utility. The UN General Assembly resolution 1803 (XVII) of December 19, 1962 asserted that:

> "Nationalisation, expropriation or requisition shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign."[60]

This right was also recognized to be exercised in the interest of their national development and for the well-being of the people.[61]

The problem is that the sole judge of the situation within the expropriating country is the sovereign within that country and, given the possibility of differences in philosophy and ideology, it may be very difficult to establish that an expropriation lacks the necessary public purpose, as was established in the *Walter Fletcher Smith Case,* or to establish what was the real motive behind the expropriation carried out by a State. The position of the other States to assess what best serves the public interest of the nationalizing country is questionable. Except in a situation so flagrant that the procedure involves a manifest denial of justice, it seems very difficult to envisage a situation where an international organ would undertake to review a State's determination of what is a dominating public purpose.[62]

Nowadays, there is no controversy over the proposition that, when superior interests of a State demand, it could derogate the private property rights. Nearly all States interfere to some extent with private

60-Article I(4) of the Resolution 1803(XVII) December 19 1962, U.N. Reslutions, Series 1, G.A., vol. IX, 1962-63, p. 107.

61- Loc. cit., art., I(1).

62- Domke M., Foreign Nationalisations, Some Aspects of Contemporary Law, op. cit., p. 591, n. 44; see also 6 Netherlands International Law Review, 1959, pp. 140, 156 278, 285; Domke M., Indonesian Nationalisation Measures Before Foreign Courts, 54 A.J.I.L., 1960, p. 311.

property, whether by means of partial or entire nationalization of industries or through police power restrictions, or by taxation and other fiscal measures.[63] However it is clear that nationalization measures must not be arbitrary and politically motivated merely to challenge aliens' property without any good cause in order to become rich unjustly. However, it would not be inadmissible to remove the privileged position of aliens to prevent more exploitation of the country resources. That said, the extent to which the public of the nationalizing State would benefit from the measures depends more on the public policies of the nationalizing State.

While nations are supposed to be free to choose their own way of economic life, insisting on a condition like "public utility" would infringe this basic principle of international law. For example, in well established agrarian reforms, usually not all of the land-owners would be expropriated, nor would everybody benefit from the nationalization measures. It is a measure against one group of individuals (land-owners) for the benefit of another group (those without land), but such a measure would not be considered as violating the principle of the public utility. There is another aspect of the issue which must be also discussed and that is the conditions under which the investors entered the country. Those conditions are very important in assessing the conditions which would have to be fulfilled on expropriation of the aliens' property.

One of those conditions, which was discussed earlier, is whether the aliens entered and invested with the consent and free choice of the host country; or whether the investors ignored the consent of the host State and in fact imposed themselves through colonization or quasi-colonization of

63- Akinsania A. A., The Expropriation of Multinational Property in the Third World, op. cit., p. 20.

the expropriating States. Obviously, acquired rights under such a condition require different treatments from those investments which have been carried out in a normal condition based on the consent of the host State, or in a rich economically and socially well established State.[64] If the investment has been made under such conditions that it might be considered as the granting of a privilege to foreigners, the immediate purpose of the new government or regime will usually be to put an end to it without any consideration whether it is in the public interest or not.[65] However, in any circumstances, when a government expropriates the property or the contractual rights of aliens, the public interest is an important consideration in determining the proper amount of the compensation to be paid by the expropriating State to the alien. The public policy consideration is also of assistance in differentiating between nationalization as a legal act of the State or as a breach of contract which is illegal and requires a different approach.

After the Second World War, a large number of new States emerged raising the national consciousness and fierce demands for economic independence, which was somehow different from the public purpose principle. The consequent reaction in many countries against foreign private investment especially in the natural resources sector is clearly evident.

The United Nation Centre on Transnational Corporations Report

64- After the independence of those States, or following a big social or political changes, the investments and properties of the aliens were affected by expropriation, renegotiation or other measures. For example, Aminoil Oil Contracts in Kuwait; 24:2 Virg.J.I.L., 1984, p. 325; the Indonesian Expropriations, and most of the other major expropriations in developing countries.

65- These kind of measures usually are in public interest, but it is not conditional to it and it is different from the public purpose principle.

shows that the nationalization of foreign companies reached its peak in the mid-1970s with the oil crises but had declined rapidly by 1985.[66] That large number of expropriations did not occur only for public utility, but some principles such as economic independence played a paramount role in the expropriation of the aliens' properties. Although, this change in attitude might be temporary, it created a new condition which demanded new rules. Those different conditions governing each case necessitates that all the circumstances relevant to that particular case be considered.[67]

Basically, the consideration of public utility, which might include measures for security or national interest, is not an essential, sole and specific basis upon which to determine the legitimacy of expropriations by States. There is little authority in international law establishing any useful criteria by which a State's own determination of public purpose or the national interest can be questioned or the security reasons can be examined. This problem becomes more acute in regard to developing States which have more legitimate causes to expropriate aliens property.

Domke and Friedman see no place for the public utility limitation in international law. According to Friedman, an international tribunal is not in a position to judge a State's motives and should accept the State's own judgement for expropriation actions:

> "As to the motives, these are a matter of indifference to international law, since the latter does not contain its own definition of public utility. On the contrary, it leaves it to each State, in the exercise of its jurisdiction, to judge for itself what it considers useful or necessary for the public good."[68]

Friedman cites two international decisions which confirm this view,

66- UNTC Current Studies, Series A. No 16, New York, UN, 1990, p. 18; Nationalisations reached a peak in 1975 with 83 expropriations in 28 different countries but declined by 50 per cent in the following year. In 1977 there were only 15 instances. Between 1980 and 1985 the rate averaged three a year.

67- The Aminoil-Kuwait Arbitration, 21 I.L.M., 1982, P. 1033.

68- Friedman S., Expropriation in International Law, London, 1953, p. 141.

the *Oscar Chinn* Case,[69] and the *Shufeldt Case.*[70] In the *Oscar Chinn* Case, the government of Belgium, by reducing the tariffs of a government owned river transport company in the Congo, had caused a British national to be driven out of business. The Permanent Court of International Justice, deciding on a U.K. complaint, held that:

> "The Belgium Government was the sole judge of this critical situation and of the remedies that it called for - subject of course to its duty of respecting its international obligation."[71]

Domke believes that the determination of public interest by the nationalizing government could hardly be challenged unless it was wholly beyond any reasonable limit.[72] The question of public policy was also raised in the Iran-U.S Claims Tribunal in *Khemco* case. Consequently, the requirement of a public purpose, as a distinct principle, has been weakened and has yielded to a rule that any expropriation or nationalization constitutes a lawful exercise of a State's sovereign rights provided it is in public interest.[73]

69- Oscar chain case, *U.K. v. Belgium*, 1934, P.C.I.J., Series A/B, No. 63, p. 79.

70- Shufeldt Claim, *U.S. v. Guatemala,* 1930, 5 I.L.R., 1929-30, p. 179.

71- Oscar Chinn case op. cit.

72- Domke M., Foreign Nationalizations, Some Aspects of Contemporary Law, 55 A.J.I.L., op. cit., p. 590.

73- *Texaco Overseas Petroleum Co. v. Libya,* 17 I.L.M., 1977, p. 21.

3 - THE PRINCIPLES OTHER THAN PUBLIC UTILITY

The traditional rule on expropriation of foreign properties limited the expropriating States to the condition that their measures be taken only for public purpose.[74] But in modern times, as was mentioned earlier, there are few limits to what a State may consider necessary for the general benefit. If there are no other reasons, the State can always rely on security reasons, police power or on the requirements of social welfare.[75]

The motives for many of the post-war nationalization measures sprang from nationalistic, political, financial and social reasons. It is difficult to isolate a single motive in regard to any particular measure.[76] For example, in the East European nationalizations,[77] the dominant motives were political and economical ones. But, the needs for social reform and of reconstruction of the war damages played part. In the Iranian Oil nationalization of 1951, like most of the other post-war measures, the motives were mainly nationalistic, political and for social reform.[78]

74- Leading Proponents of the rules include Anzilotti, Verdross, Borchard, Oppenheim, de Visscher, Scelle, Jessup and Schwarzenberger; see more in Schwarzenberger G., Foreign Investments and International Law, London, 1969, p. 41; Brownlie I., Principles of Public International Law, op. cit., pp. 524-5.

75- Articles 4, 9 and 10 of Harvard Draft, Convention on the International Responsibility of States for Injuries to Aliens, No. 10, of May 1, 1959.

76- White G., Nationalisation of Foreign Property, op. cit., p. 18.

77- Decree 50 of 1945, Czechoslovakian Nationalisation of the Film Industry; Decree of December 5, 1946, Yugoslavian Nationalisation of private economic enterprises; Poland Law 285 of 1950 (July 20, 1950); Decree 20 of 1949 (December 28, 1949), Nationalisation of certain industrial and transport undertakings in Hungary; Bulgarian Ukase TS 4872 of 1947; Roumanian Decree 92 of 1950 for the nationalisation of certain buildings.

In *Amoco International Finance Corporation v Iran* case, political considerations and considerations of economic policy or general national interest were stated as more decisive and paramount in decisions to nationalize the company.[79] In the Bolivian nationalization of the Gulf Oil Company, measures predicated upon political considerations were not only deemed legal but also stated to be measures taken in good will which ended to an agreement with the Company.[80]

The only condition that nowadays is considered illegal in international law, as expressed by General Assembly of the United Nations, is expropriation for purely and explicitly individual or private interests.[81] Otherwise, an international authority would hardly be competent to judge about the adequacy of the purpose of the nationalizing State. However, expropriation of private property does not necessarily provide for the transfer of those interests to the State. Measures such as land reform provide for the redistribution of the expropriated land to private individuals.

In the Case of *Sea-Land Service, Inc. v. the Islamic Republic of Iran, Ports and Shipping Organization of Iran,* the Tribunal did not consider the purpose of the taking and found that there had not been a deliberate governmental interference in the Company's operations.[82] The most radical view, expressed by a Western claims commission, was in

78- Ford A. W., The Anglo-Iranian Oil Dispute, 1954, University of California, pp. 199-203.

79- *Amoco v. Iran,* Award 310-56-3, 15 Iran-U.S.C.T.R., 1987 II, Para. 225

80- Furnish D. B., Days of Revendication and National Dignity: Petroleum Expropriations in Peru and Bolivia, Lillich, The Valuation of Nationalized Property in International Law, op. cit., Vol. II, p. 59.

81- Article 1(4) of the General Assembly Resolution 1803(XVII), 1962, op. cit., p. 107.

82- *Sea-Land Service, Inc.* v. *the Islamic Republic of Iran, Ports and Shipping Organization of Iran*(135-33-1), of 22 June 1984, in X Y.C.A., 1985, p. 249.

the case of *Dickson Car Wheel Co. v. United Mexican States.* In that case, the Mexican-U.S. General Claims Commission stated that States have always resorted to extraordinary measures to save themselves from imminent dangers and injuries to foreigners resulting from these measures do not generally afford a basis for claims. A foreigner residing in a country which, by reasons of natural, social or international calamities, is obliged to adopt these measures, must suffer the natural detriment to his affairs without any remedy.[83]

4 - THE REQUIREMENT OF COMPENSATION

The existence of an obligation of a host State to compensate a foreign investor for expropriation of property and its measurement has been one of the most important and controversial issues in international law.[84] It is a rule on which States' public policies are divided or in some cases diametrically opposed to each other. Most of the writings on the question of expropriation have been devoted to this principle, but still no clear single standard has found universal acceptance, according to which compensation can be determined for the expropriated properties of aliens. The reason is that an attempt has been made to apply certain rules to all expropriation cases. As it was stated in the *Banco National de Cuba* v. *Sabbatino,* there are few if any issues in international law today on which opinion seems to be so divided as to the limitations on a State's power to

83- *Dickson Car Wheel Co. (U.S.A.)* v. *Mexico,* Mexico/U.S. Claims Commission, R.I.A.A., vol. 4, pp. 681-2.

84- Clagett B. M., The Expropriation Issue Before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?, 16 L.P.I.B., 1984, No. 3, p. 813-14.

expropriate the property of aliens, *i.e.* the conditions which should be fulfilled when a State expropriates aliens' property.[85]

Basically, the approach to the question of compensation started in the free economic system of the West and was based on the loss suffered by the nationalized party. This is natural, since the problem arises as a result of claims by the former owners for compensation for their loss, and has been defended by the government of the nationalized parties.[86] But, it has not been practiced and accepted universally. No single legal system in the world would accept that any person ought to gain at the expense of others. At the beginning, the difference of opinion concerns not the terms themselves, but the applicability of them. For example, the recent American Restatement reads in this respect:

> "A state is responsible under international law for injuries resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for *just compensation*;"[87]

According to the United States, "just compensation" does not mean anything less that "full compensation". To developing countries, however, the term has a completely different meaning. Moreover, the majority of writers in this field do not share this view, nor is it reflected in the majority of international decisions. At least, in the case of large-scale nationalizations, it is commonly believed that, regardless of whether there is a duty on a State to compensate aliens for the taking of their

85- *Banco National de Cuba* v. *Sabatino,* March 23, 1964, 376 U.S. 398, 11 L. ed. 2d 804, 84 S. ct. 923, U.S. Supreme Court Reports, (Lawyer' Edition), p. 824.

86- The question of the prompt, adequate and effective compensation is relevant to this approach to the question of compensation.

87- Restatement of the Law, Third, Foreign Relations Law of the United States, vol. 2, the American Law Institute, Washington D. C., May 14, 1986, p. 196 (emphasis added).

property, non-payment of compensation promptly does not render the measures unlawful.[88]

The differences in opinions and in international awards, together with the variety of agreements concluded between expropriating and expropriated parties on the issue of compensation, indicate that a proper classification of expropriation cases, according to the conditions governing them in this respect, is inevitable. The conditions, which by their nature result from the economic, political and consequently the legal relations between the parties, which include the behaviour of the foreign investors and the changing economic circumstances, in particular those changes that have been brought about by the increasingly integrated world economy of international finance and multinational corporations. The issue of compensation should be approached on the grounds that the gain of one party must not be at the expense of the other.

The traditional position of the capital exporting countries has been to some extent consistent by asserting the rule of payment of prompt, adequate and effective compensation based on the international minimum standard. While, it has been asserted that the standard implies "full" compensation, some have stated that it does not necessarily mean that.[89] The position of the third world countries is far more complex and less categorical and therefore a common position is not taken by them on the issue.

Classification of the cases according to the conditions surrounding them would indicate the kind of legal nexus existed between the expropriating and the expropriated parties and would help to end most of

88- See for example, Friedman, Expropriation in International Law, op. cit., pp. 206-211; Dowson and Weston, Prompt, Adequate and Effective: A Universal Standard of Compensation? 30 Forham Law Review, 1962, p. 727.

89- Opinion of Gunnar Lagergren of 15 August 1985 in INA Corp. in XI Y.C.A., 1986, pp. 315-16.

the arguments[90] which exist in support and against the duty to compensate aliens and on different compensation standards.

Although case law is far from being the only, or the most important, source of international law, it does however play a significant role in the development of the rules of international law. Thus, expropriation cases could be generally divided into two categories:

1 - Cases in which the owner of the property or rights expropriated is in an equal bargaining or negotiating position vis-a-vis the expropriating country: in other words, cases in which the expropriating country is not in desperate need of investment but is instead a relatively rich and well developed country; or possibly, the expropriating country is economically, politically and technologically more advanced than the expropriated one. This category covers developed countries dealing with the properties and rights of aliens from other developed countries or from developing countries.[91]

In developed countries, with their established political and economic system, the government is in a position to decide freely upon the rules governing alien property, upon the extent to which property rights may be extended and upon the contractual facilities to be granted to aliens. The governments of these countries are not usually under a considerable political influence of foreign countries to grant any concession or contract to the nationals or agencies of the other countries. Economically, they are in such a position that investors are not able to impose any term of

90- See for an example of such arguments between O. Schachter and Mendelson in 79 A.J.I.L., 1985, pp. 414-422.

91- It is rare that a developing country invest in a developed State, but some developing countries such as the Members of OPEC for different reasons do invest or buy shares in developed countries.

contract or concession on them. If foreigners are allowed to become involved in economic life of the host country, they are in most material respects upon an equal footing with the nationals of that country. Therefore, when they obtain a right to property or contract, it is not considered as privileged against the nationals of that country. Aliens usually are not in such an advantageous financial or technological position as to put them in a distinct bargaining power. In other words, the developed States have almost complete, if not total, sovereignty over all of their affairs, and are thus fully self-determinant. The characteristic of this group of countries is, then, the ability to make free decisions to regulate their economic relations with foreigners and to exercise full control over their political and economic affairs.

The most important factor is that foreigners enter and invest in these countries in accordance with the will of the host countries freely exercised. That is, investors cannot impose themselves on these States. While they have finance, technology, knowledge and management ability and political will to pursue their own economic affairs in the absence of the foreign investors, the military might of such countries obviate the risk that involvement of other countries in such activities might endanger national security and independence.[92]

When this group of countries decides to expropriate the property of aliens, it is very reasonable to apply the international minimum standard rules, especially the rule of payment of full compensation, and demanding that other similar countries to do the same.[93] This group of

92- Most of the developing countries attached to one political bloc usually grant a considerable number of concessions or contracts to their supporting countries or sometimes as it was the case in Iran to their unfavourable powerful neighbours.

93- That was the norm which established the principle of international minimum standard among the European countries, but they have always tried to apply the

countries is all too aware that it is not in its interests to leave the owners of expropriated properties uncompensated, since its own nationals have investments abroad in other countries and might receive similar treatment. If this were to happen, then the nationals of developed countries, since they are the main investors in other countries, would be the biggest losers in international investment affairs.

On the other hand, the governments of the developed countries are rich enough to expend money on their public sectors, and are not so needy as to be unable to pay compensation for expropriated property. Moreover, the main element of the legitimacy of contracts and in general economic relations, *i.e.* free will, between these countries and the investors exists, and they are usually less affected by the change of the circumstances, out of the control of the host countries, the generally-accepted principle among these countries is that, in the case of expropriation of properties of aliens, prompt, adequate, and effective compensation must be paid to the expropriated individuals in accordance with the international minimum standard. Therefore, any non-payment of compensation by these countries could be considered as unjust enrichment at the expense of alien investors.[94]

The position of the capital-exporting countries which attach much significance to the sanctity of private property is that expropriation of alien property is lawful if it is for a public purpose, is non-discriminatory, and is accompanied by prompt, adequate, and effective compensation.[95]

principle to all other countries.

94- Wortley B. A., Expropriation in International Law, Cambridge 1959, pp. 96-7; Friedmann W., Some Impacts of Social Organization on International Law, A.J.I.L., 1956, p. 505.

95- Clagett B. M., The Expropriation Issue Before the Iran-United States Claims

This traditional international standard can be compared with the practice of these countries as indicated by their own basic constitutional laws. For example, the Fifth Amendment of the Constitution of the United States provides that no person shall be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation. The Belgian constitution (February 7, 1831) provides:

> "no one may be deprived of his property except for a public purpose and according to the forms established by law, and in consideration of a just compensation previously determined."[96]

The constitution of Luxembourg[97] similarly declares that no one shall be deprived of his property, except by reason of public utility, in the cases and in the manner established by the law and in consideration of a just and prior indemnity. And French civil code states that no one can be compelled to cede his property except for reasons of public utility and upon previous payment of a just indemnity.[98]

National courts in these countries have refused to apply any foreign expropriation law that fails to provide adequate compensation or is essentially retaliatory or confiscatory according to international minimum standard. For example, the civil court of Rome upheld the legality of the Iranian expropriation of *AIOC* in *Anglo-Iranian Oil Co.* v. *SUPOR*, but gave judgement according to the international minimum standard holding that it would not have done so had there been a breach of international law, *i.e.* had the expropriation not been carried out for reasons of public interest, but for purely political, persecutory, discriminatory, racial and confiscatory motives, or had the expropriation

Tribunal, op. cit., p. 815.

96- Article 11 of the Belgiun Constitution of February 7, 1831.

97- Article 16 of the Constitution of Luxembourg October 18, 1868.

98- Article 545 of the French Civil Code.

been carried out without payment of compensation. The approach was based on the loss suffered by the private party and not determined by the public interest of the nationalizing State, taking into account the special conditions of the case created as the result of the extraordinary relations of the parties.[99]

While the issue of duty to compensate the expropriated parties has been solved in these countries, there are still some disagreement as to the precise rule for determining what exactly is meant by full, prompt and adequate compensation. It is not surprising that there have been a considerable variety of approaches to the valuation of the nationalized assets for the purpose of the compensation to the private owner.[100]

The terms are flexible enough to be interpreted in different ways. But, the main question is first the employment of the terms[101] themselves to indicate the proper norms of the law of expropriation to regulate the relation of the foreign investors and the expropriating States, and the duty to pay or not to pay compensation.

According to the capital exporting countries, States not only have a duty to pay compensation, but the compensation for the taken property must be sufficient by returning the value lost. If payment is not made promptly, interest must be added at a realistic rate, and payment must be made in hard currency or its equivalent.[102]

99- Anglo-Iranian Oil Company v. SUPOR., Civil Court of Rome, 22 I.L.R., 1955, p. 42.

100- Murphy Cornelius F., Jr, Limitations upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalisation, in Lillich R. B., The Valuation of Nationalised Property in International Law, op. cit., Vol., 3 , p. 56.

101- There exist no general agreement on the terms "Full", "partial", "adequate", "appropriate", "just", "fair" and so on to show the indemnity of the expropriated ones and also the responsibility of the countries in dealing with aliens in this respect.

Accordingly, the measure of compensation has been defended by the developed countries to be fair market value. For example, if the property taken were an ongoing business, the standard measure would be the going-concern value, including the present value of reasonably anticipated future profits which is normally determined by conducting a discounted-cash-flow technique.[103] This principle of compensation was reflected prior to World War II in some awards by international arbitral tribunals, and in a decision by the Permanent Court of International Justice.[104]

One of the celebrated cases concerning this group of States is the *Norwegian Shipowners Claims.*[105] In that case, there was no disagreement over the duty of the United States to pay compensation, the dispute involving instead the manner of the valuation of the property taken. The United States Government had offered just compensation based on the Constitution of the United States, and calculated only the price of the ships.[106] But, according to the Norwegian Government, the compensation to be paid should have taken into account not only the physical property taken, but also the losses under the contracts affected. The Tribunal, which decided according to the municipal law of the United

102. Clagett B. M., The Expropriation Issue Before the Iran-United States Claims Tribunal, op. cit., p. 815.

103. White G., Nationalisation of Foreign Property, op. cit., pp. 11-17.

104. *Chorzow Factory Case,* P.C.I.J., 1928, ser. A, No. 17; *Norwegian Shipowners' Claims,* 1 R.I.A.A., 1922, p. 340; *Germany v. Romania,* 2 R.I.A.A., 1928, p. 903; *U.S. v. Pan,* 6 R.I.A.A., 1933, pp. 367-8; *the Oscar Chinn case, G. Britain v. Belgium,* P.C.I.J., 1934, ser. A/B, No. 63, p. 81; *G. Britain v. Poland,* P.C.I.J., 1923, ser. B, No.6, p. 38; *G. Britain v. Poland,* P.C.I.J., 1926, ser. A, No. 7, pp. 22, 33, 42; *Shufeldt Claim (U.S. v. Guatmala.),* 2 R.I.A.A., 1930, p. 1100-1101.

105. *Norwegian Shipowners Claims,* Permanent Court of International Arbitration, Award of 13 October, 1992, 1 R.I.A.A., 1948, 307-346.

106. Loc. cit., p. 338.

States to the extent that it complied with international law, found that the term property under U.S. municipal law could embrace contractual rights as well. Consequently, the Tribunal awarded an amount of about $15 million including interest, as against the proposed U.S. offer of less than $3 million for the value of the property taken.[107] The tribunal declared that compensation was due in case of the expropriation of foreign property, but did not make clear whether its decision was one restricted to the particular circumstances of this case or whether it represented a general declaration on the duty to compensate.

The position of the United States on Mexican oil nationalizations of 1938 was that expropriation should not be at the expense of aliens. Secretary of State, Cordell Hull, in his letter of July 21, 1938, to the Mexican Ambassador stated:

> "The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at sometime in future. If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgement of that government, its economic circumstances and its local legislation may permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their ability or willingness to pay, and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. We are entirely sympathetic to the desires of the Mexican Government for the social betterment of its people, we cannot accept the idea, however, that those plans can be carried forward at the expense of our citizens"[108]

Secretary Hull in his letter of 22 August 1938, further pointed out:

> The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on

107- Loc. cit., pp. 325, 331, 345.

108- Hachworth G.H., Digest of International Law, vol. 3, Washington D.C., 1942, p. 655.

international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore."[109]

However, the position taken by the United States as to the principle of national treatment in the Norwegian Shipowners Claims and in the 1930 Hague Codification Conference was quite contradictory.[110] The legislation of March 1917, which affected the Shipowners had provided for the payment of just compensation based on the constitution of the United States. The dispute arose on the amount of compensation which the United States' government should pay to the owners.[111] This type of contradiction should be considered in regard to the double standard treatment of the developed States, and not as a contradiction in the law applied by those States.

However, in the post-war period these contradictions became more evident when the principle of international minimum standard was attacked by the Communist and an increasing number of Third World States as reflected in the resolutions of the General Assembly of the United Nations.

There are several cases before and after the *Chorzow factory* case[112] in which tribunals decided on the payment of full compensation.

109- Loc. cit.

110- *Norwegian Ship-owners case,* October 13, 1922, 1 R.I.A.A., 1974, p. 338; Hackworth G. H.(Delegate of the U.S.), Responsibility of States for Damages Caused in Their Teritory to the Property of Foreigners, The Hague Conference for the Codification of International Law, 24 A.J.I.L., 1930, p. 500; see more in Lillich R. B., International Law of State Responsibility for Injuries to Aliens, op. cit., p. 6.

111- *Norwegian Shipowners Claims* case, Award of October 13, 1922, R.I.A.A., vol. 1, 1948, p. 338.

112- The *Chorzow Factory* case was important on the ground that regulated the relation between Germany and Poland. It was not an ordinary case comparable with the most of the other nationalisation cases; see the section on the sanctity

However, those tribunals were in many cases concerned purely with the particular facts before them and were not concerned to lay down broad principles applicable to a wide range of hypothetical circumstances. This has been regarded as the flexibility of the general standard.[113] In fact, the tribunals have been applying different rules in a variety of different conditions rather than making the rules flexible.

In the West, it has been the general view that, even in the case of lawful requisition, full compensation must be paid, and that the payment of less than the market value of the property as of the date of taking amounts to a wrongful confiscation of the non-paid part of the property.[114] This has been the translation of "restitution in kind" when is not possible and corresponds to the value which restitution in kind would bear.[115] One of the authorities often used in this regard is the judgement of Permanent Court of International Justice on *Chorzow Factory* case. In that case the Court declared that:

> "The action of Poland which the Court has judged to be contrary to 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, right and interests which could not be expropriated even against compensation. ..... The compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two companies the just price of what was expropriated. ..... reparation must as far as possible wipe out all the consequences of the illegal act and reestablish the situation which would existed if that act had been committed. Restitution in kind or if this is not possible, payment of a sum corresponding to the value which a

of treaties and expropriation.

113- Schachter O., What Price Expropriation? 79 A.J.I.L., 1985, p. 417.

114- That was in the *Goldenberg* case, (Germany v. Roumania), 2 R.I.A.A., 1928, p. 909.

115- The leading case which has been oft-mentioned in support of this idea is *Chorzow factory Case*, 1928 P.C.I.J. Ser. A, No. 17, p. 47.

restitution in kind would bear."[116]

However, this rule failed to define adequately the amount of compensation actually required, and the impact of this rule weakened following World War II in the face of numerous nationalizations by the newly independent Third World countries.[117] Since then, the industrial States and Third World States have not been able to reach a consensus on the the rule of compensation and the proper standard for determining compensation.

This diversity of practice among States was commented upon in a general statement by International Court of Justice in the *Barcelona Traction Case*[118] that States are not under an obligation to guarantee a different treatment for the foreign property in their territory. The court argued that:

> "When a State admits into its territory foreign investment or foreign nationals, whether natural or juristic person, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection."[119]

The court held that the international obligation of States to treat aliens, in the absence of a treaty obligation, only arises from the principles which have clearly been incorporated into the body of the international law.[120] The court rejected the value of the arbitral

116- Loc. cit., pp. 46-47.

117- Bainbridge S., Nationalisations Standard of Compensation, 24:4 Virg.J.I.L., 1984, p. 998; Lillich R. B., The Valuation of Nationalised Property in International Law, op. cit., Vol., 3, pp. 183-195.

118- The *Barcelona Traction Case* (new application) 1962, *Belgium v. Spain*, I.C.J., Judgement of 5 February, 1970, I.C.J. Reports, 1970, p. 3.

119- Loc. cit., p. 32.

120- Loc. cit., p. 49; the court gave the examples such as the acts of aggression, genocide, slavery and racial discrimination which are by no means comparable

jurisprudence over the previous half-century and held that they cannot give rise to generalization going beyond the special circumstances of each case.[121] The court made it clear that, by admitting into its territory, the State does not become an insurer of that part of another State's wealth which the investment represents. The court ruled that every investment carries certain risks, and questioned any guarantee by general international law in the absence of a treaty applicable to the particular case.[122]

The statement could be considered as reference to the obligation of developed countries which have committed themselves to free market economy and also to freedom of action for others countries which have chosen to manage their economy differently. Judge Riphagen, Belgium's ad hoc Judge and the only dissident in this case, based his opinion on the responsibility of States for the treatment of aliens, in international law, and on denial of justice.[123] This could be construed that, if there is no denial of justice, a State cannot be taken as responsible for mere non-payment of compensation to aliens.

The agreements[124] concluded between countries on the payment of compensation exhibit considerable variation with regard to the types of claims covered, the form of the compensation agreed upon, the method of payment adopted and the procedure to be followed; and the agreements concluded between the developed countries confirm this idea that different

to the non-payment of satisfactory compensation by a state to an alien for the expropriation of his property.

121- Loc. cit., p. 40.

122- Loc. cit., p. 46.

123- Loc. cit., p. 337.

124- The compensation agreements were already discussed in a separate section of this work, see pp.

rules should be applied to the variable conditions existed between the different groups of countries. In some agreements with other States, France paid compensation to foreign owners of and shareholders in French nationalized gas and electricity concerns in 1946.[125] In two of these agreements between France and Belgium, France accepted to pay compensation to the Belgium stockholders and to the direct owners in the nationalized properties.[126] They were granted most-favoured-nation treatment as follow:

> "In particular, if at any future date the French Government grants to another country, for the benefit of the nationals thereof, payment by way of compensation for similar stock of sums of a greater amount, or yielding a higher interest, or payable in smaller number of annual installments, or enjoying certain transfer facilities, the Belgian Government shall be entitled to claim, on behalf of its nationals, the substitution of the compensation conditions accorded to the nationals of such other country for the procedure laid down in the present agreement."[127]

Compensation was to be calculated according to the French Law. It was to be paid to the shareholders on the basis of the average price of the shares on the French Stock Exchange between September 4, 1944 and February 28, 1945, or on the quotation for June 4, 1945, whichever was the greater amount. But, the capital obtained from redemption was not transferable abroad and had to be used or invested within France. While, in the case of the Eastern European nationalizations, entire economies

125- Convention Between the Belgian Government and the french Government for the compensation of Belgian Interests in the Nationalized Gas and Electricity Undertakings February 18, 1949, 31 U.N.T.S., p. 175; with The United Kingdom on April 11, 1951, 106 U.N.T.S., p. 3.

126- Convention Between the Belgian Government and the French Government Concerning the Conditions for the Compensation of Belgian Interests in the Nationalized Gas and Electricity Undertakings, Paris, February 18, 1949, 31 U.N.T.S., op. cit., p. 175; 73 U.N.T.S., pp. 261, 263.

127- Convention Between the Belgian Government and the french Government for the compensation of Belgian Interests in the Nationalized Gas and Electricity Undertakings February 18, 1949, 31 U.N.T.S., op. cit., p. 175.

were nationalized so that there no longer existed any private enterprise in which compensation payments could be reinvested.[128]

Accordingly, the traditional standard laid down by the pre-war cases somehow continued to be applied between certain States, requiring the payment of full compensation. Indeed it is not surprising that one finds a judgement based on the traditional rules even in recent times.[129] However, this clearly does not mean that the principle, as it was applied in pre-war cases, is applicable in every case, in all countries and in every condition.

Thus, it is reasonable[130] that full compensation be paid as the condition for the legality of expropriation in developed countries, and it is wrong to extend the rules which are dependent on these special conditions to the other groups of countries, in particular to the developing States. The partial compensation rule would not meet any objective test of reason, justice or practicality, and the concept of equivalence is inherent in the very notion of compensation in these group of countries.[131]

2 - There are those cases in which the expropriating countries are not in an equal bargaining position with the investors. Such countries have often in the past been colonies or quasi-colonies and therefore are at a

128- White G., Nationalisation of Foreign Property, op. cit., pp. 204-5. It is necessary to be mentioned that even in the case of the developed countries, they mostly reached agreement through negotiations.

129- One of the examples is Barcelona Traction case, the Judgement of Feb. 5 between Belgium and Spain holding that, even in the case of a lawful taking, shareholders are entitled to compensation for their investment and what it represented on the date of the damage, I.C.J., 1970, Reports, op. cit., pp. 3, 267, 276.

130- Its reasonableness is based on the rules of unjust enrichment and consequently the unjust deprivation of the other party.

131- Clagett B. M., The Expropriation Issue Before the Iran-United States Claims Tribunal, op. cit., pp. 876-7.

considerable disadvantage in negotiating contractual agreements with foreign countries. This severe imbalance in political and economical power had enabled the developed countries to impose restraints on a government's ability adequately to protect its own interests.[132] Some of these States not only consider expropriation of the aliens' property and rights for public utility, or politically and economically motivated, but also consider the measures as revindication of their rights and "national dignity".[133] In the case of the colonies, the conditions raised the idea of "clean state" for the contractual obligations undertaken by the colonial powers. However, controversy remains over the payment of compensation for the aliens' properties expropriated by the newly independent State. The realities and conditions of this group of countries even affected the position of some eminent Western writers. In 1955, Lauterpacht suggested that traditional rules of compensation must be subject to modification in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases, neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offered a satisfactory solution to the difficulty. As a consequence, he suggested partial compensation as a solution to the problem.[134]

The Bremen Court of Appeals, obviously ignoring the traditional rules in this regard when stated that:

132- Penrose E., Joffe G., Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, 55 M.L.R., No. 3, May 1992, p. 353.

133- See examples in Furnish D. B., Petroleum Expropriation in Peru and Bolivia, op. cit., pp. 55-85.

134- Lauterpacht H., Oppenheim's International Law, op. cit., vol. 1, Peace, p. 352.

"The equality concept means only that equal must be treated equally and that the different treatment of unequals is admissible ..... for the statement to be objective, it is sufficient that the attitude of the former colonial people toward its former colonial master is ofcourse different from that toward other foreigners."[135]

As a part of a deal by which Netherlands transferred the administration of West Irian to Indonesia, the parties signed a lump-sum agreement which provided for payment of DFI 683 million to be paid in 2003.[136] Accordingly, in some developed countries with a very conservative approach, representing the famous "Hull" doctrine, it was stated that it is the consensus of nations that full compensation need not be paid in all circumstances. Meanwhile, the possibility that in some cases, full compensation would be appropriate, was excluded.[137]

The general financial and economic position of these countries where the measures form part of a comprehensive programme of social and economic reform are indicated in the compensation agreements made between these countries and the countries whose nationals' property has been expropriated. Most of the lump-sum agreements and those agreements not resulting the actual payment of compensation[138] are the indication of the elements which affected the international rules on compensation. The alien investment in these countries would not have been conducted according to the consent and the free will of those States. In fact, investment would have been as the result of the domination of the investors country without any consideration of the legal rights of the local

135- 1 U. 159/1959; see more in Domke M., Indonesian N. Measures Before Foreign Courts, 54 A.J.I.L., 1960, pp. 3, 5.

136- Smith D.N., and Wells L.T., Conflict Avoidance in Concession Agreements, 18 Harvard International Law Journal, 1976, pp. 59-61.

137- *Banco National de Cuba vs. Chase Manhattan Bank,* 658 F 2d 875 (2d Cir. 1981, p. 892.

138- White G., Nationalisation of Foreign Property, op. cit., pp. 193-203; Kronfol Z. A., Protection of Foreign Investment, Netherlands, 1972, pp. 118-19.

people. The direct occupation or the political and economical influence of the investors' countries would, in fact, have deprived the natives of control of their natural resources, or created an unjust and unequal economic and political relations between them. Expropriation measures by these countries ought not to be considered as expropriation, but rather as reinstitution and revindication of their own property which, in accordance with the principle of self-determination, they obtain the right to decide for their utility.[139] Aiding puppet regimes to rule a country and gaining privileged concessions against the interest of the nation create a similar legal situation, contrary to the international principles of self-determination and the principles of Human Rights on economic and political self-determination.[140]

It is the same where countries requesting IMF aid in times of economic crises have been forced into compliance with the demands, made by that organization as a condition of such aid, that they open up to private foreign investment. Such demands may lead later to problems in those countries. Finding one effect of law on the oil industry, as Muchlinski states,[141] has been to act as an instrument of power, resulted in the largest and the most important nationalizations, of which history of the international oil companies in the Middle East provides dramatic examples.[142] Particularly when transnational companies are involved,

139- The actions which deprives people from the right to determine their own social, economical and political affairs are against the basic principles of Human Rights.

140- Article 1(1) of the International Covenant on Civil and Political Rights, 11 U.N. Resolutions, Series 1, G.A., 1966-68, op. cit., p. 169.

141- Muchlinski P. T., Law and the Analysis of the International Oil Industry, in Judith Rees and Peter Odell, The International Oil Industry: An Interdisciplinary Perspective , London, 1987, p. 142.

142- Penrose E., Joffe G., and Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose, op. cit., p. 353.

they are heavily predominant in certain industries characterized by the importance of marketing and technology and by an olipolistic organization of industry within the developed countries give them the bargaining power to extract more concessions from the host governments.[143] This imbalance of bargaining power shifts control into the hands of the foreign companies over resources, markets and technology. These are a part of the elements which create a new condition in developing countries and should be taken into account. As was stated in *Kuwait v. Aminoil,* the determination of the amount of an award of appropriate compensation was considered better carried out by means of an inquiry into all the circumstances relevant to the particular concrete case rather than through abstract theoretical discussion.[144]

With modern knowledge and technology, agreements between foreign companies and governments are usually made before the extent of the resources is fully known to developing countries. In making a contract the company usually takes into account inter alia, the political risk that the government will renege on its bargain if exploration is much more successful and profitable than what has been anticipated or if circumstances had substantially changed.

The risk that the government bears is the risk of unexpected success, with the consequence that the company becomes excessively enriched relative to the country, the natural resources of which are the basis of such enrichment.[145] This accounts, in part, for the legal complexity of many arrangements, for how is a government in negotiating a mining

143- Lall S., and Streeten P., Foreign Investment, Transnationals and Developing Countries, London, 1977, pp. 77-8.

144- *Kuwait v. Aminoil,* 66 I.L.R., op. cit., p. 602, para. 144.

145- Friedmann w., The Changing Structure of International Law, London, 1964, pp. 209-210.

agreement to protect itself against the risk of unexpectedly success? Such agreements are frequently disadvantageous to the less developed countries. These countries, by making such contracts or agreements, do not mean to create such imbalanced economic and probably political relations with the investors and their governments.[146]

The result of these circumstances is a high degree of instability particularly with regard to mining contracts made between developed and developing countries, particularly when the agreement is considered as unfair distribution of the wealth. As was mentioned in the *Aminoil case,* the division of profits regarded as equitable today will need to be modified in order to be regarded as equitable tomorrow.[147]

The taking of such unfairly distributed property, the developing States justify expropriation of rights implicitly or explicitly guaranteed by their agreements and do not regard the international minimum standard as applicable. This argument implies that the host State, in its eagerness to gain the benefits of foreign investment, was somehow coerced into accepting that investment upon other than reasonable terms.[148]

This idea found support in the resolutions of the General Assembly of the United Nations on sovereignty over natural resources, in some of which no reference was made to international law, but in which was stressed the unfettered right of nations to expropriate and suggested that compensation should be left to the discretion of the appropriate bodies within the expropriating State.[149] These resolutions reflect the position

146- More discussion on the international rules governing the contracts between governments and nationals and governments see the section "Sanctity of Contracts and Expropriation"

147- *Kuwait V. Aminoil,* 66 I.L.R., 1982, p. 564, para. 20.

148- Asante, Stability of Contractual Relations in the Transnational investment Process, 28 I..C.L.Q., 1979, pp. 401, 408.

149- G. A. Resolution 1803(XVII), 17 U.N. Resolutions, Series 1, G.A., 1962-3,

of the developing Countries and represent a clear departure from the traditional rules. The first serious blow to the traditional rules of expropriation occurred in 1972, when the Trade and Development Board of the United Nations Conference on Trade and Development(UNCTAD) in Resolution 88(XII) of 19 October stated that:

> "[i]t is for each state to fix the amount of compensation and the procedure for those measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts, without prejudice to what is set forth in the General Assembly resolution 1803(XVII)."[150]

Resolution 3171(XXVIII) of 17 December 1973 which was considered as the second blow against traditional rules states that the application of the principle of nationalization carried out by States as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the procedure of payment. It also implies that any disputes which might arise should be settled in accordance with the national legislation of each State carried out such measures.[151]

Resolution 3171 (XXVIII) and the UNCTAD resolution apparently purported to abolish the right of diplomatic protection, weakening the norms governing compensation. From the language of the UNCTAD resolution and resolution 3171 (XXVIII) it is apparent that the supporters intended to absolve themselves from potential international responsibility by inserting the provision that any dispute concerning a State's nationalization of foreign-owned property falls within the sole jurisdiction

p. 107; G.A. Resolution 3281(XXIX), 15 U.N.Resolutions, Series 1, G.A., 1974-6, p. 302; Resolution 3201(S-VI), 14 U.N. Resolutions, Series 1, G.A., 1972-4, p. 528; Resolution 3171(XXVIII), 14 U.N. Resolutions, Series 1, G.A., 1972-4, p. 422.

150- T.D.B. Resolution 88(13th. Sess.) UNCTAD Doc. TL/B/421. 1972.

151- Para. 3 of Resolution 3171(XXVIII) 17 December 1973 of the General Assembly of the U.N., op. cit.

of the courts of that State and were to be resolved in accordance with the national legislation of that State.[152] Accordingly, developing States, in most of the cases involving nationalization of foreign property, have declined to submit the dispute to international arbitration.[153]

As s result of the influence of third world countries, on 1 May 1974, Resolution 3201 of the U.N. General Assembly for the first time omitted entirely any reference to a corresponding duty of compensation, even under a "possible" compensation standard.[154] The only reference to compensation found in the resolution, a reference to "full" compensation, occurred in the context of claims by developing States to be compensated for "the exploitation and depletion of, and damages to, the natural resources and all other resources..."[155] The provisions of the NIEO Charter explicitly stated it to be the right and duty of all states to eliminate colonialism, *apartheid*,racial discrimination, neo-colonialism and all forms of foreign domination, and the economic and social consequences thereof, as a prerequisite for development. States which practice such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the

152. 1, U.N. Doc. TD/B/423, 1973, p. 1475; Resolurion 3171(XXVIII) of G.A. of the United Nations, op. cit.

153. Amerasinghe C. F., The Quantum of Compensation for Nationalised Property, in Lillich R. B., The Valuation of Nationalized Property in International Law, op. cit., vol. 3, p. 91.

154. Para. 4(e) of the Resolution 3201(S-VI), Declaration on the Establishment of a New International Economic Order, U. N. Resolutions, Series 1, G.A., vol. XIV, 1972-74, p. 528.

155. Para. 4(f), in U.N. Resolutions, Series 1, G.A., op. cit; see also Girvan, Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint, in Lillich R. B., The Valuation of Nationalized Property in International Law, op. cit., vol. 3, pp. 149-179.

natural and all other resources of those countries, territories and peoples. Accordingly, any promotion or encouragement of investments that may constitute an obstacle to the liberation of those territories became forbidden.[156]

However, the great number of bilateral treaties entered into after the adoption of the resolutions of the U.N. reflects a growing State practice inconsistent with the standards adopted by those resolutions.[157] This inconsistency resulted from disagreements over the legal effect of the provisions of the Charter of Economic Rights and Duties of States on nationalization of foreign property which states:

> "Each state has the right .....
> (C) to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the state which adopts such measures, taking into account its relevant laws and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereignty equality of states and in accordance with the practice of free choice of means."[158]

The voting patterns displayed in Resolution 3281 (XXIX) illustrate that the 1974 Charter did not enjoy the majority support of the developed countries.[159] The Western States either voted against that resolution or abstained.[160] The Charter was adopted by a vote of 120 in favour. Six

156- Article 16, Resolutio 3281(XXIX) of the G.A. 15 U.N. Resolutions Series 1, G.A., 1974-6, op. cit., p. 303.

157- In a relatively short period of time 93 bilateral treaties were concluded. They express the classic compensation formula, see the list of those treaties in 24 Scandinavian Study Law, 1980, p. 123.

158- Article 2 para. 2(c), U.N.G.A. Resolution 3281 (XXIX) of 12 Dec. 1974, U. N. Resolutions, Series 1, G. A., vol. XV, 1974-76, p. 302.

159- Art. 2(1) of the Charter, 9 against, 3 abstaining; Art. 2(2)(a), 10 against, 4 abstaining; Art. 2(2)(b), 4 against, 6 abstaining, and Art. 2(2)(c), 16 against, 6 abstaining.

160- The States which voted against the Resolution 3281(XXIX) on Sovereignty

industrial countries and capital-exporters voted against it with 10 abstentions. Provisions of Article 2 of the Charter were the main obstacle in the way of consensus.[161] It is not difficult to identify the contending parties and their battle lines. The developed States, emphasizing the provisions of General Assembly Resolution 1803 (XVII), believed that the obligation of States under their agreements should be fulfilled in good faith, and the dispute settlement procedures contained in the agreements should be respected.[162] As far as these countries are concerned, the Charter is not binding. It would be acceptable for them only if it were declaratory of the existed customary international law. But, according to those who voted in favour of the Charter, it has the same legal effect as any treaty has. Baxter is of the second opinion, except that he differentiates the resolution on the ground that the question of a treaty on this particular subject had never arisen.[163] Otherwise, it would serve as a way-station on the road to the conclusion of a treaty. However, when a substantial number of States asserted the Charter, it created a momentum of increased defection in the pre-existing rules in order to result a new rule.[164]

Accordingly, the 1962 Resolution requirement of appropriateness came out with a compromise between the two main international legal

Over Natural Resources were Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom, and the United States. The Countries which abstained were Austria, Canada, France, Ireland, Israel, Japan, The Netherlands, Norway and Spain, 15 U.N. Resolutions, Series 1, G.A., 1974-6, p. 111, the footnote.

161- 29 U.N.G.A.O.R.C. 2 (1638th, intg), 382-3, U.N. Doc. A/C., 2/SR 1938 (1974).

162- 29 U.N.G.A.O.R. Annexes (agenda item 48) I at 3 U.N. Doc. A/9946 (1974).

163- Baxter R. R., International Law in "Her infinite Variety", in 29 I.C.L.Q., 1980, p. 564.

164- Brownlie I., Principles of Public International Law, Oxford, 1990, p. 11.

doctrines on the measure of compensation. The compromise came in the face of the traditional test of prompt, adequate and effective compensation. But, there still remained very important issues to be solved. For example, the term 'appropriate', compensation was not defined and no effort was made to formulate sophisticated valuation techniques.[165] The United States, which originally considered Resolution 1803 (XVII) less than satisfactory, unilaterally tried to correct the defect by interpreting 'appropriate' compensation to mean "prompt, adequate and effective" compensation. This, however, was challenged by some other States which could not be simply dismissed.[166] The standard, as far as applies against the interests of developing countries, has not been acceptable to those countries that have to resort to expropriation as a means of reasserting national control over their basic domestic resources. Such claims for compensation may be so staggering as to jeopardize vital national goals of the expropriating State.[167]

Therefore, the term "appropriate" in the Resolution 1803 (XVII) of the General Assembly of the United Nations was adopted as a compromise between the norms and principles of different members of the international community. It can be interpreted as implying full to partial compensation depending on its application in the developed or less developed countries. However, the standard of "appropriate" compensation was left undefined by Resolution 1803 (XVII), and any reference to its determination "in accordance with international law"

165- Lillich R. B., The Valuation of Nationalized Property in International Law, op. cit., vol. 3, p. 184.

166- Goldman R. K. & Paxman J. M., Real Property Valuations in Argentina, Chile, and Mexico, in Lillich R. B., The Valuation of Nationalized Property in International Law, op. cit., vol. 2, pp. 164-5.

167- Loc. cit.

surely makes it more controversial. This is particularly so when a majority of States in the United Nations, including nearly all of the developing States, has launched a frontal assault on the system itself.[168]

The interpretations, such as of Nawaz,[169] that the payment of compensation ought to be reasonable in the circumstances of each case, are not less vague and controversial, except that they indicate that some elements and circumstances should be taken into account and a relative weight should be attributed to them. At least, there is no consensus on what amount of compensation would be reasonable nor on what should be the criteria for its measurement. The only undertaking of States in Resolution 1803(XVII) of the General Assembly of the United Nation was the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

Therefore, the fundamental changes of approach introduced by the General Assembly of the U.N have significant consequences for the application of the rules of State responsibility towards aliens. Its effect is specially on the duty of States to compensate aliens affected by the expropriatory measures. The new approach of the General Assembly of the U.N. is quite different from the asserted traditional rules which provided that, since the act of nationalization or expropriation is in violation of acquired rights, it is the duty of the State to eliminate all the damaging consequence of its "unlawful" act.

Although the arbitrators in *Texaco* and *Aminoil* cases opined that the resolutions adopted after 1962, notably the Resolution 3171 (XXVIII) and Article 2 (2)(c) of the Charter, proclaim political rather than valid

168- Lillich R. B., The Valuation of Nationalized Property in International Law, op. cit., vol. 3, pp. 186-7.

169- Nawaz M. K., Nationalisation of Foreign Oil Companies, Libyan Decree of 1 Sept., 1973, 14 Indian Journal of International Law, 1974, p. 74.

legal principles, and did not consider them as customary international law.[170] However, there was not an constant approach towards the libyan expropriations. In *Topco/Calasiatic* Arbitration, the arbitrator Dupuy first raised and then dismissed any possible justification for Libya's breach of the concession, finding support from the Judge Jessup's expert opinion and from *Aramco* and *Saphire* awards and declared libya responsible on the basis of the rule of *pacta sunt servanda.*[171] Similarly, in *BP* case, libya was considered liable for damages, and *BP* was entitled to *restitutio in integrum.*[172] In each Libyan arbitrations, there was the conclusion that Libya had violated its duties under the deeds of concession and had breached its contractual obligations. However, in *Liamco* case identically, it was held that the action was lawful, even so compensation was due or being prescribed by Libyan law. In the course of his judgement, Mahmassani said that:

> "The classical doctrine required the payment of prompt, adequate and effective compensation for the nationalized property of an alien, which include the loss of future profits from property such as invested capital or a concessionary right granted for a specific number of years....."

Referring to *Delagoa* and *Shufeldt* cases, he added that:

> "The classical doctrine was not always accepted neither in the inter-war period nor after 2nd World war. Adequate compensation as including loss of profit ..... was no more acceptable as an imperative general rule. It retains only the value of a technical rule for assessment of compensation, and a useful guide in reaching settlement agreement as was well and justly asserted."[173]

Libya paid the plaintiffs a 'net book' value rather than 'going concern' value of their physical assets. No compensation was paid for loss of unextracted oil, future profits or good will.[174]

170- *Texaco v. Libya,* 17 I.L.M., 1978, p. 30.

171- *Topco/Calasiatic* Award on the merits, Para. 3, 17 I.L.M., 1978, p. 3; Para. 51, Jessup opinion pp. 7-10, and para. 59-62.

172- *BP* v. *Libya,* 53 I.L.R., 1979, p. 358.

173- *Liamco* v. *Libia,* 62 I.L.R., 1977, (1982), pp. 206-7.

Despite all these diversities in practice and rules of expropriation, the achievements through the resolutions of the United Nations are considerable, one might well conclude that it might be difficult to identify clear cut rules in this area of international law. Much more development is needed to make the related concepts and rules clear and defined. It is not possible, except that through the United Nations, for all States to reach agreement on common concepts, and to establish the basis for the further developments on the exact conditions which State must fulfil when they expropriate foreign investments. This in turn will not be possible unless the various kinds of economic and political relations which exist between investors and the host States, particularly those of developing countries are studied carefully, and the related elements taken into account. Otherwise, the traditional rules would cause gross injustice to developing States and application of domestic laws would become less helpful.

To achieve unanimity in the United Nations, these new rules should be based on the very basic principles[175] of international law which have been accepted by all States. To implement them, it is necessary to change the existing relations between developed and developing States. Accordingly, the circumstances in which foreign investment was originally made is probably one of the most important factors in determining the responsibility of an expropriating State. If, for example, the investment occurred during a colonial, immediate post-colonial or quasi-colonial period, in assessing the responsibility of States for payment of compensation, different rules would be appropriate.[176] That has

174- 11 I.L.M., 1972, pp. 36-7.

175- The principles mentioned in the Charter of the United Nations, in Declaration on Principles of International Law ....., in Charter of Economic Rights and Duties of States, and in International Covenants on Human Rights.

176- Lillich and Amerasinghe are of the same view, see in Lillich R. B., The

caused some division of views and standards in the international community on the question of compensation which has inspired some commentators to argue that the traditional international rule on compensation for expropriation never existed, or that it has already changed, or is in the process of changing, or should be changed to permit host States to pay partial rather than full compensation to expropriate foreign investors.[177]

As a result, the rules of international minimum standard on compensation has been challenged as being not applicable to this group of countries on the ground that, if the nationalizing country is too poor to pay full compensation or if the nationalization is pursuant to a fundamental change in the political or economic structure of the State, only partial compensation is applicable.[178]

With regard to the developing countries, the lack of free will may be as the result of special conditions; the lack of finance, technology, experts and so on, without any direct pressure, which make them obliged to accept special terms of contracts or agreements. In these countries, great inequality in bargaining power may have existed between the investor and

Valuation of Nationalized Property in International Law, op. cit., vol. 3, pp. 198, 199; Amerasighe C. F., The Quantum of Compensation for Nationalised Property, in Lillich R. B., The Valuation of Nationalized Property in International Law, op. cit., vol. 3, p. 91.

177- Clagett B. M., The Expropriation Issue Before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?, 16 L.P.I.B., 1984, No. 3, p. 876; Dolzer R., New Foundations of the Law of Expropriation of Alien Property, 75 A.J.I.L., 1981, pp. 553-557; Schachter O., Compensation for Expropriation, 78 A.J.I.L., 1984, p. 121; Lauterpacht H., Oppenheim, International Law, 8th ed. 1955, pp. 352-54; Somarajah M., Compensation for Expropriation: The Emergence of New Standards, 13 J.W.T.L., 1979, p. 108.

178- Girvan N., Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint, in Lillich R. B., The Valuation of Nationalised Property in International Law, vol. 3, op. cit., pp. 149, 172-3.

the host State at the time that they entered into an economic agreement. Therefore, it would be unconscionable to hold the host nation to the terms of its agreement.[179]

The other possibility in regard to the developing countries, as was mentioned earlier, is that by dint of lack of enough knowledge, they may often be short-changed by multinational companies. In both cases, when the expropriating countries find themselves in a suitable condition, they carry out expropriation to adjust the balance between the profit of the company and the interest of the country, that is to shift the balance in their own favour.

The approach adopted in the cases of *Kuwait v Aminoil* and *Amoco International Finance Corporation v Iran* in some ways reflect the conditions governing the rules of expropriation in this group of the countries. The Tribunal in *Aminoil case* emphasized the importance of a "balanced indemnification" and of an award based on a "reasonable rate of return," as contrasted to "speculative profits."[180]

The evident characteristic of this group of nationalization cases, as was mentioned in the *Aminoil* case, is the condition of the determination of the amount of appropriate compensation on the inquiry into all the circumstances relevant to the case. What are those determinant circumstances affecting the relevant rules? Have they become the international rules applicable to determine the limitation of the compensation? What was the norm according to which the award allowed nothing for the loss of profit during the remaining thirty years of the concession? The sole compensation for an annual reasonable rate of

179- Asante S. K. B., Stability of Contractual Relations in the Transnational Investment Process, 28 I.C.L.Q., 1979, pp. 401, 408.

180- *Kuwait v. Aminoil*, 66 I.L.R., op. cit., p. 602, para. 144.

return on the remaining investment was set by the tribunal amounted to $10 million which was to be calculated for the period up to the date of expropriation on 19 September 1977. The Tribunal accepted neither Kuwait's position that compensation should be based on net book value nor Aminoil's belief that anticipated lost profit should be compensated, but it accepted a moderate line which clearly bridges the gap between the public and the private interest.[181]

In the case of *Amoco International Finance Corporation v Iran*[182] the question of the public interest was considered as the cause for partial award as the appropriate compensation. The Tribunal held that a nationalization cannot be equated to a normal business investment or to a transaction in a free market, not only because the expropriating owner is a reluctant seller, but also because the expropriating State acts for a public purpose.

The elements affecting the amount of compensation payable to the Company, according to the Tribunal, were political considerations and considerations of economic policy or of general national interest which were taken into account by the Tribunal in order to award compensation equitably and prevent any unjust enrichment or deprivation of either party.[183] In other words, the Tribunal took into account the economic position of both parties as a condition for assessment of the amount of the compensation to be paid. This type of approach to appropriate compensation is far removed from that of the international minimum standard, according to which appropriate compensation is equal to full

181- Penrose E., Joffe G., Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, 55 M.L.R., 1992, op. cit., p. 358.

182- *Khemco case,* (Amoco International Finance Corporation) v. Iran, op. cit.

183- *Kuwait v. Aminoil,* 66 I.L.R., op. cit., pp. 604-6, 609-10.

compensation which must be paid to the property owners. Nevertheless, there need be no contradiction between the two approaches if the norms of human rights and unjust enrichment are accepted as general principles of international law[184] and applied for the evaluation of expropriated properties, having regard to the particular circumstances of each case. Indeed, this would be a more rational and economically equitable to consider the broader issues and long term gains and losses of both parties. Such considerations become particularly important when the major purpose of a nationalization is to remove what the government claims is an unreasonable monopolistic position.[185] Compensation in this group of cases usually relates to foreign contractual claims on the exhaustible natural resources of a developing country over which there had long been economic and political conflict, which probably was partly responsible for a major social and political revolution. The application of the principles enunciated makes it possible to take realistic account of a larger number of economic considerations affecting both private companies and governments where, from the economic point of view, there is a legitimate conflict between the interests of property owners and those of a wider public. This, in turn, would lead to a deeper consideration of legal aspects of the problem and perhaps to a different framework for analysing not only the respective positions of the parties, but also the methods of valuation from the point of view of appropriate or just compensation.[186] Similar to the Egyptian, Indonesian, Mexican and Iranian expropriations,

184- Friedmann has expressed the view that the principle of unjust enrichment should now be held to a general principle of law recognised among civilised nations, Friedman W., Some Impacts of Social Organization on International Law, 50 A.J.I.L., 1956, p. 505.

185- Penrose E., Joffe G., Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, 55 M.L.R., op. cit., pp. 358-9.

186- Loc. cit., p. 359.

Cuban expropriation measures targeted a particular State. Article 24 of Cuban fundamental law of February 7, 1959 provided:

> "Confiscation of property is prohibited, but it is authorised for the property of the Tyrant deposed on December 31, 1958 and his collaborators, of natural law or juridical persons responsible for crimes against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public order. No other natural or judical person can be deprived of his property except by competent juridical authority and for a justifiable reason of public benefit or social interest and always after payment of appropriate compensation in cash fixed by court action ....."[187]

These considerations have caused not only developing countries to depart from their position in regard to compensation from the international minimum standard, but also this attitude has been reflected in the position of some developed States. For example, the U.S. Supreme Court in *Sabbatino* decision recognized as early as in 1964 that international law was unclear in the area of compensation.[188]

In reply to the United States position on international minimum standard, Mexican Foreign Affairs Minister on August 3, 1938 stated:

> "My Government maintains ..... that there is in international law, no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriation of a general and impersonal character like those which Mexico has carried out ..... Nevertheless, Mexico admits, in obedience to own her laws, that she is indeed under obligation to indemnify in an adequate manner, but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treaties on international law, is that the time and manner of such payment must be determined by her own law."[189]

In this category, there is also an argument that partial compensation is justified because full compensation is impossible as the result of the host

187- Domke M., Foreign Nationalizations, 55 A.J.I.L., 1961, p. 587.

188- *Banco National de Cuba v. Sabbatino*, 376, U.S. 1964, pp. 398, 428, 11 L. ed. 2d 804, 84 S. ct. 923, U.S Supreme Court Reports, op. cit, p. 824.

189- Hackworth G.H., Digest of International Law, op. cit., p. 655.

nation's impoverished circumstances.[190] This argument may represent a view that the applicability of the international law principle of full compensation should depend on the likelihood of its effective enforcement. Therefore, the argument needs to have force from an equitable perspective. If it is not equitable to take foreign investments because the foreign investors suffer loss, it is equally inequitable if the host States abandon their social and economic reform and developments because they cannot afford to pay full compensation.[191]

Further evidence in support of the above argument is that, in many international decisions, the reasons for the obligation of States to compensate aliens were not discussed in explicit terms. This is, as pointed out by some writers, due to the fact that the terms of reference of the tribunals examining the disputes concern, explicitly or implicitly, the determination of the amount of compensation, rather than the very duty of compensation.[192]

Another example of this category of cases is the Peruvian nationalization of IPC in 1968. After the unsuccessful attempts of President Belaunde to repossess La Brea y Parinas oilfields, as the result of the pressure by the United States Embassy and the State Department, on October 9, 1968, the revolutionary Government of Peru took possession of the oilfields and the Talara industrial complex held and operated by IPC up to that time.[193] The action was characterized as the initiation of a constitutional expropriation which was carried out as revindication, or

190- Girvan N., Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint, see in Lillich B. R., The Valuation of Nationalised Property in International Law, vol. 3, op. cit., pp. 149, 172-3.

191- International Convention on Human Rights, op. cit.

192- Piran H., Nationalisation of Foreign Property in International Law and Iran-U.S. Claims Tribunal, op. cit., p. 317; Fatouros A. A., Government Guarantees to Foreign Investors, New York, 1962, op. cit., p. 302.

193- Furnish, D. B., Petroleum Expropriation in Peru and Bolivia, op. cit., p. 63.

recovery by the rightful owner of property held by another. The revindication measure meant that the government claimed a right to recoup the oil reserves as they existed in 1924. For the part of those reserves which was extracted and could not be replaced, the government asked $690,524,283 by way of restitution.[194]

Although Socialist countries were not in such a position, but their ideological approach was similar. Their position was that there was no obligation on the part of the expropriating State to provide compensation because nationalization entails a restoration of the property to its rightful and lawful owners, namely the people. Like Mexico, they maintained that there is no obligation on the part of the taking State to make reparation. Nevertheless, they generally agreed to compensate for property so expropriated, although it may have been expressed to be *ex gratia*, in which case the payment is generally far from being adequate.[195]

The Egyptian nationalizations of British and French owned properties and the Indonesian nationalization of Dutch-owned properties were presented as struggles against the domination of those countries. Expropriation of the properties under such conditions was not only to improve the public sectors of the society, but it was the public interests in general which would determine the conditions of the expropriations in this group of the countries. Demand for political and economic self-determination, national control and security, and so on are the elements involved in these group of expropriations.

Developing States have attempted to strike a balance, if possible between the interest of the public and foreign investments. For example

194- Loc. cit.

195- Akinsania A. A., The Expropriation of Multinational Property in the Third World, op. cit., p. 29.

in Peru, upon expropriating the International Petroleum Company in January and February 1969, the Government of Peru announced that it would pay full compensation to the company once the latter had paid the value of the petroleum "illegally" extracted since 1924. This was fixed by the Government at $690 million. The Company received a lump-sum amount of $23.1 million in 1974 as compensation agreed between Peru and the United States. The compensation payable to ITT as a result of its property expropriated in Peru, was to be reinvested in Peru. The agreement between Peru and the United States on the compensation for the taking of Marcona Iron Mining Company was to be financed by foreign loan.[196] Such practices as those, adopted by of the developing countries reflect the realities of their relations with foreign investors.

In their establishment, the position of the Eastern European countries on expropriation of foreign property was as revindication of the public rights. However, later they provided guarantees to foreign investors. For example, Article 106 of the Bulgarian Decree No. 56 provides that investments made by foreign persons shall not be subject to confiscation or expropriation through administrative procedure. Expropriation should be made by agreement, and in the case of non-agreement, the amount of compensation should be determined by the district court.[197]

Similarly according to the law of Czechoslovakia expropriation should be carried out on the basis of law, and the foreign participant

196- On Peruvian expropriations see Sigmund P. E., Multinationals in Latin America, the Politics of Nationalization, University of Wisconsin Press, Madison, 1980, pp. 180-224; Furnish D. B., Petroleum Expropriation in Peru and Bolivia, op. cit., pp. 55-85.

197- Burzynski A., The Concept of a Joint Venture and the Legal Context for Joint Ventures in CMEA Countries, 5 Florida International Law Journal 1990, Spr., pp. 189-90.

should receive a prompt compensation corresponding to the actual value of its property at the time when the property was affected by the measure.[198]

Although the legal systems of these countries are not prepared to serve foreign investments, and until recently the only major economic entities in these countries, State enterprises, were created by administrative decisions, and in consequence of their confiscatory acts, the gesture of these countries illustrated in their laws to show their commitments based on their free will, confirms our classification of the cases according to the conditions which investments enter to the recipients countries. However, with regard to the Eastern European expropriations, which were carried out, ostensibly at least, in accordance with Marxist Ideology, any element which directly affect the basic rights and national interest of a country would comprise the condition for expropriation.

In general, there is the need for a comprehensive rule that will provide for the distribution of burdens and damages suffered by the parties. Where damage has been suffered by a member of the community in the interests of the latter it would be unjust that that member alone should bear the full burden of the sacrifice.

The same principle should apply in the case of nationalization of enterprises already established. If the interests of the community are invoked in order to justify payment of less than full compensation, contrary to the practice adopted in the case of expropriation, it should nevertheless be recognized that such a justification can not be put forward as applying to foreigners who, by the very fact of nationalization, have been cast from the national community in whose favour nationalization has been carried out.

198- Section 22 of the Czechoslovakian Act No. 173, Para. 1&2.

In total, the formula of expropriation in third world countries has different framework, particularly when aliens belong to a politically dominating State. As expropriation measures in developing countries usually does not comply with the traditional rules, it is necessary to divide States into two groups, and implement rules appropriate to each group of those States. On this basis, the rules expressed in the various resolutions of the United Nations on sovereignty over natural resources would end the controversy over the rules of expropriation. Accordingly, the term "appropriate compensation" would comprise different amount; when implemented in relation to different groups of States, and would satisfy their needs and interests in this regard without doing any injustice to either interested parties.[199] It is the time to recognize those elements which differentiate the developed and developing States as legal means,[200] and account them in assessment of expropriation measures of developing States to bring the demanding justice to the parties.[201] That has been the reason for some writers having suggested that it is not possible to establish a single standard or principle for the valuation of nationalized foreign property as a universal rule of international law.[202]

199- Developing States need development and protection against exploitation by foreign companies. On the other hand, the position of foreign investors in developing countries is so advantageous that in any condition of expropriation they would rarely be treated unjustly; see the elements suggested in this regard in the general conclusion of this work.

200- See the elements suggested in the general conclusion of this work.

201- Lissitzyn O. J., The Meaning of the Term Denial of Justice in International Law, 30 A.J.I.L., 1936, p. 632; Lillich R. B., The Valuation of Nationalized Property in International Law, vol. III, op. cit., pp. 196-7.

202- Vicuna O., The International Regulation of Valuation Standards and Processes: A Re-examination of Third World Perspectives, Chapter V, in Lillich R. B., The Valuation of Nationalized Property in International Law, vol. III, op. cit., p. 131.

(SECTION THREE)

INTERNATIONAL AGREEMENTS

Numerous and varied international agreements have been concluded, especially since the Second World War, in relation to the investments of aliens. They could be classified in two main groups:

1- agreements concluded to secure aliens' properties before being affected by any measure of expropriation, *i.e.* the investment guarantee agreements.

2- agreements which are related to the payment of compensation, *i.e.* the claim settlement agreements.

The first group of agreements are not much related to this work and should be discussed in a separate work. In this section, the latter group will be discussed. Although, the common subject of these agreements is payment of compensation, they demonstrate considerable variation with regard to the types of claims covered, the form of compensation agreed upon, the method of payment adopted and the procedure to be followed.

These agreements could be divided into three main groups each of which will be considered in turn. Group 1 consists of the individual agreements concluded between a State and an individual claimant. Group 2 comprises the agreements between States, which did not result in payment of compensation. Group 3 comprises the agreements between States and resulted in payment of compensation in various forms.

1 - INDIVIDUAL AGREEMENTS

Occasionally, individual agreements for the payment of compensation for the expropriated property of aliens have been concluded directly between the aliens concerned and the government of the expropriating State. Direct recourse by private persons has always existed within the realm of domestic adjudication. Yet, there is no denying that the process of decision through which most of these private claims have been and continue to be resolved - what is called the law of international claims - has reflected mainly inter-State dealings. In the absence of diplomatic initiative on the part of the private claimants' government, these claims have generally gone begging.[1] The reason is that individuals are not subjects of public international law and the agreements concluded between them and other States have not been supported by international law. However, with the recent developments in the Iran-US claim settlements,[2] they may receive more international attention.

One of the earliest agreements is the 1940 Agreement between the American corporation of Sinclair Oil Corporation and the Mexican Government for compensation for its expropriated oil properties. The company accepted compensation of $8.5 million payable over a period of three years. A similar agreement was reached between Whitehall Securities Corporation Ltd., a British company, and the Mexican

1- Lillich R. B. and Wetson B. H., International Claims: Their Settlement by Lump-Sum Agreements, part I, the commentary, The Virginia University Press, 1975, p. 10.

2- The latest of this kind of the agreements is the agreement between Iran and two American companies (ARGO & SUN) which after long-term negotiations the two Companies were compensated for $260 milion, they had claimed for $1.3 billion, (not published yet), in Joumhoori Islami, No. 3826, 22nd Aug. 1992, p. 2; The agreement was approved by the Iranian Parliament, Joumhoori Islami, No. 3884, 29th Oct. 1992, p. 13.

Government.[3]

Other important individual agreements relate to the claims of the Anglo-Iranian Oil Company and the Suez Canal Company. The agreement of the Anglo-Iranian Oil Company is of considerable length and complexity.[4]

The compensation agreement between Egypt and the Suez Canal Company, as well as other individual agreements were achieved initially through diplomatic agreements and then through lump-sum agreements with regard to the conditions surrounding each case. Moreover, the limited practice of the individual agreements is insufficient to conclude a new rule of customary international law, particularly when some of those expropriating States, while paying compensation for their expropriation measures, expressly maintained their legal position.[5]

2 - AGREEMENTS BETWEEN STATES

2 - 1 - Agreements not Resulting in the Actual Payment of Compensation:

In this group of the cases, the parties to the agreements did not decide not to pay or not to receive compensation for the expropriated property. It comprises either those agreements which contain an undertaking on the part of the nationalizing State to pay compensation or

3- Cmd. 7275, 1947: Ratification by Mexican Congress, September 11, 1947; see more in Friedman S., Expropriation in International Law, London 1953, p. 29.

4- It will be discussed in chapter three on "Iranian Oil Nationalization".

5- Mexico was a country that maintained her legal position not being responsible for payment of compensation to aliens; Hyde, Compensation for Expropriation, 33 A.J.I.L., 1939, PP. 109, 111-112.

which establish a procedure for dealing with claims, but which nevertheless, do not result to the payment of compensation or, the cases which the parties did not reach an ultimate agreement for the payment of compensation and no compensation was paid. This group of agreements could be subdivided into two groups. First, agreements which set up Mixed Commissions[6] composed of representatives of the contracting States and entrusted with various functions concerned with, for example, the interpretation of the agreement or assessment and determination of the compensation to be paid by the nationalizing State, and second, agreements which settled the individual claims according to the municipal law of the nationalizing State.

The agreement between Yugoslavia and Czechoslovakia of September 4, 1947[7], the agreement concluded between the United Kingdom and Poland in 1948[8], the Danish-Poland agreement concluded on May 5, 1949,[9] and the agreement of May 23, 1949 between Italy and Yugoslavia[10] are among this group of agreements.

6- White considers this type of agreements as "not remarkable", see in Nationalisation of Foreign Property, London 1961, p. 193 Note 22; Huston states their creation exceptional procedure which is not the normal feature of the conduct of inter-state relations, see in International Tribunals, Past and Future, Washington, 1944, p. 196.

7- Agreement Concerning Czechoslovak Assets Sequestrated and Nationalized in Yugoslavia on 4 September 1947, 112 U.N.T.S., 1951, p. 91.

8- Exchange of Notes Constituting an Agreement Concerning Compensation for British Interests Affected by the Polish Ntionalization Law of 3 January 1948, 87 U.N.T.S., p. 3.

9- Protocol No. 1 on Danish Interests and Assets in Poland, Warsaw 12 May 1949, U.N.T.S., op. cit., p. 179; This agreement was also superseded by the agreement of February 26, 1953. 186 U.N.T.S., p. 301.

10- Agreement Concerning Italian Property, Rights and Interests in Yugoslavia, Belgrade, 23 May 1949, 150 U.N.T.S., 1952, p. 179. This agreement was also superseded by the agreement of December 18, 1954, but did not enter into force until February 10, 1956. 284 U.N.T.S., 1957-58, p. 239.

The other group of agreements comprises individual claims settled in accordance with the municipal law of the nationalizing State.

One of those agreements was concluded between Czechoslovakia and Belgium on March 19, 1947.[11] Under its terms, the Czechoslovakia agreed to give the claims of Belgian holders of shares no less favourable treatment than Czech nationals in determining the amount of compensation due. However, the Belgians did not in fact receive any compensation and the issue was later resolved through a later lump-sum compensation agreement concluded between Belgium and Luxembourg on the one hand and the Czechoslovakia on the other.[12]

A similar agreement between Czechoslovakia and France also failed to settle the question of compensation with regard to French property rights and interests.[13] According to White, Czechoslovakia agreed to pay compensation, determined by the Czech Government, to individual French claimants who were able to establish the legitimacy of their claims.[14] However, the Parties did not reach an agreement because the Czech authorities persistently contested the legitimacy of the claimants' rights and the amount of the compensation due.[15]

The only agreement which was not superseded by a lump-sum agreement and worked through an individual procedure was the agreement between the Czechoslovakia and the Netherlands signed on November 4, 1949.[16]

11- Exchange of Letters Constituting an Agreement Concerning Belgian Property Nationalized, Confiscated or Transferred by the Czechoslovak National Administration, Brussels 19 March 1947, 23 U.N.T.S., 1948-49, p. 35.

12- Foighel I., Nationalisation, London, 1957, p. 132, (n. 1). ?

13- No english text of the agreement was found.

14- White G., Nationalisation of Foreign Property, op. cit., p. 199.

15- Loc. cit.

16- 155 B.F.S.P., 1949, III, p. 292.

This type of agreements, under which the compensation is either left to the discretion of the authorities of the nationalizing State, or is governed by the municipal law of that State, is not favoured by States whose nationals' property has been taken. In practice, they have not been successful, but rather have been superseded by agreements providing international settlements. The contradiction between the terms and the result of these agreements shows that the terms of the agreements did not carry with them the recognition of the rules they contain and has made it difficult to derive from them a clear international customary rule on the law of expropriation.

2 - 2 - Agreements Resulting in the Payment of Compensation

This group of agreements encompass the majority of expropriation cases. They include many different kinds of agreements which may be classified as follows:

2 - 2 - 1 - Agreements concluded between Developed Countries:

Following the nationalization of gas and electricity undertakings in April, 1946, France concluded compensation agreements with five States to deal with individual claims arising from those expropriations.[17] The

17- Convention Between the Belgian Government and the French Govvernment Concerning the Conditions for the Compensation of Belgian Interests in the Nationalized Gas and Electricity Undertakings, 18 February 1949, 31 U.N.T.S., 1949, p. 173; And April 12, 1950, 73 U.N.T.S., 1950, p. 257; Agreement (with Annexes and Exchange of Notes) Relating to the Terms of Compensation of British Interests in Ntionalized Gas and Electricity

agreement between France and Belgium of February 18, 1949, was limited to the claims of Belgian stockholders which by later agreement extended to Belgian nationals who were direct owners of the nationalized undertakings.[18] The rule of non-discrimination was applied which granted the Belgian nationals most-favoured-nation treatment.

While the compensation to be paid might be considered adequate, it was not prompt. The municipal law of France was to determine the amount of the compensation to be paid.[19] It was redeemable in installments, the first redemption to occur within six months of the ratification of the agreement. The payment procedure varied and the amount of compensation was not effective in the sense that the capital obtained from redemption was not transferable abroad, but had to be reinvested in France. All the agreements with France followed a common pattern, containing an arbitration clause regarding any difficulties which might arise in regard to the interpretation or application of the provisions which were not settled by direct negotiation.

These agreements represent a departure from the international minimum standard rules which should be considered in the light of the post-World War situation in France.

Undertakings, Paris 11 April 1951,106 U.N.T.S., 1951, p. 3; The other states are: Switzerland, Canada, and Luxembourg.

18- The agreements with Belgium on February 18, 1949 and on April 12, 1950, op. cit.

19- Articles 10, 11, 12 and 14 of the French Law of April 8, 1946 was to be the basis of calculation of the compensation.

2 - 2 - 2 - Lump-sum Agreements:

Compensation settlements after World War II were marked by the phenomenon of lump-sum agreements.[20] A majority of these lump-sum agreements provided for the payment of compensation in installments over a period of years. In only a few of them was payment to be made in one transaction.[21]

The lump-sum agreements were the result of the non-payment of compensation through other means such as remedies under municipal law or under national or international arbitration. Lump-sum agreements were the result of diplomatic intervention. But in their intervention, States consider what might be the impact on the relations with the expropriating States, and on foreign policy generally. Therefore, the determination to espouse a claim against a foreign State becomes an act of national policy.[22]

Countries may have different political, social, economical and other motives in deciding how to pursue national policy. It is difficult to find the reasons for pursuing the different policies in all of the agreements and determine their exact effect on the international rules on expropriation of foreign properties. Some believe that lump-sum agreements are no more

20- Lillich R. B., International Claims: Postwar British Practice, Syracuse University Press, 1967; Lillich R. B., Lump-Sum Agreements, op. cit.; Lillich R. B. and Weston B. H., International Claims: Their Settlement by Lump Sum Agreements, University of Virginia Press, 1975; Weston B. H., International Claims: Postwar French Practice, Syracuse University Press, 1971; Garcia-Amador, F. V., The Proposed New International Economic Order, p. 22; Fatouros A. A., Government Guarantees to Foreign Investors, Columbia University Press, New York, 1962, p. 303.

21- Foighel I., Nationalisation, op. cit., p. 98; White G., Nationalisation of Foreign Property, op. cit., p. 206; Kronfol Z. A., Protection of Foreign Investment, op. cit., p. 120.

22- Kronfol Z. A., Protection of Foreign Investment, op. cit., p. 127.

than a *lex specialis,* and have no legal effect beyond the unique circumstances giving rise to them.[23] If this is correct, how then can they be dignified as "sources" of general international law from which guidance can be secured in regulation of international behaviour and responsibilities? While they represent merely a compromise between the polar positions held on this question, lump-sum agreements also represent voluntary concessions to socio-economic and political, extra-legal expediencies such as demands for the release of frozen assets, the remission of outstanding debts, the promise of commercial trade and purchase of goods and such other rewards which can strengthen a particular bargaining hand.[24] But if one is to seek absolute equality of bargaining power and the complete absence of pressures, very few settlements of international disputes or arrangements of matters of mutual concern could be taken as evidence of customary international law. However, it cannot be true that all of the lump-sum agreements carry with them the recognition or creation of new law, particularly when the compensation agreements as part of international settlements present, and obtain recognition for counter claims and have reciprocal impact.[25]

23- Lillich and Weston, International Claims, op. cit., p. 11.

24- Mintz N. N., Economic Observations on Lump-sum Agreements, 43 Indian Law Journal, 1968, p. 885; The revised version of the easy see in Lillich and Weston, International Claims, op. cit., p. 264.

25- Foighel I., Nationalisation, op. cit., pp. 122-23; Fatouros A., Government Guarantees to Foreign Investors, 1962, pp. 305-6; See also Lillich and Weston, International Claims, op. cit., p. 17.

2 - 2 - 3 - Agreements Between Developed and Less Developed Countries:

A relatively large number of the expropriations of alien property occurred in the Eastern European countries. Although the measures taken by these States were based on Communist ideology, the realities of international relations induced them to conclude compensation agreements with the governments of the expropriated nationals.

One of the earliest lump-sum agreements was concluded between the Soviet Union and the U.K. in 1929. As a result of a new economic policy in the Soviet Union which caused the interference in the conduct of businesses, *the Lena Gold Fields Ltd.*, a British company claimed against that country. As a result of an award[26] made in London in favour of the company, £13m was to be paid to the company by the Soviet Union. After long negotiations with the U.K. government, the Soviet government agreed in 1934 to pay the company transferable notes for £3 million, payable six-monthly over a period of twenty years. This agreement was honoured until 1940.

Under the agreement between the United States and Yugoslavia of July 19, 1948, the Government of Yugoslavia agreed to pay the sum of $17m to the Government of the United States in full settlement of all claims of the nationals of the United States on property rights and interests which was nationalized or taken by the Yugoslav Government between September 1, 1939 and the date of the agreement.[27] Correspondingly, the United States Government was to unblock Yugoslav

26- *Lena Gold Fields* Arbitration, I.L.R., 1929-30, pp. 426-7.

27- Article 1 of the United States and Yugoslav agreement Regarding Pecunary Claims of the United States and Its Nationals (with *aido-memoire* and Exchange of Notes) of July 19, 1948, 89 U.N.T.S., 1951, p. 44.

public and private assets and enable that Government to use or export the gold which amounted to $46,800,000 and other assets on deposit in its name in the Federal Reserve Bank of New York.[28] The agreement covered only the claims of direct owners of nationalized undertakings or shares in such undertakings or the claims of mortgagees of real property and of stock, without waiving or releasing any claims of the Yugoslav nationals against any nationals of the United States.[29] The provisions of Article 5 of the agreement were violated and the American nationals' property was expropriated and later became the subject of the agreement of November 5, 1946.[30]

The agreement also contains contradictory provisions when it states that, in accordance with the Convention of Commerce and Navigation between the United States and Serbia, signed in October 2-14, 1881, the Government of Yugoslavia agreed to accord to nationals of the United States lawfully continuing to hold or acquiring assets in Yugoslavia, and also the rights and privileges of using and administering those assets, on conditions not more favourable than the rights and privileges accorded to nationals of Yugoslavia or of any other country.[31] The Yugoslav Government based these promises on the Convention that existed before the expropriation measures and granted the rights which had been denied

28- The Aide-Memoire from the Department of State Concerning the Issuance of Licenses Unblocking Yugoslav Assets in the United States, 89 U.N.T.S., 1951, p. 46

29- Articles 2(A, B, C) and 4 of the agreement of 1948; creditors and bondholders were not included, 89 U.N.T.S., op. cit.

30- The amount of $3,500,000 was paid in five annual instalments; U.S. and Yugoslav Agreement Regarding Claims of U.S. Nationals, Belgrade, 5 November 1964, 550 U.N.T.S., 1965, p. 31.

31- Article 5 of the agreement Between the Government of the U.S. and Yugoslavia Regarding Pecunary Claims of the U.S. and its nationals, July 19, 1948, in 89 U.N.T.S., op. cit., pp. 45-6.

in practice. The nationalization measures, as in all other Eastern European countries, had ideological motives, *i.e.* they were not for public utility alone, but for deprivation of private property. However, the rule of non-discrimination was inserted in the agreement.[32]

The claims of creditors against nationalized enterprises were not included in the agreement.[33] The exclusion of such claims has not however been a common feature of these agreements. Indeed, such claims were covered in the agreements concluded between Switzerland and Hungary,[34] between Poland[35] and Yugoslavia,[36] between Sweden and Hungary[37] and Czechoslovakia[38] between the United States and Poland[39] and between the United Kingdom and U.S.S.R.[40]

On the other hand, the agreement between the United States and the Yugoslavia, together with the agreements between Norway and Poland,[41]

32- Loc. cit.

33- It was excluded similarly in the agreement of March 16, 1967, (Art. 5), between France and Cuba Concerning the Indemnification of french Property, Rights and Interests Affected by the Laws and Measures Promulgated by Cuba since 1 January 1959, English text see in Lillich And Weston, International Claims, op. cit., p. 345.

34- Article 1(1), 1950 ROLF 736; (1950) AS 712; English text see in Lillich and Weston, International Claims, op. cit., p. 49.

35- Article 1(3), 1949 ROLF 839; (1949) AS 817, English text see in Lillich and Weston, International Claims, op. cit., p. 21.

36- Article 4(2), 1948 ROLF 995; (1948) AS 1007; English text see in Lillich and Weston, International Claims, op. cit., p. 16.

37- Article 1(1), 1951 S.O. No. 16; English text see in Lillich and Weston, International Claims, op. cit., p. 57.

38- Article 1, Para 2, 1967 S.O. No. 52; English text see in Lillich and Weston, International Claims, op. cit., p. 144.

39- Article 2(c), Agreement Between U.S. and Poland Regarding Claims of Nationals of the U.S., Washington, 16 July 1960, 384 U.N.T.S., p. 172.

40- Article 1(a), U.K. and Soviet Union Agreement Concerning the Settlement of Mutual Financial and Property Claims, London, 5 January 1968, 638 U.N.T.S., 1968, p. 42; B.T.S. 1968, No. 12.

Sweden–Czechoslovakia,[42] Netherlands–the U.S.S.R.,[43] United States-Canada,[44] the Federal Republic of Germany–Italy,[45] Austria–Japan,[46] and Great Britain–the Federal Republic of Germany[47] provided that compensation was to be paid in a single transaction.

Against the payment of Poland's debt, and release of blocked Polish assets by the Norwegian Government by the agreement of December 23, 1955,[48] Poland agreed to pay compensation for Norwegian nationalized property.

In a similar agreement between Sweden and Czechoslovakia on December 22, 1956, the lump-sum agreed was five million Swedish

41- The Agreement of December 23, 1955 Between Norway and Poland Relating to the Liquidation of Mutual Financial Claims, (1955) St. prp. nr. 103; English text in Lillich and Weston, International Claims, op. cit., p. 123.

42- The Agreement of December 22, 1956 Between Sweden and Czechoslovakia Concerning the Settlement of Certain Claims and Debts, (1957) S.O. No 52; English text in Lillich and Weston, International Claims, op. cit., p. 143.

43- The compensation payable to either party by the other party was equally 3,400,000 Dutch guilders was considered to have been paid and received on the day of the agreement entered into force without an exchange of money; 656 U.N.T.S., p. 45.

44- The Agreement of November 18, 1968 Between U.S. and canada, 6 U.S.T., 7863; T.I.A.S., No. 6624.

45- The Agreement of October 19, 1967 Between Germany and Italy Concerning the Settlement of Property, Conomic and Financial Matters to the Second World War, (1969) BG B1. II353; English text in Lillich and Weston, International Claims, op. cit., p. 352.

46- The Agreement of November 29, 1966 Between Austria and Japan, English text see in Lillich and Weston, International Claims, op. cit., p. 335.

47- U.K. and German Agreement concerning compensation for U.K. Nationals Who Were Victims of National-Socialist Measures of Persecution, Bonn, June 9, 1964, U.K.T.S., 1964, No. 42; 539 U.N.T.S., 1965, p. 187.

48- Article 1, Agreement to the Liquidation of Mutual Financial Claims, (1955) St. prp. nr. 103, English text in Lillich and Weston, International Claims, op. cit., p. 123; compensation for the damage and suffering caused during the Second World War.

Kronor as indemnification for Swedish property, rights and interests affected by the Czechoslovak measures of nationalization and by all other measures, whether consequent upon modifications in the Czechoslovak economy or due to the war, as well as for the Swedish claims concerning property confiscated during the occupation.[49]

The agreement between Sweden and Czechoslovakia was the outcome of long negotiations and involvement of numerous factors. The compensation was set off in its entirety against the sum of five million Kronor allocated to Czechoslovakia as part of the Swedish Government's contribution under the Washington Accord of July 18, 1946 to certain signatories of the Paris Agreement reparation.[50] The agreement abrogated the earlier exchange of notes between the two States by which Czechoslovakia undertook to grant most favoured nation treatment to Swedish interested parties with regard to the application of Decrees 100, 101,102 and 103 of 1945, as well as the rules and measures relating to confiscations.[51]

The bulk of the lump-sum agreements comprises those under which compensation was paid in installments over a period of years. In some of them, payment of compensation was conditional upon and tied to some counter measures to be carried out by the other parties which were to receive the compensation.

Seven such agreements were concluded between the United Kingdom and Yugoslavia, Czechoslovakia, Poland, Bulgaria, Hungary, Roumania and the Soviet Union.[52] The first of these agreements with Yugoslavia

49- Article 1 of the Agreement Between Sweden and Czechoslovakia December 22, 1956, (1957) S.O. No. 52; English text in Lillich and Weston, International Claims, op. cit., pp. 143-4.

50- White G., Nationalisation of Foreign Property, op. cit., p. 209.

51- Article 9 of the Agreement Between Sweden and Czechoslovakia December 22, 1956, op. cit., p. 145.

which was related to the terms and conditions of payment of the amount agreed on, was signed on December 23, 1948, and was completed by the Exchange of Notes on December 26, 1949.[53] The payment of compensation was conditional upon the conclusion of a long-term trade agreement between the contracting parties. Apart from £450,000 which was to be paid not later than one year after the signature of the first agreement, it was agreed later that the rest of the compensation, which amounted £4,050,000, to be paid in fifteen half-yearly installments over a period of seven years.[54] The agreement on the amount and the procedure of payment indicates that it was neither prompt nor adequate and effective. It was not full and adequate in the sense that what the

52. With some of these countries more than one agreement was concluded; The U.K. and Yugoslav Agreement Concerning Compensation for British Property, Rights and Interests Affected by Yugoslav Measures of Nationalization, Expropriation, Dispossession and Liquidation (with Exchange of Notes), London, 23 December, 1948, 81 U.N.T.S., 1951, p. 121, U.K. and Yugoslav Trade Agreement (with Schedules, Exchange of Notes and Appendixes), Belgrade, 26 December, 1949, 87 U.N.T.S., 1951, pp. 71, 402 (two agreements); U.K.T.S. 1949, No. 60 and U.K. and Czechoslovak Trade and Financial Agreement, London, 28 September, 1949, 86 U.N.T.S., 1951, pp. 141, 161, 176 (three agreements); U.K.T.S. 1954, No. 77, and Agreement Between U.K. and Poland Regarding to the Settlement of Financial Matters, Warsaw, 11 November, 1954, 204 U.N.T.S., 1955, p. 137; U.K.T.S. 1955, No. 79 and 222 U.N.T.S. p. 349; U.K.T.S. 1956, No. 30, and 249 U.N.T.S., p. 19; U.K.T.S. 1960, No. 82, and Agreement Between U.K. and Romania Relating to the Settlement of Financial Matters, London, 10 November, 1960, 385 U.N.T.S., 1961, p. 113; U.K.T.S. 1968, No. 12, and U.K. and Soviet Union Agreement Concerning the Settlement of Mutual Financial and Property Claims, London, 5 January 1968, 638 U.N.T.S. 1968, p. 41.

53. Agreement Between U.K. and Yugoslavia Regarding Compensation for British Property, Rights and Interests Affected by Yugoslav Measures of Nationalization, Expropriation, Dispossession and Liquidation, London, 23 December 1948, 87 U.N.T.S., 1951, p. 402.

54. U.K. and Yugoslav Trade Agreement of 26 December 1949, 87 U.N.T.S., 1951, p. 71.

British government paid her own nationals for the claim raised in respect of the Yugoslav measures was five times more than that paid by the Yugoslav government as compensation.[55] Moreover, it imposed a long-term trade agreement on the government of the claimants.

The compensation agreement of September 28, 1949, between the United Kingdom and Czechoslovakia did not secure a better condition. Again the compensation agreement[56] was closely connected to a trade and financial agreement,[57] and also to an agreement for the settlement of certain inter-governmental debts.[58] Similarly, the compensation was in regard to all claims of British nationals affected by the measures of nationalization, expropriation, disposition, or other restrictive measures, irrespective of their legality or illegality. The amount of £8m was agreed to be paid in eighteen half-yearly installments,[59] which would equal 7 per cent of the sterling proceeds of Czech exports to U.K.[60] The Report

55- The amount paid by Yugoslav Government was £4,500,000, but the amount paid by the Foreign Compensation Commission was £25,120,582; Sith Anual Report of Foreign Compensation Commission for the Financial Year Ended the 31st of March, 1956, Cmd. 9849, (1956), No. 9, p. 4.

56- Preamble of U.K. and Czechoslovak Agreement Regarding Compensation for British Property, Rights and Interests Affected by Czechoslovak Measures of Nationalization, Expropriation amd dispossession, 28 September, 1949, 86 U.N.T.S., 1951p. 161.

57- U.K. and Czechoslovak Trade and Financial Agreement, London, 28 September, 1949, 86 U.N.T.S., op. cit., p. 141.

58- U.K. and Czechoslovak Agreement Regarding to the Settlement of Certain Intergovernmental Debts, London, 28 Septemver, 1949, 86 U.N.T.S., op. cit., p. 175.

59- Article 3(a), Agreement Between U.K. and Czecholovakia Regarding Compensation for British Property, Rights and Interests Affected by Czecholovak Measures of Nationalization, Expropriation and Dispossession, London, 28 September 1949, 86 U.N.T.S., op. cit., p. 164;

60- The Exchange of Notes Between the Government of U.K. and the Government of Czecholovakia, 1956, U.K.T.S. 1957, No. 5.

of the Foreign Compensation Commission[61] indicates that the Czech Government was to pay the amount of eight million pounds compensation which comparing to the amount of £89,768,175 paid by U.K to the claimants, was inadequate. The other asserted international norms such as the principle of "public utility" had not been applied equally.

In the agreement between Poland and U.K., it was clearly admitted that 65 per cent of the value of the property claimed by the U.K. be the basis for the establishment of compensation. But, in the agreement with Bulgaria it was agreed that all sums due to the U.K. Government or to British nationals from the Bulgarian Government or her nationals from commercial and banking transactions, shipping and transport services where the obligation arose on or before 28th October 1944 be paid.[62]

It is difficult to assess the adequacy of the lump-sum compensation, but payment of £400,000 compensation over a long period of time for all the obligations certainly does not appear to constitute adequate compensation. The payment of compensation by installments which established a small percentage of the sterling proceedings of imports of the expropriated party is far from being prompt and adequate. The criteria by which the government of the claimant would distribute the compensation was to be determined by the receiving government and the related domestic law of that State.[63] According to the agreements, the government of the claimants became forbidden to pursue further any of the settled claims on behalf of the claimants. Thus, it has been the usual practice in lump-sum agreements to provide the claimants with no alternative but to accept the amount received and distributed through the

61- Loc. cit.

62- Article 1(a) to (d) of the Agreement op. cit..

63- Halsbury's Laws of England, op. cit., para. 609; Guest A. G., The Crown Law, op. cit., para. 709.

agreements. The only exception was the agreement between Italy and Tunisia of August 29, 1967, in which it was provided that, in the case of refusal on the part of the claimants to accept the amount of the compensation granted by Italian authorities, calculated according to the Italian legislation, they were admitted to present their claims before the Tunisian Government in accordance with the legislation in force in Tunisia.[64]

In many cases, the success of the aliens' government to secure pecuinary compensation for its nationals had depended on the extent of the assets of the nationalizing State located on its territory and its ability to offer advantageous financial or trading terms to that State. For example, the United Kingdom's government signed trade agreements with Czechoslovakia and Yugoslavia through which it was intended that both countries might earn the sterling needed to discharge their obligations under their compensation agreements, while Yugoslavia was advanced a substantial sterling credit to enable it to buy goods scheduled in the trade agreement.[65] By the Litvinov assignment of 1933, the U.S. government obtained title to the Soviet assets in the United States and used the proceeds to discharge the Russian obligations to U.S. nationals whose assets were nationalized by that government after 1917. Under the U.S-Yugoslav Compensation Agreement, Yugoslavia agreed to the release of $17m (out of $47 million of blocked Yugoslav gold in the United States) for disposal upon the free gold market, the proceeds going to compensation.[66]

64- Article 1, Agreement Between Italy and Tunisia Relating to Indemnification and to Economic and Financial Cooperation of August 29, 1967, (1968) Rev. Gen. D.I.P. 545; English text see in Lillich and Weston, International Claims, op. cit., p. 346.

65- Akinsanya A. A., The Expropriation of Multinational Property in the Third World, op. cit., p. 30.

In the agreement between the United Kingdom and the Soviet Union of January 5, 1968, both countries kept what was in their hands. The United Kingdom agreed not to claim for the assets nationalized, expropriated or affected by other measures by U.S.S.R including property, rights and banking , commercial and financial interests of the British nationals in Latvia, Lithuania, Estonia and the Western Regions of the Ukraine, Moldavia and Byelorussia. The British assets also included bonds owned by nationals of the United Kingdom and shipping services provided under the agreement of 22 June, 1942.[67]

These assets were taken for similar claims and properties, including bank accounts, ships detained by the British authorities, and banking, commercial interests belonged to the Soviet Republics, and also the gold of the central banks of Latvia, Lithuania and Estonia held in the Bank of England.[68]

It seems that among the Western European States which have made compensation agreements with Eastern European States, Switzerland has achieved the most satisfactory results in the matter of compensation and the terms of payment.[69] While the compensation received by the Swiss was not prompt,[70] considering them to be satisfactory implies that, if the

66- Fawcett J. E. S., Some Foreign effects of Nationalisation of Property, 27 B.Y.I.L., 1950, pp. 371-75.

67- Article 1, in 638 U.N.T.S., p. 41.

68- Article 2, U.K. and Soviet Union Agreement Concerning the Settlement of Mutual Financial and Property Claims, London, 5 January 1968, 638 U.N.T.S. op. cit.; The president of Lithuania in his first visit to London after independence demanded the return of the golds belonged to that country.

69- This success had various causes including small number of Swiss nationals who had property and investments in the Eastern European States, White G., Nationalization of Foreign Property, op. cit., pp. 48, 63, 117, 197-8, 205-6, 208, 213, 217, 223-5..

70- For example the compensation to be paid by Yugoslavia, Poland and Roumania to Switzerland were by instalments.

Switzerland's achievements are considered to be in conformity with international law, the agreement of other Western European States with Eastern Europe fall short of the necessary standards of international law.

The behaviour of this group of countries can be evaluated according to the background of the measures they took. In the West, it is believed that the rise of communist regimes were the motives and backgrounds that resulted to the expropriation of the aliens' property, and those regimes were responsible for the taking of the property of aliens. Having a quick look at the principles, the rules and philosophy of those States indicate that in fact, the behaviour of the capital investors, internal and external, were recognized as being responsible for all those upheavals in the socialist countries. This belief created a trend in these regimes not to pay compensation for the properties taken. The evidence of such an attitude is provided by the agreements made by these countries with the the countries whose property was nationalized, which contained only a general recognition of liability to pay compensation, but did not result, at least for a long time, in the payment of compensation.[71] However, the theory of co-existence raised by their "Political Ideology", and the reality of the international relations forced those communist States to reach agreement with the investors' governments.

The content of the agreements concluded by Eastern European

71- The examples are the Exchange of Notes between the United States and Poland on April 24, 1946, 4 U.N.T.S., p. 155; agreements between Sweden and Czechoslovakia of March 15, 1947, between Sweden and Hungary of July 26, 1946, Between Denmark and Poland of December 5, 1947, and Between Norway and Poland of February 4, 1948, Exchange of Notes between U.S.A. and Czechoslovakia of November 14, 1946, 7 U.N.T.S., p. 119; Exchange of Notes between U.K. and Hungary of August 19, 1954, 199 U.N.T.S., p. 149 which was finalised by the agreement of June 27, 1956 between U.K. and Hungary relating to the settlement of financial matters, Cmd. 9820.

countries is a direct reflection of their economic and political bargaining power. The conditions contained in these agreements represent a midline between the agreements concluded between the developed countries and those between the developed and developing countries. Through these agreements, in fact, they established a balance between the liability for payment of compensation by installment, and the opportunity for development offered by the inclusion of trade agreements.

The provisions of the agreements between the developed countries are different from the agreements between those of developed and the less developed countries. In the agreement between United States and Canada of November 18, 1968,[72] for example, the Government of Canada agreed to pay a lump-sum of $350,000 in full and final satisfaction of all claims due by the United States. The compensation was to be paid for damage or detriment attributable in whole or in part to the construction and maintenance of Gut Dam, and not as the result of any direct expropriation measures taken by Canada.[73] The settlement was made without prejudice to the legal and factual positions maintained by the parties and was not to be regarded as a precedent for future cases.[74] The compensation was paid in a lump sum. Although payment was not "prompt" in the sense of the date the damage was actually sustained, however, with respect to the nature of the dispute and the position of the

72- The agreement reached following the suggestion of the tribunal established on March 25, 1965 that a compromise settlement might be negotiated, 6 U.S.T., 1968, 7863.

73- Although Canada accepted to pay for the damage sustained by the United States, but by using the terms "allegedly attributable" and "allegedly caused", Canada did not admit liability for the damage; Para. 2, 5 of the Exchange of Notes Between Canada and United States of November 18, 1968, 6 U.S.T., 1968, 7863.

74- Para. C of the Agreement Between Canada and United States of November 18, 1968, 6 U.S.T., op. cit.

Dam in the international section of the St. Lawrence River, the delay in payment seems was inevitable.

The French agreements with Belgium, Switzerland, United Kingdom, Canada and Luxembourg[75] following the nationalization of gas and electricity undertakings in April 1946, were exceptions in which compensation was to be paid in installments, and capital obtained from redemption was not transferable abroad. In other lump-sum agreements between developed countries such limitations have rarely been imposed upon the property of aliens. But, in most of them, agreed compensation was to be paid within few days or months.[76]

2 - 2 - 4 - Agreements concluded between Developed and Developing States:

The position of third world countries on the issue of payment of compensation is far more complex and less straightforward. All developing countries have indicated their attitude toward nationalization in their investment laws/codes, policy statements, or constitutions, and many accord protection to private foreign property in commercial treaties. Those countries providing nationalization clauses in their constitutions have also given legal guarantees of compensation, the terms "just", "appropriate", "equitable" and "fair" compensation being used interchangeably.[77]

75- 31 U.N.T.S., p. 173; Vol. 106, p. 3; Vol. 73, p. 257.

76- For example in the agreements between France and Germany of July 27, 1961 (1963) J.O., 3367; between Japan and Canada of Sept. 5, 1961 (1961) Can. T.S. No. 8; 451 U.N.T.S., p. 47; between United States and Canada of Nov. 18, 1968, 6 U.S. T., 7863.

77- Akinsanya A. A., The Expropriation of Multinational property in the Third

However, the agreements between developing and developed countries usually contain conditions less favourable to the countries whose nationals' property have been expropriated. The reasons for the differences on the conditions of expropriations will be discussed in the following section.[78] Here we will discuss the provisions of some of the lump-sum agreements concluded between developing and developed countries.

On September 10, 1946, Egypt and Italy reached an agreement relating to measures taken by the Egyptian Government with regard to Italian property, rights and interests in Egypt, and also with regard to the damages suffered by Egypt as a result of military operations on its territory.[79] The Government of Italy agreed to pay the Government of Egypt the sum of 4,500,000 Egyptian pounds as the indemnification for war damages[80] and took the amount of 2,172,735 Egyptian pounds for other expenses of the Italian nationals and institutions.[81] The Government of Egypt was to maintain under sequestration a portion of Italian property in Egypt equal in value to the amount of damages suffered by Egypt.[82] The Egyptian nationals whose property was damaged in Italy were to be indemnified and all the restrictive measures against them nullified.[83] As an advantage to Egypt, the provisions included in the agreement provided that Italy would renounce in its name

World, op. cit., p. 30.

78- See the section on The Conditions of Expropriation of Aliens' Property under International Law, pp.

79- English text of the agreement in Lillich and Weston, International Claims, op. cit., p. 1.

80- Loc. cit., article 1.

81- Lo. cit., article 2.

82- Loc. cit., article 5.

83- Loc. cit., articles 6 and 7.

and in that of its nationals, all claims resulting from special war measures taken by Egypt including those mentioned in article 2 of the agreement related to Italian property, rights and interests in Egypt. To help the economic rehabilitation of Italy, Egypt also agreed not raise any new claim against Italy.[84]

A similar agreement, concerning financial and commercial relations and British property in Egypt, was signed between the United Kingdom and Egypt on February 28, 1959.[85] In terms of this agreement, the Government of Egypt undertook to lift the sequestration measures imposed on British property since July 26, 1956 and return such property or the proceeds thereof to the persons entitled.[86] Properties belonging to British nationals, sold by the Government of Egypt between October 30, 1956 and August 2, 1958 were excluded from those undertakings, and all exchange control restrictions on Egyptian accounts and restrictions on Egyptian transactions were removed.[87] The agreed amount of £27,500,000 in installments,[88] is nearly half of the estimated sum of £45,000,000 in regard to the nationalized properties of the British nationals and the claims for injury or damage to property during sequestration.[89]

84- Lo. cit., articles 2, 3 and 8.

85- Agreement Between U.K. and Egypt concerning Financial and Commercial Relations and British Property in Egypt, February 28, 1959, U.K.T.S., 1959, No. 35, Cmnd. 723.

86- Article 3 (a and b) of the Agreement Agreement Between U.K. and Egypt concerning Financial and Commercial Relations and British Property in Egypt, February 28, 1959, op. cit., p. 3.

87- Article 2 of the Agreement Agreement Between U.K. and Egypt concerning Financial and Commercial Relations and British Property in Egypt, February 28, 1959, op. cit.

88- Article 4 of the Agreement Agreement Between U.K. and Egypt concerning Financial and Commercial Relations and British Property in Egypt, February 28, 1959, op. cit.

The lump-sum agreement between Netherlands and Indonesia of September 7, 1966[90] provides another example of this group of the agreements. While the parties to the agreement emphasized that the agreement should be based on principles of justice, humanity and equity, they agreed not to itemize their respective claims or evaluate them, and the compensations which Indonesia was to pay arranged in long installments.[91]

In this connection, the agreement between Switzerland and Cuba of March 2, 1967[92] is also remarkable. The compensation agreed was to be paid in installments and on the condition that, the Swiss parties buy 40,000 metric tons of sugar or equivalent green coffee or molasses at the market price.[93] If after the expiration of the eight years fixed in the agreement the indemnity had not been completely paid, the obligations of the contracting States would be considered extended until their complete satisfaction.[94] It was implicit in the agreement that the compensation paid by Cuban Government was not adequate and might give rise to further claims by the Swiss nationals. However, the Swiss Government

89- Parliamentary Debates (Commons), March 16, 1959, col. 36, 149.

90- Netherlans and Indonesia, Agreement Concerning the Financial Problems Still Outstanding Between the Two Countries, Haugue, 7 September, 1966, 686 U.N.T.S., 1969, p. 121.

91- Article 2, Netherlans and Indonesia, Agreement Concerning the Financial Problems Still Outstanding Between the Two Countries, Haugue, 7 September, 1966, op. cit., p. 124.

92- Agreement Between Switzerland and Cuba Concerning the Indemnification of Swiss Property, Rights and Interests Affected by the Laws Promulgated by Cuba Begining 1 January 1959, Havana, March 2, 1967, English text in Lillich and Weston, International Claims, op. cit., p. 339.

93- Loc. cit., article 3(a).

94- Loc. cit., article 3(d); the obligation of Swiss towards the payment of compensation by Cuba was financing Cuba by purchasing sugar or coffee from that country.

was barred from supporting any more such claims against Cuba.[95]

The clear expression of the question raised in respect to developing countries was stated in the agreement of August 29, 1967 between Italy and Tunisia.[96] There, in addition to the conditions mentioned in regard to the other agreements, Italy agreed to grant long-term loans to Tunisia in payment of compensation, and also by way of contribution to the success of the Plan of Development of Tunisia.[97] The Italian Government also granted a quota of 150,000 hectoliters of Tunisian wine to be imported and sold at the internal Italian market price, and furnish the necessary authorization for that.[98]

In sum, the international agreements on the issue of compensation illustrate varied practice of the different groups of countries. The agreements between aliens and States have not yet reached the scale necessary to establish an international custom. Moreover, from the international point of view, they are not yet remarkable enough to conclude certain rules of international law from them. The agreements which have not resulted in the actual payment of compensation were either solved by later lump-sum agreements which were balanced with many economical and non-economical factors.

95- Article 5, para. 3, Agreement Between Switzerland and Cuba Concerning the Indemnification of Swiss Property, Rights and Interests Affected by the Laws Promulgated by Cuba Begining 1 January 1959, Havana, March 2, 1967, op. cit.

96- Agreement Between Italy and Tunisia Relative to Indemnification and to Economic and Financial Cooperation, Rome, August 29, 1967, (1968) Rev. Gen. D.I.P. 545; English text see in Lillich and Weston, International Claims, op. cit., p. 346.

97- Loc. cit., article 2(2) and 3.

98- Article 5, Agreement Between Italy and Tunisia Relative to Indemnification and to Economic and Financial Cooperation, Rome, August 29, 1967, op. cit., p. 348.

Many agreements resulted in the actual payment of compensation. Although such agreements provided for the payment of compensation, there was considerable variation with regard to the types of claims covered, the forms of compensation agreed upon, the methods of payment adopted and the procedures to be followed. Accordingly, it is not possible to deduce common clear-cut international rules applicable to all States.

The measures taken by communist countries indicate an unsuccessful struggle by these countries on the basis of their political ideology. They paid compensation for the taken properties. However, the conditions they fulfilled in payment of compensation encouraged developing countries to expropriate aliens' property.

The group of agreements which form the central focus for this study are the compensation agreements concluded between developed and developing countries. The agreements made with developing countries tend to be of some complexity; and not infrequently include collateral conditions or agreements entirely unrelated to the question of compensation. Those conditions were in fact excuses for developing countries to refrain from payment of compensation to the aliens, or sometimes enabled them to pay due compensations. Various advantages have been given to these countries, and by conclusion of such agreements the traditional rules of international minimum standard have regularly been violated.

The provisions of agreements concluded between developed and developing countries with regard to the amount of compensation are inconsistent with those of agreements concluded between the developed countries. In some cases the compensation paid to aliens by their own government has been five-fold the amount paid by the expropriating State. The reason is probably that lump sum settlements have not necessarily

been considered to involve the assignment or admission of liability under international law.[99] Among more than 130 such agreements concluded since the Second World War, only six contain an express admission of responsibility, and these were all made by Japan to settle war claims against her.[100] In the other settlements, no mention of international liability is made, save that it may be expressly excluded.[101]

Moreover, the International Court of Justice in the *Barcelona Traction* case took the view that lump sum agreements are not to be regarded as creative of customary international law, and the arbitrator in *Aminoil* adopted a similar view.[102] Nevertheless, it is possible to derive some conclusion according to the divisions introduced above.

A further evidence to this argument is the preferential treatment of developing countries in the General Agreement on Tariffs and Trade (GATT). The issue of the differences between the developed and developing countries are well indicated in the provisions of GATT. The

99- Gray C. D., Judicial Remedies in International Law, Oxford 1987, p. 179.

100- Agreement Between Greece and Japan Relating Settlement of Certain Greek Claims, Tokyo, 20 September 1966, 609 U.N.T.S., p. 103; Agreement Between the Government of Japan and the Government of G. Britain Relating Settlement of Certain British Claims, Tokyo, 7 October 1960, 384 U.N.T.S., p. 94; Exchange of Notes Constituting an Agreement Between the Government of Japan and the Government of Spain Relating the Settlement of the Problem Concerning Certain Types of Spanish Claims, Madrid, 8 January, 1957, 318 U.N.T.S., p. 221; Agreement Between the Government of Japan and the Government of Sweden Regarding Settlement of Certain Sewedish Claims Settlement, 20 September 1957, 325 U.N.T.S., p. 29; Agreement Between Switzerland and Japan Concerning the Settlement of Certain swiss Claims Against Japan, ROLF 357, 1955, AS 344, English text see in Lillich R. B. and Weston B. H., International Claims: Their Settlement by Lump sum Agreements, op. cit., p. 115.

101- Gray C. D., Judicial Remedies in International Law, op. cit.

102- Case Concerning the Barcelona Traction, Light and Power, Limited, *Belgium v. Spain*, I.C.J.R., 1970 pp. 49-50; *Aminoil case*, I.L.M., 1982, p. 976.

differences manifested by trade disputes, together with the particular needs of developing countries, have come increasingly to preoccupy GATT throughout the past two decades. Developing country GATT members have for many years been able to apply certain of its rules with considerable flexibility.[103] Additional provisions were added to the General Agreement specifically dealing with trade and development. Promotion of the trade interests of developing countries was an important element in the Tokyo Round of trade negotiations.[104] Some provisions were added in 1965 to deal with the special needs of the developing countries and to set out GATT's principles and objectives in meeting these needs. The member States undertook commitments to take joint action to assist the developing countries "as a matter of conscious and purposeful effort".[105] The developed countries gave concessions and contributed to help the developing country members by reducing import duties and other trade barriers facing export from developing countries, while the developing countries were allowed to impose import restrictions or suspend tariff concessions on imported products from other countries.[106] As the result of the Tokyo Round, a permanent legal basis was established within the GATT for preferential trade treatment on behalf of, and between, developing countries. One of the elements taken into account was the uncertain financial and economic conditions of such developing countries.[107]

103- Article XVIII of GATT, GATT, Basic Instruments and Selected Documents, vol. IV, 1969, p. 28.

104- GATT, what it is, what it does, pp. 13-15.

105- Part IV, articles XXXVI, XXXVII, XXXVIII of GATT, GATT, Basic Instruments and Selected Documents, vol. IV, op. cit., p. 53.

106- Article XIX of GATT, GATT, Basic Instruments and Selected Documents, vol. IV, op. cit., p. 36.

107- GATT, what it is, what it does, op. cit., p. 12; Garcia-Amador F. V., The Emerging International Law of Development, London, 1990, pp. 95-103.

However, the difficulty remains now to agree upon the elements involved in those agreements and identify the exact responsibility of States towards expropriated aliens. This is particularly so when one bears in mind that some agreements were concluded simply to help the expropriating States to unblock assets. It follows that many of those agreements were not concluded as a result of some strongly held conviction on the part of the expropriating States. Indeed, Eastern European States even suggested that they had made the payments in an *ex gratia* manner and not under a legal obligation.[108] Therefore, as it was stated in *Amoco International Finance Corp.* case, State practice as manifested in settlement agreements cannot be considered as customary rules of international law, unless it presents specific features which demonstrate the conviction of the State parties that they were acting in application of what they considered to be settled law.[109] But, as evidence of this argument, they indicate that a universal rule cannot be extracted from them. Thus, it is necessary to classify the rules in regard to expropriations of aliens' property in accordance with the conditions of each group of States.

****
****
*****
***
*

108- Seidl Hohenveldern I., Communist Theories on Confiscation and Expropriation, Critical Comments, 7 A.J.C.L., 1958, p. 547.

109- *Khemco case (Amoco International Finance Corp.) v. Iran,* 15 Iran-U.S. C. T. R., p. 266.

CHAPTER THREE

IRANIAN OIL NATIONALIZATION

Background:

Before any discussion on the question of nationalization of the oil industry in Iran, we will survey briefly the background to the granting of the Oil Concessions in Iran, and then the terms and conditions they comprised.

The competition between Britain and Russia for concessions to exploit Iranian oil resources continued for more than half a century. Russian effort was concentrated in the north and that of the British in the south. The competition for concessions in Iran was so intense that, by the end of the nineteenth and early in the twentieth century, all of the country's resources and technical projects were granted to foreigners, predominantly the British and Russians. The concessions to foreign commercial and industrial investments, together with the inefficiency and corruption of the ruling class and some other elements, brought Iran to a political and financial crisis.[1] Those foreign investors used their influence in the country to secure the appointment or dismissal of

1- One of the elements of the inefficiency of the Ruler of the time was the continual borrowing of the shah for his personal affairs; Lenczowski G., Russia and the West in Iran; A Study in Big-Power Rivalry, Ithaca, 1918-1948, (1949), p. 5; see in general in Shuster W. M., The Strangling of Persia; Record of European Diplomacy and Oriental Intrigue, London, 1913, chap. II; The Middle East, a Political and Economic Survey 1950, published by the Royal Institute of International Affairs, pp. 219-235.

officials, in some cases, even directly dismissing the disliked officials.[2]

During this period of quasi-colonial domination, a number of concessions were taken from Iran of which the most notable, in terms of its political significance, was the D'Arcy Concession of 1901.[3]

The political influence of Britain secured the economic interests of Britain in Iran in such a way that the concession granted to the Anglo-Iranian Oil Company was the manifestation of that influence which continued as a link between the two countries. But, like the other foreign held concessions in Third World Countries, such as Mexico, Chile, Bolivia, Peru, Indonesia and Egypt, it contained seeds of disagreement between the host nation and the concessionaire which ended in a violent changes in the existing situations.

2- Reza Shah was moved and sent to exile by direct intervention of Britain; Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 6; Shuster M., The Strangling of Persia, op. cit., chaps. II, III.

3- Before this concession, in 1872, Baron Julius de Reuter, a British subject, was granted an exclusive concession to exploit all the natural resources of Iran, except precious stones and metals, and to build railways and telegraph systems, but as the result of the Russian protest they were forced to cancel the plan; See in Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., pp. 3-15.

(SECTION ONE)

THE IRANIAN OIL CONCESSIONS

Their Establishment

William Knox D' Arcy an Australian[4] national, living in Britain, obtained an oil concession of 1901 in Iran. D' Arcy had obtained a sixty year oil concession on May 28, 1901 which had given him access to the whole of Iran except the northern provinces of Astarabad, Khorasan, Azarbaijan, Gilan and Mazanderan, the traditional areas of Russian influence.[5] The concession gave D' Arcy the exclusive right to explore, exploit, refine and sell natural gas, oil and bitumen in all these areas.[6] He also obtained the right to construct pipe lines and installations, and to use all state-owned non-cultivated lands necessary for the purposes of prospecting. Through the concession, he was protected against the necessity for paying inflated prices for private land that might be necessary for the operation.[7] He was relieved from all kind of taxes and tariffs throughout the period of the concession, and the Government guaranteed all necessary measures to secure the performance of the concession relative activities.[8]

4- Some writers for example, Walden has mentioned him as British, and his address mentioned in the concession is: 42 Grosvenor, London.

5- Chapter 1 and 6 of the Concession, in Makkey H., Ketabe Siyah (Persian), second edition, Vol. 1, Teheran 1980, p. 21-22; Makkey at that time was a member of parliament and reporter to the Special Committee on Oil and the special envoy of the government in oil affairs.

6- Chapter 1 of the Concession, in Makkey H., Ketabe Siyah, op. cit., p. 21.

7- Chapters 2 and 3 of the Concession, in Makkey H., Ketabe Siyah, op. cit., p. 21.

8- Chapters 7 and 14 of the Concession, in Makkey H., Ketabe Siyah, op. cit., pp. 22-23.

In return, D' Arcy agreed to establish one or more companies to exploit oil within two years, and make an initial payment to the Crown of £20,000 sterling and £20,000 in shares of the company. He was to pay 16 per cent of the annual net profits to the Iranian government. The concessionaire was also to pay 2,000 tommans for the acquisition of the mines in operation of Naftshahr, Qasre shirin and Daleki in Bushehr.[9] No provision was made for the renegotiation on any of the agreement's provisions in order to make allowance for changing circumstances.

The concession was originally granted to a private individual by the government of Iran. The Anglo-Iranian Oil Company had transferred companies' stocks to the British government in 1914 which equalled to indirect transfer of the concession. This transfer was later claimed by the Iranians to have been contrary to provisions of the concession and against the consent and the wishes of the government of Iran,[10] and was used as the evidence that the concession had become null and void. A provisional agreement was reached on December 22, 1920 but was not ratified by the Majlis. Royalties continued to be small, based on net profits.[11] Iran's difficulties increased when Britain went off the gold standard on

9- Chapters 4 and 10 of the Concession, in Makkey H., Ketabe Siyah, op. cit., pp. 21-22.

10- On this basis, later on March 14, 1951(Esfand 18, 1329), the British Ambassador in Teheran wrote to Iranian Prime Minister, Mr. Ala, that British government cannot be indifferent on the issue of the Anglo-Iranian Oil Company, which is an "English" and even "International" company; reprinted in Makkey H., Ketabe Siyah(Persian), Vol. 2, pp. 122-124; Iran never accepted that the agreement was transferred and in the agreement of April 29, 1933 in the definition of the terms, and in Article 26 of the that agreement, it was clarified that "The Company" means the Anglo-Iranian Company or any other legal entity which with ratification of the government of Iran the concession be transferred to it.

11- See the report on the royalties, profits and gross sale figures in Persian Oil, The Economist, Vol. 115, December 3, 1932, pp. 1019-1020.

September 21, 1931, and her sterling balance reduced. This tremendous political and economical pressure brought about a further deterioration in relations between Iran and the company until finally the Iranian government, on November 27, 1932, notified the company that the concession was terminated.[12] Declaring the D' Arcy concession void, the Iranian finance ministry challenged the company on the grounds that the concession had been granted at the time of dictatorship and ignorance and through illegal channels. Moreover, it was stated that the company did not fulfil the terms of the concession.[13]

During the oil dispute of 1932-1933, the Anglo-Iranian Oil Company made serious and direct threats against Iran, and Britain threatened to use force which was then common when powers were allegedly acting to protect their nationals' lives and property abroad. In a letter to the British Ambassador in Teheran it had already been declared that:

> "His Majesty's Government will not hesitate, if the necessity arises, to take all legitimate measures to protect their just and indisputable interests. ..... His Majesty's Government will not tolerate any damage to the Company's interests or interference with their premises or business activities in Persia."[14]

British warships appeared in the Persian Gulf, and a series of notes were exchanged between the two governments. Britain brought the dispute before the Council of the League of Nations and tried to submit

---

12- Britain and Persia, The Economist, Vol. 115, December 17, 1932, pp. 1125-1126. See also Note 6 in Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 286.

13- Etelaat (Iranian newspaper), November 27, 1931; see also Musaddiq M., Musaddiq's Memoirs (Persian), p. 199; I. C. J. Pleadings, pp. 685, 690; See more on dependencies of the regime in Iran to Britain in Memoirs of General H. Fardoust, Raise and Fall of Pahlavi Dynasty(Persian), vol. 1, Teheran, 1369(1991), passim.

14- *AIOC Case,* I. C. J. Pleadings, 1952, p. 237.

the case to the Permanent Court of International Justice. Subsequently, a new agreement was reached between the Anglo-Iranian Oil Company and the Iranian Government on April 29, 1933.[15] Contrary to the opinion of some writers,[16] and to the contention of Britain and the Company, the new concession was not more content to Iran than the former one, for it extended the concession for 30 more years, so that even the Shah regretted its renewal in the time of his father.[17]

As a result of the Second World War, Iran as well as the other countries, experienced a very rapid and severe growth in inflation. The cost of living multiplied almost sevenfold between March 21, 1941, and March 21, 1945.[18] With the distinct upward trend in prices during 1949, the Iranian government demanded increased royalties from the AIOC. There had already been pressure, since 1940, for the revision of the AIOC's royalty formula which was caused in part by the disparity between the royalty formula agreed in respect of Latin America (especially Venezuela) and those provided for the 1933 concession. Accordingly, they resolved upon a new agreement to increase the royalty rate by about 2 shillings per ton of oil sold in Iran or exported subject to the fluctuations in the price of gold, by virtue of which agreement, the company's title under the 1933 concession was affirmed.[19] This small increase of the profit for Iran occurred when the company had already

15- The text of the Agreement see in Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., appendix I p. 233.

16- Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 18.

17- Pahlavi M. R., Mission for My Country, Chapter 12; see also Musaddiq's Memoirs, op. cit., p. 205

18- The Indexes of money in circulation, Wholesale prices, cost of living, and import prices see table 1 of the Appendix II in Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 248.

19- Articles 1 and 3(A)of the Supplementary Agreement.

offered a fifty-fifty profit-sharing formula in its negotiations with the Iranian government. But the Iranian representatives had refused the offer in the hope that a more favourable arrangement might be reached. Public opinion within Iran, as well as that of the United States Embassy, had crystallized in such a way that the Supplementary Agreement was regarded as inadequate and was rejected by the Majlis. The company subsequently refused to concede to a demand of the new Iranian Government that they reduce the price of the oil products in Iran and to increase the number of the Iranians employed and trained by the company.[20]

The British foreign office, ignoring the warning of the American embassy in Teheran, insisted that the company was a commercial enterprise, and that the Iranians would ratify the Supplementary Agreement when their need for money was great enough.[21] The Oil Special Committee of the Majlis reported that it was not in favour of the agreement, on the grounds that it did not safeguard Iranian rights and interests.[22] The report of the Special Committee was approved by the Parliament, which in turn requested that the committee might make suggestions on the course the government should take action in the issue of oil.[23] This event coincided with the Arabian-American Oil Company's fifty-fifty profit-sharing agreement. The company urged Razmara to reopen negotiations for a similar agreement, but it was too late. A formal resolution was presented to the special committee for the

20- This issue was argued by the Iranians in all oil discussions, at least since 1932. It was repeated by Dr. Musaddiq in many occasions, including in the Security Council of the United Nations on October 15, 1951; U.N.S.C., Official Records, 560th Meeting, p. 19.

21- Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 50.

22- The Parliamentary Debates of December 17, 19, 21, 24, 1950.

23- Loc. cit.

nationalization of the Iranian oil industry, and a mass demonstration of people supported the action.[24] Thus, the Supplementary Agreement was never ratified, and eight days later, on March 15, 1951, the Majlis passed a bill nationalizing the Iranian oil industry.[25]

(SECTION TWO)

THE LEGAL CHARACTER OF THE ANGLO-IRANIAN OIL CONCESSIONS

There is a presumption that States, in concluding an agreement, do not always intend to create legal relations, and that this intention would need to be clearly manifested before a legal character is attributed to the agreement.[26] For example, Iran under occupation, basically lacked the intention to contract legal obligations under the agreements because it has not been common, especially at the time when the oil concessions were granted by Iran, to compromise the sovereignty of a country in favour of a private party, particularly as they did not conform to the rules of law with regard to the formation of contracts and were renounced by the later statements and legislation. The sovereignty and interests of the government was submitted to the mercy of the private concessionaire through the concession agreement, inconsistent with the aims and

24- Makkey H., Ketabe Siyah,op. cit., Vol. I, pp. 483-685.

25- See the Article to nationalizing the oil industry and the law regulating the nationalization in appendix I.

26- Fawsett J. E. S., The Legal Character of International Agreements, 30 B.Y.I.L., 1953, p. 385.

principles of international law.[27]

The concept of a concession granted to the aliens in Iran was taken from the French law to be applied in a different legal and political and administrative system. In France, Germany or Switzerland a concession is under the direct control of government which consist of regulatory rules which can be changed unilaterally by the government.[28] It retains inherent power to control the terms of the agreement and to adjust them to the changing needs of the public service. For this purpose it can, without any default of the contractor, suspend, vary or rescind the contract, transfer it to another party or take it over itself, and the application of the rules governing the modification of administrative contracts can not be excluded by agreement.[29] This legal concept was used in the AIOC concession while the government of Iran had no control over the concession and the company. Rather, it was the company which in fact influenced the government and dictated the terms and the conditions of the concession. However the term 'concession' was not unfamiliar to Iranians, and it did not have the meaning equal to contract, but it has always meant a privilege granted as the result of the special relation of the parties with the background of political and economic dominance of the foreigners on the country.[30] The term has been

27- Preamble to and Article 1(2,3) of the Charter of the United Nations, 24 October 1946; preamble to the declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, Resolution 2625(XXV) of 24 October 1970, U.N. Resolutions, Series 1, G.A., vol. XIII, 1970-71, p. 338.

28- The Arbitration between Saudi Arabia and Aramco, 27 I.L.R., 1963, pp. 157-9.

29- Greiger R., The Unilateral Change of Economic Development Agreements, 23 I.C.L.Q., 1974, pp. 96, 99.

30- Speech of Shah in the oil engineers union in Abadan, March 3, 1966; Debates of the Majlis on the nationalization of the oil industry, the Black Book, 2

replaced by 'Economic Development Agreements'. The change of name reflects the changed power relationships between capital-exporting and importing States.[31]

Oil and oil installations were regarded as immovable property, and the Iranian Civil Code of June 6, 1931 did not recognize any rights of aliens in immovable properties. Therefore, those aliens who owned such properties were required to transfer them to Iranian nationals or to the government.[32] Without reference to that law, the District Court of Tokyo declared that, the land over which the appellants exercised their rights under the said agreement cannot be treated as so-called 'concession land' under international law, nor can such rights be called a 'concession'.[33] A similar judgement was delivered in *AIOC v. SUPOR Company,* in which the court rejected the right of the company to the concession.[34] The Civil Court of Rome held that the 1933 concession was contrary to the Iranian Constitution[35] and therefore contrary to

Vol.s, passim; Movahed M. A., Our Petroleum and Its Legal Problems, third edition, Teheran, 1979, pp. 242-3.

31- Greiger R., The Unilateral Change of Economic Development Agreements, p. 74.

32- The Law Collection of 1931, (Persian), p. 67 onward and the regulations on the ownership of aliens of Nov. 26, 1948 (Persian), p. 206 onward; regulations of Oct. 5, 1963, the Law Collection of 1963, pp. 131-2; 1965, p. 13 onward. There have been some exceptions to those rules, excluding the countries which mutually agreed Iranian nationals could have the same amount of property in that country or those aliens who reside permanently in Iran. The Iranian law of property researched to be use recently in the Iran-U. S disputes by the Iranian Lawyers. The result was published in 11 B.I.L.S.L.R., Autumn-Winter 1989-90, pp. 73-96.

33- *AIOC v. Idemitsu Kosan Kabushiki Kaisha,* District court of Tokyo, 20 I.L.R., 1953, 308.

34- *AIOC v. S.U.P.O.R. Company,* Civil Court of Venice, 22 I.L.R., 1955, pp. 32-33.

35- Article XVI of the Constitutional Law of October 7, 1907; it imposed an

Italian public order and not applicable in Italy, as it had created an expropriation without prescribing the procedure and criteria of compensation in favour of the owners of the land covered by the concession and not belonging to the Iranian government.[36] The terms for payment of compensation were later inserted in the 1954 agreement between the Iranian government and the Consortium.[37] If it was acceptable under the Iranian civil code that aliens could possess immovable properties, under the same law and as it was contended by the company against *SUPOR*, under the Constitution, it would be illegal to dispossess the company of its property, especially since it was explicitly stated in the law regulating nationalization of the oil industry that the company was in control of that industry.[38] Therefore, the acquisition, occupation and possession of such properties was granted by the Iranian government to the aliens in contravention of the Civil Code of Iran.[39]

The principle of ownership laid down by Article 38 of the Iranian Civil Code that the owner of the soil is also the owner of what is under the soil and is entitled to benefit thereby subject to the restrictions prescribed by the law then in force. Furthermore, Article 161 of that Code prescribed that the mines belong to the owner of the soil under which they are situated. Therefore, at the time when the concession was

obligation to grant compensation only in favour of parties who had been deprived of ownership, and Article 29 of the Iranian Civil Code distinguishes ownership from the right of utilization.

36- Article 4 of the 1933 Concession; *AIOC v. S.U.P.O.R.*, Civil Court of Rome, 22 I.L.R., 1955, p. 32.

37- Articles 7(D) and 9 of the 1954 Agreement.

38- Articles 36 and 37 of the Iranian civil code, and para. 2 of the law regulating nationalization of the oil industry.

39- Article 161 of the Civil Code of Iran; see also I.C.J. Pleadings, 1952, op. cit., p. 182.

granted, the owner of the soil was fully entitled, in the absence of any special restriction, to exploit any mines below the soil of his own property and was also entitled to benefit from such mines after they had been discovered.[40] The owner was also entitled to prevent any other parties and even the government from exploiting the mines in his subsoil and benefitting from any mines which may have been discovered there. Thus, the concession agreement of April 29, 1933, in fact, partially expropriated the right of the owner of the soil by preventing him from exploiting mines under his land. The concession not only expropriated the right of the owner to the deposits discovered on his land for, such land was contained within the boundaries of the concession which the government granted to the company, but also indirectly confiscated the lands of private parties by imposing a fixed price in the case of disagreement and disregard to the purpose for which the land was purchased.[41] No provision for payment of compensation was made in the agreement, nor even for a right of appeal against the decision of the government. The company which was protesting against the nationalization measures by the government, never admitted that under the Iranian Civil Law, the exclusive right of the company granted through the concession was a partial expropriation of the rights of ownership to the private lands.[42] There was no other law which gave such exceptional rights to the aliens and the Iranian Constitution Law laid down that the protection of the rights of foreigners was subordinate to the laws of the Iranian State.[43]

40- Article 161 of the Iranian civil code; this law later became conditional to a special regulatory rule.

41- Article 3(d) of the 1933 agreement.

42- Article 3 of the Law of February 6, 1939 had granted the exclusive right of utilization of oil wells to the Government.

The uncertainty surrounding the ownership of subsoil mines by the concessionaire was not unique to Iranian legal system, but exists generally in islamic law which consequently has been reflected in the laws of some of the islamic countries.[44] Accordingly, in *the Aramco Arbitration* the arbitrator concluded that in islamic law there is no agreed concept on mineral concessions including oil mines.[45]

All these elements together with the historical, political, social and economic conditions stated in *SUPOR* case,[46] put the *AIOC* case in a special category different from the other groups of the private and public contracts,

Moreover, it is doubtful whether concessionary contracts have been recognized by the contract law of Iran at all. Accuracy and legitimacy of contracts has been conditioned in that law to:

1- Intention and consent of the parties to the contract;

2- Competence of the parties to the contract;

3- Agreement upon a determinate subject;

4- Legitimate cause of the contract.[47]

It is very doubtful whether the oil concessions conform to these conditions, as the parties agreed upon an uncertain venture. Therefore, under the Iranian civil code they would have been null and void. That was one of the reasons that the concession and its predecessors were undesirable and rejected by Iranians.[48] All these defects in the

43- Article VI of the 1907 Constitutional Law.

44- Movahed M. A., Our Petroleum and its Legal problems, op. cit., pp. 209-210.

45- State Responsibility, *Saudi Arabia v. Aramco*, 27 I.L.R., 1963, pp. 163-4.

46- *Anglo-Iranian Oil Company v. S.U.P.O.R.*, Civil Court of Rome, 22 I.L.R., 1955, pp. 37, 39.

47- Article 190 of the Iranian civil code.

48- The Court of Venice considered the concession against the civil code of Iran and rejected any right of ownership to the AIOC. See generally in Makkey H.,

Concession Agreements with the Anglo-Iranian Oil Company became the motive to introduce the nationalization law of the oil industry. It made the provisions on payment of compensation ambiguous and uncertain, conditioned upon the legitimacy of the claims of the company which must have been approved by the Iranian Houses of Parliament and Senate.

In fact, the Concession of 1933 was a law according to which the lands of the private owners were expropriated but its legality depended upon the payment of compensation under the constitution. The civil code of Iran describes the claims of the owners as 'rights' and those of the concession holders as 'interests' which would be evaluated under different rules. No compensation is due in respect of such interests under the Iranian legal system.[49]

The reason, as it was stated earlier, is that the concept of concession granted to the aliens in Iran was taken from other legal systems and that it was a concept largely incompatible and inconsistent with the Iranian legal system. However, the concession to the Anglo-Iranian Oil Company was approved by the Iranian Parliament according to the provisions of the Constitution on procedures to enter into contracts with aliens[50] but, it was in contradiction with some other Iranian Civil Code. Under the Iranian Civil Code, the concession could be ended according to the discretion of the grantor without any right to the concessionaire to claim for compensation for the acquired rights and, if the removal of the

---

Ketabe Siyah, op. cit., 2 Vol.s, passim; the existence of the Concessions has been counted as one of the effective elements of the Constitutional Revolution, see Movahed M. A., Our Oil And Its Legal Problems, op. cit., p. 218.

49- Article 15 of the Law of 1939; this concept has been accepted in the Italian legal system, Article 40 of the Italian Constitution; see also 22 I.L.R., 1955, pp. 34-35.

50- Article 24 of the Iranian Constitution of 1907.

installations was productive of damage to the subjects of the concession, he could not claim for the installations planted according to the concession.[51]

Iranians on different occasions declared that their measures of nationalization were in fact simply a revindication of the nation's rights to their natural resources.[52] Therefore, they regarded themselves as having a basic right to nationalize the *AIOC*. They believed that the only issue which had hitherto delayed the revindication of that right was the control and influence of the company over the political and economic affairs of Iran.

However, it does not follow from this that the measures were outside the scope of the general principles of international law. The rules, such as 'equity' and 'intention of the parties', strike a balance between the principles of international law designed to create legal rights and duties binding on a country and create a relationship between States, recognizing and practicing among the legal systems and civilized nations, especially when a mineral contract is involved.[53] That was the position of the contracts which allowed the OPEC and other countries to intervene in oil agreements, changing the price of oil, reviewing the terms, and changing the conditions of such agreements and increasing the tax burden.[54] If the Iranian nationalization measures are evaluated on this basis, a different conclusion will be reached.

51- See the provisions of the Iranian civil Code on 'Haghe Entafa', Articles 40-54.

52- This idea was also expressed by some of the British officials. The Chancellor, Richard Stocks in the election campaigns of October 1951 in Cheshire had criticised the company as "looter"; reported from The United Press in Makkey H., Ketabe Siyah, op. cit., Vol. IV, p. 25.

53- Geiger R., The Unilateral Change of Economic Development Agreements, p. 100.

54- Movahed M. A., Our Oil and Its Legal Problems, op. cit., pp. 160, 164-6, 175-6.

The principle of *pacta sunt servanda* was breached, apparently to make the agreements more equitable and no serious legal challenge was mounted against the later decisions of the OPEC members, including Iran, to change the contracts terms. As the Resolution 122 of the OPEC mentioned, constant increase of inflation in the Western Countries and the devaluation of dollar, both of which had the consequence of reducing the purchasing power of the OPEC members, were the legitimate reasons to alter the terms of the contracts.[55] Prior to the establishment of OPEC, there had not been any such automatic increase in the incomes, for the reasons already mentioned. The changes requested by the OPEC members might be seen as violating the sanctity of the contracts, but they did not contravene either the member's duties towards the oil companies, or the above mentioned principles of international law. Those contracts had been concluded under different circumstances, and changing the terms of those contracts on the basis of the change of the circumstances has been accepted under international rules. The OPEC members believed that it would not be contrary to the U.N. Charter and international rules to pass legislation in each member State obliging the oil companies to submit to their lawful demands for a change in the terms of the agreements.[56] While the companies' countries as the consumers of the OPEC oil had an interest in the maintenance of the existing agreements, they did not institute any legal action against the OPEC countries, and the companies agreed to change the terms of the contracts.[57] The reason was simply that the changed circumstances appeared to make the performance of the agreements inconsistent with the initial intention of the host States.

55- Loc. cit., p. 166.

56- Loc. cit., pp. 175-6.

57- Loc. cit., pp. 181-3.

(SECTION THREE)

THE IRANIAN OIL CONCESSIONS AND INTERNATIONAL LAW

As it was explained earlier, the Iranian oil concessions had no strong basis within the Iranian Civil Code. However, it was a transnational contract and it was accordingly of international concern. If the Iranian oil concessions were concluded directly between the two States they would become of international law concern, the parties to the agreements would be international subjects, and having the characteristic of being governed inter alia, by the terms of the concession as a part of international law. Under international law, the agreements would be concluded with the intention of the parties being expressed in written form by representatives of the States with full powers.[58] But, contracts need not only concluded between States. They are enough to become, directly or indirectly the subject of an agreement between States. This was the argument of the UK to bring the case before the International Court of Justice.

There is no uniform international practice on the issue of expropriation and the case law in this field is not sufficiently developed to be fully reliable.[59] There are many cases similar to the *AIOC*, but the procedures and conclusions are relatively varied. For example, in *Shufelt's v. Guatemala*, the arbitrator declared that the case was governed by international law and it was referred to an international tribunal which did not of course administer municipal law.[60] In the

58- Articles 1,2 of the Vienna Convention on the Law of Treaties.

59- Geiger R., The Unilateral Change of Economic Development Agreements, 23 I.C.L.Q., 1974, p. 80.

Amco Asia v. Indonesia it was claimed that the State was entitled to withdraw the approval it had granted for reasons which could not be invoked by a private contracting party as an exceptional powers of a State to terminate contracts.[61] The Supreme Court of the USA called the expropriation power essential to the life of the State.[62] And in England, all of the contracts which would be performed within UK would be governed by English Law.[63] But, in *the Mavrommatis case,* because the case was taken by the Greek Government, it was considered in the domain of international law.[64] The most identical cases, which indicate the diversity of State practices in this field of international law, are the Libyan expropriation cases in which the arbitrators reached different conclusion in similar cases.

Despite differences in the procedures, it seems to be generally accepted in international law that an equitable right should be protected regardless of whether the measures would be in breach of contract or not.[65]

It is necessary to distinguish between measures which establish an unjust relation and those which change such a relation to a just relation and strengthen international co-operation and peace and minimizing violation of the agreements in developing countries and prevent any

60- *Shufeldt Claim, U.S.A. v. Guatemala,* 2 R.I.A.A., p. 1098.

61- *Amco Asia v. Indonesia,* 24 I.L.M., 1985, p. 1029.

62- McAllister, U.S. Constitutional Law and its relation to a Contract between a State and a Foreign National', Rights and Duties of private Investors Abroad, 1965, pp. 249-251.

63- Bowett D. W., State Contracts With Aliens: Contemporary Developments on Compensation for Termination or Breach, B.Y.I.L., 1988, p. 58.

64- *the Mavrommatis case,* P.C.I.J., Series A, No. 2, p. 12.

65- Hyde C., International Law, op. cit., p. 988.

danger to international peace and co-operation. International law, without a strong basis and superiority, cannot be presumed to reduce the right of the sovereign to establish a just balance between the interests of a society and aliens, nor to effectively overcome the basic rights of the sovereign.[66] However, after World War II, international society was faced with reviewing the international norm to provide workable solution to the international problems that were created by nationalizations specially by the developing countries. This change of the norms followed with the United Nations General Assembly Resolution of December 21, 1952 which stated that, 'the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty,'[67] This Resolution was invoked in the *SUPOR Case* by the Civil Court of Rome[68] and unanimously recognized during the preceding debate in the Second Committee.[69] However, in practice, the opposite attitude of States is illustrated in the rival claims, both being based on sovereignty. Iran's right, as it was asserted on different occasions, was derived from its territorial sovereignty over all persons and things within its borders, and Britain's right of diplomatic protection was derived from its sovereignty over its citizens. So far as the other States are concerned, diplomatic protection would limit the discretion of the expropriating State. But, there arises the question of whether these States and their nationals are reciprocally responsible for the actions of each other or not? By virtue of this a nationalization cannot be a purely internal function of the

66- Harris D. J., Cases and Materials on International Law, second edition, 1979, p. 176.

67- U.N.G.A. Resolution 626 (VII), U.N. Resolutions, Series 1, G.A., vol. IV, 1952-3, p. 106.

68- *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki*, 20 I.L.R., 1953, p. 309.

69- U. N. Yearbook of International Law, 1952, p. 387.

expropriating State.

It should be noted that Iran was not free to make agreements with every company or every country.[70] For example, when the Parliament, on November 22, 1921, authorised the government to grant a fifty years concession to the Standard Oil Company, both the British and the Soviets objected. Moreover, as the result of the support of the United States in the action of the Iranian government and because of the AIOC's monopoly of transportation facilities within Iran, the Standard Oil Company was still forced to agree to share the concession with AIOC on a fifty-fifty basis. In the end, not because of the Iranians decision, but as the result of a storm of Russian protest, no agreement was reached between the parties.[71]

Until the end of the Second World War, Parliament in Iran did not emerge as a real force in government, and Iranian authorities themselves acknowledged that the agreements were made under duress, and that the concessions were imposed upon them.[72] Therefore, the agreements were concluded not with the consent of both parties, necessary for international agreements and as the proper source to create international obligations. The norm which is derived from the idea of sovereignty or State autonomy, without it agreements could not be considered as legally valid, and binding upon the contracting parties.[73]

70- Memoirs of General H. Fardoust, Raise and Fall of Pahlavi Dynasty, op. cit.

71- Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 21.

72- It was also mentioned in the Declaration of the Ambassador of Britain in Teheran on April 26, 1951, that it is generally blamed that "treaty has been made under duress.....", the text reprinted in Makkey H., Ketabe Siyah, op. cit., Vol. II, pp. 126-127.

73- Debates of the Parliament on December 3, 1950, statement of Dr. Mosadiq; the Iranian representative in the agreement of 1933 Taghizadeh, had declared on January 27, 1948, in the Parliament Round 15 that he had signed the agreement without his consent and under duress.

The repeated changes made to the provisions of the concession in order to make it a more equitable and acceptable indicates the weakness of the foundations of the concession. Part of the reason for this was the change of circumstances following international events and the new economic difficulties created as the result of a miscalculation of the profitability of the oil fields which eased the disclosure of inequitablity of the agreements.[74]

Still the terms of the concessions were so overtly favoured the foreigners and put the company in such a very advantageous position that the Iranian Parliament adopted a bill according to which the granting of an oil concession by a cabinet minister without the prior approval of Parliament constituted a crime.[75]

For example, in a note delivered by the British Ambassador in Teheran to the prime minister of Iran, the British Government emphasized its full understanding of the situation and sympathy with the desire of the Iranian Government to strengthen the economic structure of the country and to provide for the general welfare of its people. However, he questioned the legitimacy of the exercise by Iran of the sovereign rights in regard to the nationalization measures on the basis that the Iranian Government had undertook not to exercise this right. Britain considered the Iranian nationalization measures as wrong, and breaking a contract which Iran has deliberately made.[76]

74- During the Second W. War, Iran experienced a severe inflation of almost sevenfold. The other countries were not in a better situation; see appendix II in Ford A. W., The Anglo-Iranian oil Dispute, op. cit., pp. 248-250.

75- Parliamentary debates of December 2, 1944.,specially the statements of Dr. Mosadiq; when the members of the Majlis were also mostly corrupted, their approval would not increase the validity of such agreements.

76- Note of the British Ambassador to the Iranian Prime Minister of 19th May, 1952, reprinted in I.C.J. Pleadings, 1952, op. cit., pp. 41-42.

This was not the only reason that Britain believed that Iran was obliged to refrain from the expropriation of the company; according to Britain, the 1933 concession was an international agreement as it had resulted from the settlement of the dispute between the two countries arising out of the cancellation of the D'Arcy concession which had been solved under the auspices of the League of Nations and ratified by the Iranian Parliament so as to become the law of the country. There is no doubt that States are bound by the terms of the international treaties which they freely conclude with other States, and violation of such treaties brings international responsibility. Accordingly, Britain was justified in its challenge to the nationalization measures and in its demand for restitution of the concession as the remedy for the measures which were regarded as breach of the contract and wrong against the AIOC.[77]

The reality, however, was that Britain was not a party to the contract and had only exercised its diplomatic protection through the mediation of an international organization. Therefore, the argument was rejected by the International Court of Justice on the ground that the submission of the dispute to the League Council was only the exercise of the right of diplomatic protection in favour of one of the British nationals.[78] Otherwise if the company was guilty of a wrong, the Iranian government must according to the provisions of the concession demand a remedy through arbitration.[79] In this case it would prevent any allegation to suppress the property of aliens.

The Court of Rome held the opposite view, namely that the nature of the nationalization law as expropriation cannot be disputed by reducing

77- *AIOC Case,* I.C.J. Pleadings, 1952, op. cit., pp. 12, 46, 70, 74-75.

78- *AIOC Case, United Kingdom v. Iran,* I.C.J., Judgement, p. 112.

79- *AIOC Case,* I.C.J. Pleadings,1952, op. cit., p. 72.

it to a mere revocation of a concession.[80] Iran always followed this view and contended that the concession was granted under private and domestic law similar to the concessions which States grant to their nationals or to aliens for the purpose of the operation of certain sources of wealth, and were thus, commercial matters exclusively within its domestic jurisdiction with reference to the exception contained in the Iranian Declaration of 2nd October 1930.[81] With regard to the sovereign rights over the natural resources, recognized in international law, such provisions could not restrict the legislative right of the Iranian Parliament. Although, the Parliament in the previous period had ratified the agreement, limiting the Iranian government's right to alter the provisions of the agreement or annul it, it was declared by the International Court of Justice that neither the 1933 concession nor other concessions were international treaties capable of limiting the sovereignty of Iran. But equally, it was declared that an alien must be protected against any denial of justice.[82] When the concession was governed by the municipal law of Iran, it could not restrict the right of the Parliament to alter the agreement or ratify or change a law contrary to the previous laws of the country, or to annul a law.[83] There are similar cases in which the arbitrators declared that it is possible that the contract be the subject of the law of not a specific State,[84] while there is no specific agreed rule of international law in this regard, and the award of the courts are varied.

The reality was essentially far from the arguments in international law. It was not the case that the company as a private person was being

80- *AIOC v. S.U.P.O.R.*, The Civil Court of Rome, 22 I.L.R., 1955, p. 38.

81- *AIOC Case*, I.C.J. Pleadings, 1952, op. cit., pp. 131, 156.

82- See the Judgement of the I.C.J., op. cit.

83- *AIOC v. S.U.P.O.R.*, The Civil Court of Rome, 22 I.L.R. 1955, p. 41.

84- *Tresor public v. Galaxis*, cited in 23 I.C.L.Q., 1974, p. 82.

oppressed at the hand of a powerful government which in so doing was ignoring the rights of a powerless person and depriving him unjustly of his property. On the contrary, it was Iranian officials who complained that the company had always tried to impose a weak and incompetent government on Iran. Therefore, the Government of Iran declared that, to put Iranian oil at the disposal of the Iranian people "they would fight to death to recover their rights"[85]

This was not enough to be presented as a legal argument against Britain which rejected it on the ground that there were certain treaties and conventions by which Iran was obliged to accord to British nationals the same treatment as that accorded to nationals of the most favoured nation.[86] The treaties between Iran and other States were invoked as evidence according which Iran was obliged to treat the nationals of other States in accordance with the principles of international law.[87] Moreover, the United Kingdom claimed that the 1933 concession itself was an implied convention between Iran and the United Kingdom government and breach of that was contrary to international law and brought international responsibility for Iranian government.[88]

If possible, as Dr. Mussadiq claimed in his message to the President of the United States, Iran might challenge the company and Britain for

85- *AIOC Case,* I.C.J. Pleadings, 1952, op. cit., p. 61.

86- The Established Treaties of 1857 and 1903 between the United Kingdom and persia; I.C.J. Pleadings, 1952, op. cit., p. 14.

87- The Treaties which were given as evidence were the Treaty between Persia and Egypt of November 28, 1928, Persia and Belgium of May 9, 1929, Persia and Czechoslovakia of October 29, 1930, Persia and Denmark of February 20, 1934, Persia and Switzerland of April 25, 1934, Persia and Germany of February 17, 1929, Persia and Turkey of March 14, 1937, Exchange of Notes between Persia and the United States of May 14, 1928, Persia and the Netherlands of June 20, 1928, Persia and Italy of June 25, 1928.

88- *AIOC Case,* I.C.J. Pleadings, 1952, op. cit., pp. 18-19.

their interference in the domestic affairs of Iran in disregarding national legislation and international law by resisting the application of the Iranian Petroleum Industry Nationalization Act, and thus preventing the nation from pursuing its own interests.

Therefore, the United Kingdom had to allege and prove a cause of action under international law and practices acceptable to the International Community. It could not allege a breach of duty arising under municipal law with analogy to international treaties. The main difference is that Iran could not use its own law to vary its treaty obligations towards Britain, but in private law contract, Iran did assert that right.[89]

89- Bowett D. W., State Contracts with Aliens, op. cit., p. 55.

(SECTION FOUR)

THE LAW OF NATIONALIZATION OF THE OIL INDUSTRIES IN IRAN

On March 15 of 1951 the Parliament of Iran passed a "Single Article" bill nationalizing the oil industry throughout the country. The Article reads as:

> "for the happiness and prosperity of the Iranian Nation and for the purpose of securing world peace, it is hereby resolved that the oil industry throughout all parts of the country, without exception, be nationalised; that is to say, all operations of exploration, extraction and exploitation shall be carried out by the Government."[90]

This article in accordance with the established legislative procedure of Iran was confirmed by the Senate on March 20. Later in April of that year, a more detailed bill of nine articles was prepared and passed by both the Houses of Parliament and Senate and the bill received the assent of the shah on May 1 and 2.[91] In fact, the nationalization law of the oil industry in Iran first had passed during the 15th session of the Parliament, on October 21, 1947, making null the Ghavam-Sadchikove Agreement, advocated exploration and exploitation of oil throughout Iran to Iranian government. This law had passed despite the agreement of the company on 50-50 share of the parties to the profit.[92] But, for the reasons mentioned above, the law was ignored and the previous agreement was substituted by the agreement of 1933.[93]

90- See appendix I.

91- See the text of the Single Article Law and the Detailed Bill in Appendix I.

92- Debates of the Parliament on December 3, 1950, statement of Dr. Mosadiq, op. cit.

93- The Writer has been unable to have access to any documents relating to this agreement and the legislation of the Parliament in that period.

The Iranian nationalization law coincided with the recommendations of December 22, 1952 of the General Assembly of the United Nations concerning the exploitation of natural resources which was followed with many other U.N.G.A. Resolutions defending the right of the developing countries to economic development and permanent sovereignty over their natural resources.[94] The coincidence of the oil nationalization in Iran with Resolution 626 (VII) of the General Assembly was considered by the Civil Courts of Venice and Rome in the case of *AIOC* v. *SUPOR* as an evidence that it constituted a clear recognition of the legality, in terms of international law, of the Iranian Nationalization Law.[95] The legality of the nationalization measures was confirmed in *AIOC v. Idemitsu Kosan Kabushiki Kaisha* by stating that the idea of the nationalization law coincided with the resolutions adopted by the General Assembly of the United Nations.[96] The Court took its own incompetence to pass judgement upon the validity or invalidity of the nationalization law as further evidence of the legality of the nationalization measures by an independent sovereign.[97]

Therefore, the right of nationalization was asserted by the Foreign Affairs Minister of Iran as an internal matter, related solely to the

94- This resolution was introduction to the U.N.G.A. Resolutions 1314 (XIII), 12 December 1958, 1515 (XV), 15 December 1960, 1803 (XVII), 14 December 1962, 2158 (XXI), 28 November 1966, 3281 (XXIX), 1974. See generally Hyde J. N., Permanent Sovereignty Over Natural Resources, op. cit., pp. 854-67; Gess K. N., Permanent Sovereignty Over Natural resources, 13 I.C.L.Q., 1964, pp. 398-449; Brownlie I., Principles of Public International Law, 1979, pp. 531-51.

95- *AIOC V. S.U.P.O.R.*, 22 I.L.R., 1955, pp. 40-41.

96- *AIOC v. Idemitsu Kosan Kabushiki Kaisha*, 20 I.L.R., 1953, pp. 309, 313

97- Loc. cit., p. 313.

national sovereignty of Iran and not related to the British Government and not the subject of complaint.[98] Mr Saleh, the Iranian representative to the Security Council, also contended that the oil resources of Iran, like its soil and its rivers, were the property of the people and, accordingly, they had the authority to decide what should be done with them. It was also contended that they had never agreed to share that authority with anybody else or to divide their ownership of all or any part of that property.[99] Therefore, according to Iranians, the authority over oil had never been surrendered and the concession had no international effect. This idea seems contrary to the provisions of the 1933 Concession, through which it was guaranteed not to annul or change the terms of the concession by any means.[100] However, after the War, the idea became established that nationalization and expropriation were part of the foundations of national sovereignty and based on the equality admitted among members of the United Nations.[101] Articles 1(2), and 2(7) of the United Nations Charter were given as further evidence that it was a settled principle of international law that, in matters of domestic concern, to which this question clearly relates, the exercise of sovereign rights can neither be abridged nor interfered with by any foreign sovereign or international body.[102] However, if through the concession Iran had limited its sovereign right permanently, even if it was a domestic issue, the measures would be wrong under international law. Defending the right to nationalize the oil industries, Mr. Saleh said further that the 1933 AIOC concession was a private agreement which could in no way limit or

98- *AIOC Case,* I.C.J. Pleadings, 1952, op. cit., p. 384, 679-680.

99- By the concessions Iranians apparently had agreed to submit the right, but the statement indirectly refers to the invalidity of the concessions.

100- Article 21 of the 1933 Concession.

101- U.N.S.C., Official Records, Meeting 560th, p. 6.

102- Loc. cit., p. 7.

abridge the sovereign right of Iran to dispose of its resources as it saw fit.[103]

In a letter of May 20, 1951, Minister of Finance wrote to the company that:

> "the nationalisation of industries derives from the right of sovereignty of nations, and other governments, among them the British Government and the Mexican Government, have in various instances availed themselves of this same right ..... which is founded on the indisputable principles of international law .....is not referable to arbitration; and no international authority has the competence to deal with this matter"[104]

It has frequently been mentioned that in the absence of treaty obligations, international law recognizes the right of a sovereign State to nationalize or expropriate foreign-owned property within its territory in the public's interest.[105] Iran passed the Single Article on the ground that it had no contrary treaty obligations, a contention which was rejected by Britain. While both parties asserted that expropriation measures should not be contrary to international law. Britain believed that Iran was limited by the terms of the contract by which Iran expressly undertook not to terminate the concession unilaterally. Alternatively, it was argued, even if the taking were not unlawful on that ground, the Iranian measures would amount to an unlawful confiscation, because there had been no payment of prompt, adequate and effective compensation. Accordingly, Britain demanded restitution on the basis of the judgement of the Permanent Court of International Justice in the *Chorzow Factory*[106] or payment of pecuinary compensation consisting of a sum corresponding to

---

103- Loc. cit.

104- The text of the letter see in I.C.J. Pleadings, 1952, op. cit., p. 40.

105- Hackworth G. H., Digest of International Law, op. cit., Vol. III, p. 662; Foighel I., Nationalization, op. cit., pp. 72-3; White G., Nationalization of Foreign Property, op. cit., pp. 32-8 are the examples.

106- *Chorzow Factory , Claim for indemnity, Merits,* P.C.I.J.,Series A, No. 17.

the value which a restitution in kind would bear.[107] It meant that Iran and other developing countries would not be able to expropriate aliens property at any time, for they would not be able to pay such a compensation, and even if they could, the taking would place an immediate burden on the public which would be contrary to the aims of the expropriation.

Britain attempted to raise the issue of the obligation of Iran under the 1933 concession and the legal position of the company, in particular the obligation not to void the concession and the right to take the case to arbitration,[108] and, if rejected by the Iranian government, to the International Court of Justice.[109]

The British Government considered the difference between concessions which contained a clause by which the grantors expressly divested themselves of the right of unilateral termination with those concessions containing no such clause as a matter of degree which in both cases according to the British Government constitute a breach of contract. Accordingly, in every contract there is an implied undertaking against breaking it. However, the difference was considered as having substantial and decisive character in the realm of international law and it was admitted that such a breach was not necessarily unlawful under international law if certain conditions were fulfilled.[110] Any unilateral modification or abrogation of agreements has been considered relevant to the cases which the relations of the contracting parties reach an impasse

107- legal submissions, I.C.J. Pleadings, 1952, op. cit., pp. 81-82.

108- *AIOC Case,* I.C.J. Pleadings, 1952, op. cit., p. 12.

109- Statement of Morrison before the House of Commons on May 29, 1951. BIS, Legal Aspects of the Anglo-Iranian Oil Question, ID 1063, New York, June, 1951, p. 6.

110- *AIOC Case,* I.C.J. Pleadings, 1952, op. cit., pp. 88-89.

and consensual arrangements are no longer possible, particularly when the undertaking is highly successful and the interests of the foreign investor and the host government clash because of the increasing gap between the profits each gain.[111] In such a situation, modifications have become admissible; the situation which is not as the result of clear breach of contract or *force majeure* which are unilateral actions of the government taken for a public purpose. It is also different from a fundamental change of circumstances which renders the performance of the agreement, although not technically impossible, unduly onerous or fruitless and unacceptable.[112] Long-term contracts such as the 1933 Concession were not adjusted to changing circumstances and interests in order to make them acceptable to the parties and their continuation possible.

The Consortium Contract of 1954 was modified in 1965, 1967 and 1971 as the result of the decisions of the OPEC Members which was indirectly imposed upon the oil companies in the Member States.[113] This kind of modification has not been considered as a violation of the principle of *pacta sunt servanda*,nor contrary to the international law.

However, controversy mostly centred on the existence of a binding treaty between Iran and Britain providing that Iran should not nationalize property of the British nationals. Treaties between Iran and third countries concluded on most-favoured nation basis were adduced against the measures, although, this was rejected by the International Court of Justice.[114]

111- Geiger R., The Unilateral Change of Economic Development Agreements; 23 I.C.L.Q., 1974, pp. 73, 75.

112- Geiger R., The Unilateral Change of Economic Development Agreements, op. cit., pp. 78-9.

113- Movahed M. A., Our Oil and Its Legal Problems, op. cit., p. 89.

114- *AIOC Co. Case, United Kingdom V. Iran,* contention of Britain, I.C.J., 1952, No. 16, pp. 99-101.

According to the terms of the concession, Iran was barred from enforcing the law of nationalization of oil industry. The provisions of the agreement with the AIOC expressed that the concession came to an end only when the company surrendered the concession[115] or in the event of the Arbitration Court declaring the concession annulled as a consequence of default of the company in the performance of the agreement. The agreement of 1933 also restricted the Iranian right to modify the agreement or declare it null and void. Any change or termination of the agreement must be determined and decided by the Arbitrators.[116]

Therefore, the dispute between Iran and the AIOC was over the competence and territoriality, *i. e.* whether the concession was governed by public law or it was exclusively in jurisdiction of private law, a question that still has not been answered properly.[117] If the contract was between two private persons, except in the event of *force majeur*, any non-compliance with the terms of the contract would be considered as an illegal breach of the contract which would have made payment of compensation obligatory. However, when a contract is between a private person and a government, different procedures have been pursued by municipal courts of different countries. For example, the United States courts, although they recognize certain distinctions based on certain inexact constructions of foreign legislation, have also accepted the concept of territoriality of public law.[118] English courts, in applying the principle of territoriality, have made some tentative attempts at

115- Article 25 of the 1933 Agreement.

116- Article 26 of the 1933 Agreement.

117- Arbitrations on the Libyan cases are the best examples in which the judgements were contradictory in regard to similar cases in one country.

118- O'Connel D. P., A Critique of the Iranian Oil Litigation, 4 I.C.L.Q., 1955, p. 267.

distinguishing between expropriations which are valid and invalid in international law according to the law of the forum. French, German and Swiss courts have employed their own municipal law to refuse recognition to any foreign legislation which offends against public policy or natural justice.[119]

The Anglo-Iranian oil dispute made the problems arising out of expropriation of contracts more complex and increased the ambiguity of the courts in their choice of criteria . The reason was that there was no direct decisive international rule delimiting the right of expropriation and the contractual obligations of States. This point was made in the different arguments presented by the parties to the dispute.[120]

The argument of breach of contract by the company was overruled by the District Court of Tokyo which stated that the concession agreement was, in substance, a private agreement, governed by municipal law and that the company's right and interest thereunder could be expropriated by the nationalization law which was the municipal law of Iran; and that the validity of the nationalization law could not be affected by the fact that Iran might be guilty of a breach of contract or possibly of a tort. By this argument, the court separated the legal position of the nationalization measures from that of the breach of contract. However, the conclusion of the court was the same as that reached by the Italian courts.[121]

This distinction has been recognized by other international authorities. In the award of *Amco Asia* v. *Indonesia*, the Tribunal made it clear that the State is entitled to withdraw the approval it granted for

119- Loc. cit., pp. 267-8.

120- See the contentions of the Parties in *AIOC Case*, I.C.J., op. cit., No. 16; the contention of the company in the courts of Venice, Tokyo and Aden; see also O'Connel D. P., A Critique of the Iranian Oil Litigation, op. cit., p. 268;

121- *AIOC v. Kaisha*, 20 I.L.R., 1953, pp. 310, 312.

reasons which could not be invoked by a private party. The Court said that as a typical example of the exceptional powers accorded to a State as opposed to a private person, a State has the right, recognized in international law, to terminate contracts through nationalization measures.[122] The principle of sanctity of contracts was later challenged by Britain in attempting to alter the terms of its contracts with foreign corporations during a dispute over the development of North Sea oil.[123] Two important arguments were put forward by the United Kingdom Government in support of its right to alter the contracts. The first was to the effect that the UK was no longer willing to stick rigidly to contracts that were unreasonably disadvantageous to the country; and, secondly, that there was no absolute constitutional protection in either country for the principle *pacta sunt servanda*.[124] Moreover, as was mentioned earlier, in some cases the UK Government rejected any suggestion of impropriety or even a duty to compensation. Holding such a view, Britain could not challenge the Iranian's right to nationalize the AIOC and the contention of that country against Iran was inadmissible. The U.S. Government, an ally to Britain, through its ambassador, L. B. Morris, announced that it recognized and supported the right of the Iranian government to refuse the granting of oil concessions to all foreigners.[125] In other words it recognized the Iranian right to nationalize the oil industry.

The International Court of Justice also held in the proceedings between the company and Iran on this question that a concession was

122- ICSID Award of 21 November 1984, 24 I.L.M., 1985, p. 1029.

123- Brown R., The Relationship Between the State and the Multinational Corporation in the Exploitation of Resources, 33 I.C.L.Q., 1984, p. 221.

124- Daintith and Gault, *pacta sunt servanda* and the licensing and taxation of North Sea Oil Production, 8 Camberian Law Review, 1977, pp. 28, 42.

125- Reported by Lenczowski G., Russia and the West in Iran, op. cit., p. 221.

never analogous to a treaty, and refused to accept the view that the contract signed between the Iranian government and the AIOC had a double character.[126] This was confirmed by the later practice of the United Kingdom through the Treaty of Commerce, Establishment and Navigation of March 2, 1959 with Iran[127] which provided protection and security for the persons and property of the nationals and properties of the parties.[128]

The sanctity of the concession agreements as defended by Britain in the Anglo-Iranian Case has been supported neither by the traditional international law of co-existence between sovereign States nor by the emerging international law of economic co-operation based on general principles recognized by the representative legal systems of the world.[129] Therefore, a question arises as to why the company should have been entitled to preferential treatment which it could have obtained neither under his own nor any other developed legal system?

The practice of the civilized nations and courts did not provide a straight-forward rule on State contracts.[130] Some, such as the Supreme Court of Aden, declared the measures a breach of contract which demanded restitution.[131] But, not every judicial entity made the same

126- *AIOC case (Jurisdiction),* Judgement of July 22, 1952, I.C.J. Reports, op. cit., p. 112.

127- Cmnd. 698, Iran, No. 1 (1959).

128- Article 8 of the Treaty in Cmnd, op. cit.

129- Geiger R., The Unilateral Change of Economic Development Agreements, op. cit., p. 99.

130- Examples are Topco, BP cases in Libya; Amco Asia Corp v. Indonesia; Congo v. Venne; Shufeldt's v. Guatemala; Egyptian nationalization cases; Gorgia v. City of Chatanooga, (1924, Supreme Court of the USA); Ayr Harbour Trustees v. Oswal; Czarnikow v. Rlimpex; Oil nationalizations in Mexico, Peru; Decisions of the OPEC in relation to the oil companies; The UK decisions on the North sea oil and so on.

judgement to restrict States to expropriate the contracts with payment of compensation.[132] For example, in England where a contract is governed by English law, such a contract is always subject to future legislation, and neither a local authority nor the central Government may by a contractual term or a stabilization clause exclude the operation of a future statute.[133] Thus, it is impossible in English law to insert a stabilization clause against the future legislation, and no English court could challenge the Parliamentary supremacy.[134] In other countries, such as France, the law clearly distinguishes the position of sovereign State from that of private persons and confers on administrative authorities special prerogatives which are related to the interests of the host country in the promotion and direction of its economic development.[135] This overriding power of administration is used in the other industrial countries like Germany and the United States, and in the common law system, public law is not yet regarded as a separate branch of law.[136] In the United States, for example, the measure of compensation not only does not correspond to the measure of damages for breach of contract but also, according to the Renegotiation Act of 1951 excessive profits should be renegotiated.[137]

It would be somewhat disingenuous to condemn such legislation in a developing country like Iran which was in desperate need of social,

131- *Texaco v. Libya,* 53I.L.R., 1974, pp. 497-508; *Amco Asia Corp v. Indonesia,* 24 I.L.M., 1985, p. 1022; *The Rose Mary Case,* 20 I.L.R., 1953, pp. 316-328; *Norwegian Claims Case,* and so on.

132- See the section on 'Sanctity of Contracts and Expropriation', for more discussion on this type of the contracts, pp.

133- *Ayr Harbour Trustees v. Oswald,* 8 App. Cas. 623 (HL); *Czarnikow v. Rolimpex,* 1977, 3 W.L.R., 686.

134- Bowett D. W., State Contracts with Aliens, op. cit., p. 58.

135- Tresor Public v. Galaxis, 23 I.C.L.Q., 1974, pp. 83-84.

136- Loc. cit., pp. 85-99.

137- Loc. cit., pp. 90-91.

political and economical reforms. The practice of States became international with the Resolutions of the OPEC Organization which caused the alteration of the contractual terms of the Member States with the oil companies. It asked and encouraged, for example, Libya, Saudi Arabia and Venzuela to revise their contracts with the companies, and Iran applied it to the Consortium Members three times.[138]

All these elements together with the historical, political, social and economic conditions, as was stated in *SUPOR* case,[139] placed the *AIOC* case in a special category different from the other groups of private and public contracts, and put the claims of the company in a somewhat precarious position. This became more evident when the Tokyo District Court announced that there is no rule of international law empowering the court to deny the validity of the nationalization law of Iran, and found itself bound to recognize its validity.[140] What was recognized by the District Court of Tokyo and the other courts as wrongful act under international law was confiscation without compensation. Otherwise, in so far as the taking was designed to promote the public welfare, and did not violate the public policy of the country, with regard to the requirements of international comity and the mutual respect for sovereign power between nations, it would be a legal act which was to be respected.

To distinguish a lawful nationalization from an illegal confiscatory act, different courts reached various conclusions. The Tokyo Court found that it was enough that the measures were undertaken pursuant to a law regularly enacted in accordance with the established legislative procedure

138- The Resolution of OPEC in its 10th Conference of 1965, see in Movahed M. A., Our Petroleum and Its Legal Problems, op. cit., pp. 124-5.

139- AIOC v. S.U.P.O.R., Civil Court of Rome, 22 I.L.R., 1955, p. 23.

140- Loc. cit., p. 109.

of Iran which was regarded as a valid law in Iran. Meanwhile, the Supreme Court of Aden held the measures illegal, on the grounds that no compensation was paid and that it was discriminatory.[141] The Court of Aden was correct in its judgement and any other court could have reached the same conclusion if it put the basis of its argument as the court of Aden did. The court based its contention on the cases in dispute between Western countries. The conditions surrounding the *AIOC* expropriation was fundamentally different from those cases, and any analogy between the *AIOC* and those cases was irrelevant and incorrect.[142]

141- *Rose Mary Case,* The Weekly Law Report, 1953, vol. i, pp. 252, 253, 259.

142- The different categories of the cases was already explained in the sections on 'The Conditions of Expropriations of the Aliens Property', and 'Compensation Agreements'.

(SECTION FIVE)

CONFISCATORY FEATURE OF THE IRANIAN OIL NATIONALIZATION

On various occasions, the *AIOC* and the British Government raised questions as to the legality of Iranian nationalization measures by which an alien's interest had been confiscated without compensation.[143] Similar arguments were presented by Western Countries against the nationalization measures adopted in the Soviet Union, Eastern Europe and Mexico, but it was not accepted by any of those countries that such measures were or might be illegal.

The British Government contended that the accusations made against the company by Iran and the Nationalization Act indicated that the measures were not dictated by imperative requirements of the Iranian economy and the measures were confiscation disguised by nationalization. Moreover, they pointed to the fact that, since the adoption of the 1933 concession, Iran had never requested an arbitration in order to test the validity of any grievances against the company.[144] Thus, they contended, the nationalization measures, far from being necessary for the protection of the vital interests of Iran, were, in fact, primarily motivated by anti-foreign prejudice on the part of the Iranian Government.[145]

The Iranian Government challenged this contention, declaring that it had for some time been dissatisfied with the activities of the company and

143- *Caisha Case*, 20 I.L.R., 1953, pp. 309-10; *Jaffrate Case*,1952; The Weekly Law Report, op. cit, p. 253.

144- *AIOC Case*, I.C.J. Pleadings, op. cit., pp. 97-99.

145- Loc. cit., pp. 100-101.

offering to produce irrefutable documentary evidence in this regard. Despite that, the Iranian Government emphasized that it in no way intended to confiscate the properties of the company.[146]

The grounds on which Iran might justify such action were numerous. For example, the direct and indirect intervention of the company in the internal affairs of Iran and the default and misconduct by the company were advanced as some reason for taking expropriation measures.[147] In fact, the company was taking such actions, and Iran always was complaining that the company was acting as a government inside the government of Iran.[148] Even those who were pro-company did not hesitate to express the view that the actings of the company were illegal and its interests illegitimate. In general, the dominant position of the company in Iran was a sign of the domination of foreigners over the political and economical destiny of the country.[149]

This was the reasoning adopted by the Special Committee on Oil in its report to the Parliament, in which it was stated that the 1933 Agreement could be declared void for the reason that it has been concluded under a dictator government assisted and established by Britain.[150] The signatory to the agreement on the part of Iran had also confessed that the agreement was imposed upon Iran and it had not been the wish of the Shah to extend the agreement. The reason given for the

146- Message of the prime minister of Iran to the president of the United States of America, 11th June, 1951, I.C.J. Pleadings, op. cit., pp. 685, 690.

147- *AIOC Case*, I.C.J. Pleadings, 1952, op. cit., p. 83.

148- See generally on this argument the debates of Majlis in Makkey H., Ketabe Siyah, op. cit., passim.

149- Speech of Shah in the union of the oil engineers in Abadan in March 1966, reprinted in Movahed M. A., Our Oil and Its Legal Problems, op. cit., p. 243, note 2.

150- See more in Raise and Fall of Pahlavi Dynasty, op. cit., two volumes.

ratification of the concession was that Members of the Parliament were elected under a corrupted system by the direct influence of the British government and the company. Thus, when the 1933 concession, which was prepared by the company, replaced the D' Arcy concession, the members of the Parliament approved it unanimously in one day without any challenge to the concession.[151] The company, it was contended, had not been a merely commercial concern but had exercised and profound influence within the political and economic sphere and by encouraging corruption and bribery had endeavoured to prevent essential reforms.[152]

The Company had never permitted the Iranian government to inspect or audit its books, which were alleged to be fictitiously prepared in order to conceal real profit of the company and therefore reduce the amount of the royalties due. Thus, the company had refused to pay the royalties on its profits fully, and such payments were due.[153]

In a note to the British embassy in Teheran, the Iranian Government indicated that Iran had used the right of nationalization in response to the illegal and unjust measures taken by the company in Iran.[154] Thus, the nationalization measures represented a reaction to the company's behaviour in Iran. While penal confiscation of property of aliens has not

151- Musaddiq's Memoirs(Persian), op. cit., p. 201. Criticizing the Shah, Musaddiq says that, nobody expected Reza Shah to do independently for, he had come to power by the direct help of the foreigners and was unable to disobey them. He expected the shah act more independently.

152- The Third ad hoc Committee's Report presented to the Majlis by the prime minister Ghavam, reprinted in Makkey H., Ketabe Siyah, op. cit., Vol. II, p. 329; see also "Mission for my country", chapter 5, written by shah; see also I.C.J. Pleadings, 1952, op. cit., p. 59.

153- Royalties paid to Iran during the years 1901-1932 amounted to £11 million, while the normal taxes, from which the company was exempt amounted to £22 million.

154- The Note of the August 6th 1952; reprinted in Makkey H., The Years of the National Movement, Vol. 6, Teheran, 1990, pp. 59-61.

been rejected in international law,[155] if it were to be considered as a penal confiscatory measures, the consequence should vary in comparison with nationalization. The measures taken for the purposes mentioned in the Single Article Law, for the purpose of international law, constituted a legal exercise of sovereign power, provided the nationalization of the property had been accompanied with payment of compensation. Otherwise, it would simply be a confiscatory measure, which was not easy for Iran to justify and practice under the governing law of the concession.

In a more severe situation, in 1937, Bolivia had confiscated the assets of the Standard Oil Company which was accused of taking a hand in the war for personal interests. The company was also accused of fraud and non-compliance with the contract and the contract had been declared annulled. The company received little compensation for its assets.[156]

The Iranians did not declare the measures confiscatory and officially rejected any argument that the aim of the law was to confiscate the company's property mostly for practical reasons rather than legal ones. However, the Supreme Court of Aden refused to recognize the legality of the nationalization measures. The court held that the measures were discriminatory and, since no compensation had been paid, were in the nature of a confiscation.[157] The approach taken by the Court was completely different from that of the Iranian Government. Meanwhile, it was clear to the court that payment of prompt compensation was not a universally recognized law.[158]

155- Parry and Grant, Encyclopaedic Dictionary of International Law, under the term Nationalization, p. 252.

156- Kunz J. L, The Mexican Expropriations, op. cit., pp. 42-47; the company was paid 3 million dollars against receiving a loan of considerable amount.

157- *Rose Mary case*, the Weekly Law Reports, 1953, pp. 252-3.

158- Loc. cit., p. 253.

The District Court of Tokyo did not accept the argument that the nationalization measures were confiscatory on the basis that the applicants did not dispute the fact that the Iranian nationalization law was a law regularly enacted in accordance with the established legislative procedure of that country. Consequently, the Law must be regarded as a valid nationalization law within Iran.[159] Similarly, the Court in Venice rejected any suggestion that the taking was illegal confiscation of AIOC's property, and attached little weight to the argument that legality of the measures require prompt compensation.[160]

The question of confiscation of aliens' property has been raised mostly in respect to the rights of aliens as an illegal measure unacceptable in international law. The other aspect of the issue, *i.e.* the duty of aliens towards the host States, has usually been ignored. In this regard, as was mentioned in the Bolivian takings, confiscation might be a penalty for the behaviour of aliens. In the case of the Iranian nationalization of the oil industry, although the Iranian Government accused the company of various wrong doings, it would have proved difficult, if not impossible, to carry on a penal confiscatory measure against the company, without, at the same time, further provoking the British Government. Surely, if Iran had taken a stronger position against the company and Britain, the legal and economic consequences would be different. Iran indirectly claimed that some of the company's rights and claims were illegitimate. The Law Regulating Nationalization of the Oil Industry stated that:

> "..... the Government is charged to investigate the lawful and rightful claims of the Government as well as those of the Company, to report its views therein to the two Houses of Parliament and upon ratification to give effect thereto."[161]

159- *AIOC V. Idemitsu Kosan Kabushiki Kaisha*, 20 I.L.R., 1953, op. cit., p. 309.

160- *AIOC v. S.U.P.O.R.*, (Court of Venice), 22 I.L.R., 1955, p. 22

In the debates on the issue of oil nationalization in the Parliament and the contentions put forward before the International Court of Justice there were many accusations against the company which, if they were considered as a motive for the takings, the measures would be confiscation rather than nationalization. The provisions of the Law Regulating Nationalization of the Oil Industry had not made it clear how the Government was to distinguish rightful claims from wrongful ones. There was another obstacle to the payment of compensation to the company, namely ratification of the two Houses of Parliament. There was no guarantee that the two Houses would have ratified the amount demanded by the company or even that suggested by the government.

Iran chose juridical procedure, because it had not the bargaining power to challenge Britain neither economically, politically or militarily. This is also the reality for nearly all of the expropriations in the other developing countries, both before and after the Iranian nationalizations. That this is so is apparent from their position at the time of the expropriations and from the fact that they ultimately paid compensation.[162]

Therefore, the Iranian Government, as a sovereign power, was not limited to the applicable law of the contract, and had the right to vary or terminate the concession in the public interest.[163]

As it was indicated, in accordance with the statements of Taghi Zadeh, the signatory to the 1933 concession, and as restated by Dr. Musaddiq, "the agreement was signed under duress and consequently not

161- Para. 3 of the Law Regulating Nationalization of the Oil Industry, Appendix I.

162- This is at least correct in the Mexican and Bolivian expropriations.

163- See more on this issue in section on Contracts between states and the Aliens pp. 24-25.

valid but null and void".[164] This duress continued even after nationalization and consisted in threats to the Iranian Government. In fact, Britain was ready to dispatch military forces to Iran to prevent the nationalization measures or the dismantling of important parts of the oil installations.[165] Therefore, it is open to question whether the concession was concluded according to the principles of international law, particularly the principles of free will and self-determination. For those reasons, the agreement lacked the sentiment of shared responsibility for the conduct of the Iranian government as a necessary force behind it. While there is a direct relation between the strength of a legal relation and the sentiment behind it, the AIOC concession lacked such an element. That was the reason that, the Iranian Government challenged the legality of the concession and was not ready to refer the dispute to arbitration in accordance with the provisions of the 1933 concession.[166]

In respect to the validity of the agreement asserted by Britain, its provisions clearly precluded any kind of transfer of the concession to another party without the consent of the Iranian government.[167] But the company had effectively done so by selling more than 50 per cent of the shares in the company to the British government, which was a further cause for the Iranian government's confiscation of the concession. However, putting the argument on a solid basis, Dr. Musaddiq regularly declared that nationalization of the oil industry had been undertaken by

164- The Speech of Dr. Musaddiq to the Foreign Press Representatives on May 28th, 1951; See also Parliamentary Debates of October 19, 1950.

165- Note Delivered by British Ambassador in Teheran to the Iranian prime minister of 19th May, 1951, reprinted in I.C.J. Pleadings, 1952, op. cit., p. 42-43, 683-684.

166- Makkey H., The Years of National Movement, Vol. 5, Teheran, 1990, pp. 431-2.

167- Article 26 of the 1933 Agreement, in Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., Appendix I, p. 246.

virtue of the Iranian Nation's sovereign rights. In an interview with foreign press representatives, he stated that "no agreement can deprive us of this right. All legal authorities agree on this point."[168] Declaring the agreement to have been signed under duress, and therefore invalid and void, he stated that the nationalization measures had been taken without prejudice to the validity of the agreement. The statement was to prevent the oil company and the British Government referring the matter to arbitration. He emphasized that neither the Parliament nor the Iranian Government has raised any point regarding the agreement, consequently the oil company cannot invoke the arbitration clause.[169]

A similar statement was made by the Iranian representative to the Security Council of the United Nations: Iran did not contest the validity of the 1933 concession, at least for the purpose of the proceedings in the Security Council. Notwithstanding the fact that Iran was coerced into concluding the 1933 concession, which according to universally established legal principles would be null and void, in order to avoid futile debate and prevent any confusion, it was contended that "the Iranian government does not wish to enter into any discussion regarding the nullity of the agreement imposed upon us."[170]

Therefore, the only remedy for the private company which sustained loss was to claim compensation from the expropriating government. When such a clause is provided for in the Iranian nationalization law,[171] there is no basis on which to challenge that law by circumventing the provisions of the 1933 concession. Particularly, when

168- Speech of Dr. Musaddiq, op. cit.

169- Loc. cit.

170- U. N. S.C. Official Records, op. cit., p. 18.

171- Articles 2 and 3 of the Law Regulating Nationalization of the Oil Industry. See Appendix I.

the governing law is the law of the country which enacted the change, the clause will usually be abortive. It does not mean that the contract of the private parties or that of the private and a State is of "a lower order" than those between States. The point is that each of the contracts belong to different orders. The "order" is determined by the position of the parties and cannot be changed merely because the expectation of one of them is disappointed. According to the established order which cherishes certainty, equitable treatment and sound results, it is possible to judge the existence or non-existence of a breach of contract.[172]

However, there will remain the question whether Iran had rightfully used its sovereignty to expropriate the property necessary for public use, or whether it was merely a misuse of power to deprive the alien unjustly. As happened in the AIOC case, it is vital to the parties of an agreement to determine by the contract that the contracting State apparently waived rather than reserved its power and the right to change its law to the detriment of the alien with whom it contracts.[173]

Contrary to the *Aramco Arbitration case* of 1958,[174] the Iranian concession, which was in fact the revised version of the D' Arcy concession, did not constitute the governing law of the contract; rather it was to be determined by the third or single arbitrator appointed under the 1933 concession.[175] Therefore, the rejection of the Iranian Government

---

172- According to each legal order, the cases of discrimination, denial of justice, and so forth could be determined.

173- The merits of each case would determine the intention of the contracting parties; See generally Mitchell J. D. B., The Contracts of Public Authorities, 1954; Mann F. A., State Contracts and State Responsibility, pp. 582-3

174- Aramco Arbitration (1958), 27 I.L.R., P. 117; in that arbitration, it was mentioned that, "The Tribunal holds that the concession has the nature of a concession which has the effect of conferring acquired rights on the Contracting Parties."

of settlement of the dispute according to the terms of the concession was not an innovation as an illegal measure of the taking of property.

Similar to the Iranian position, Chief Justice Waite in Stone v. Mississippi had expressed the view that even legislature cannot bargain away the police power of a State, and irrevocable grants of property and franchises may be made if they do not impair the supreme authority or make laws for the proper government of the State. But no legislature can curtail the power of its successors to make such laws as they deem proper in matters of police.[176]

The Iranian representative to the Security Council of the United Nations, discussing Iran's exercise of the prerogatives of national sovereignty in nationalizing the oil industry, said:

> "The fact that the imposed agreement was made with a foreign national does not alter the case. No evidence can be deduced to show that international law puts aliens in a favoured position over the nationals of the country, which nationals are unquestionably subject to its general legislation, If governments have sovereignty in internal affairs only in respect of their nationals but not in respect of foreigners who have the support of powerful governments, the latter would enjoy special rights and privileges incompatible with the equality of rights. Such a doctrine would subvert the law and could only ensue in a modern revival of the system of capitulatory privileges. No independent state would willingly subject itself to such degradation and slavery."[177]

As is clear from the language of this statement, the Iranian representative was not asserting Iran's position under international law, but complaining about subversion of law by a powerful State against a weaker one.

While he believed that international law was weak and inefficient to protect the right of small nations, he did not explain what would be the

---

175- Article 22(d) of the Concession.

176- Mann F. A., State Contracts and State Responsibility, op. cit., p. 585.

177- The idea was not based on international minimum standard doctrine; U.N.S.C. Official Records, op. cit., p. 8.

result were the foreigners to belong to a weaker or to an equal State, nor whether the national law of the State is the proper law to establish a just relation between the interests of the public and the aliens or not. However, he pledged that Iran would continue to observe every legal limitation on its sovereignty which flowed from Iranian participation and co-operation in the affairs of the family of nations, and contended that the law which they practiced was not contrary to any legal limitation which was recognized among nations. Defending the Iranian right to nationalize the oil industries, he said that the great and powerful are still dominating the world, and the protection of the fundamental rights of the weak requires them to be most jealous of their independence and sovereign rights. He recognized the limitations on sovereignty imposed by international law and international agreements, Still he denied any obligation on Iran to limit herself toward the AIOC, as the absolute right to manage internal affairs without any limitations other than those contained in the principles and laws established in the country itself.[178]

Accordingly, he rejected the competence of the I.C.J. and the Security Council to consider and decide on the case. The contention of the United Kingdom was not based on whether Iran had the right to nationalize the AIOC or not; neither, was claimed that this act constituted a breach of the conventions between the two countries and ought to be considered in the I.C.J., or as a measure which had created a situation which had constituted a potential threat to international peace.[179] The United Kingdom sought to preserve the *status quo* and solve the dispute

178- Loc. cit., p. 10.

179- Loc. cit., pp. 10-11; U.N.S.C. Official Records, 559th Meeting, 1 October, 1951, p. 21; In regarding to danger to peace, the Iranian representative argued that a nation like Iran economically and militarily is unable to endanger international peace and security. He said, whatever danger there may be to international peace and security, lies in the actions of the United Kingdom.

through negotiation. That was the reason why the members of the Security Council were divided in their opinions on the question whether there was a dispute between the United Kingdom and Iran or instead essentially within the domestic jurisdiction of Iran.[180] Before the Security Council adjourned its discussion, Sir Gladwyn Jebb, the UK representative declared that the United Kingdom was willing to resume negotiations on the basis of recognition of the principle of nationalization. When the parties did not reach a solution, the British government and the AIOC again announced that they did not recognize Iran's right to the property or to sell the oil.[181]

The conditions fulfilled by Iran in nationalizing the oil industries was confusing. Was it a measure taken according to the general policy of the Iranian Government for public utility or an unjust confiscation against a foreigner to exclude him from that section of the economy? To answer this question and other related questions, the conditions governing the Iranian oil nationalizations now have to be considered.

180- U.N.S.C. Official Records, 560th Meeting, p. 28.

181- U.N.S.C. Official Records, 565th Meeting October 19, 1951, pp. 8-9; Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 156.

(SECTION SIX)

THE CONDITIONS FULFILLED BY IRAN IN THE NATIONALIZATION OF THE OIL INDUSTRY

The question as to the conditions which must be fulfilled under international law when a country nationalizes or expropriates aliens' property were discussed in the previous chapter. Here we will try to find out how much the Iranian oil nationalization conformed to these conditions.

1 - The Principle of Non-discrimination:

Discrimination literally means an act which makes an unwarranted distinction between two or more persons or groups of persons. In the context of international law of expropriation and nationalization, it is apparently used in a similar connotation. Some academic writers have supported the literal meaning of discrimination.[1]

To prevent any unjust treatment of the aliens, it has generally been accepted that measures of expropriation must not be discriminatory against aliens or any group of them, and that any such treatment would be contrary to international law. Any discrimination in the manner and circumstances in which the measures are taken against all or a group of them would make a measure an illegal act, even if that measure were to form part of a programme of general reform; nationalization measures

1- Friedman S., Expropriation in International Law, op. cit., pp. 189-193; Foighel I., Nationalization, op. cit., 1957, p. 47; Herz J. H., Expropriation of Foreign Property, 1941, 35 A.J.I.L., p. 249.

must apply to all properties in an ordinary situation.[2] As was mentioned earlier, this rule applies generally when some or all the properties affected have not been privileged,[3] except when, as the general policy of the government to attract foreign investments, reasonable privileges have been granted to them. Otherwise, if the consequence of the measures were to end the discriminatory position in favour of some of the aliens who had gained their properties advantageously, it could not be condemned as an illegal action. Therefore, we should consider whether the Iranian nationalization of the oil industry discriminatorily suppressed the company, or whether the measures were non-discriminatory and therefore acceptable under international law.

The Single Article Law of March 20, 1951 nationalizing the oil industry of Iran does not express any discrimination against Iranian nationals or aliens. It stated that:

> "..... The oil industry throughout all parts of the country, *without exception,* (italic added) be nationalized; that is to say, all operations of exploration, extraction and exploitation shall be carried out by the Government."[4]

The single Article was expressed in general terms, and did not expressly mention who would be affected. However, the only person and company whose property was affected by the law was the AIOC, and the detailed law regulating nationalization of the oil industry, which authorised the actual transfer of the assets of the AIOC to the Iranian Government, referred to the company by name and did not mention any other undertaking.[5]

2- Herz J. H., Expropriation of Foreign Property, op. cit. p. 249; White G., Nationalization of Foreign Property, op. cit., p. 5; Kronfol Z. A., Protection of Foreign Investment, Netherlands, 1972, p. 24.

3- Principle of non-discrimination, Section on the Condition of Expropriation, p.

4- Appendix I.

The United Kingdom Government took the view that, quite apart from other considerations such as the breach of the 1933 Concession and the inadequacy of the compensation offered under the Nationalization Laws, the Iranian measure was internationally unlawful in that it was directed exclusively against a foreign national. The United Kingdom Government stated that, although the law purported to be of a general character, it was in fact directed exclusively against a particular foreign company. The United Kingdom's reason was that, apart from the Anglo-Iranian Concession, there was another oil concession in Iran, namely a concession operated by the Kavir-i-Khurian Company and owned jointly by the Soviet Union and an Iranian group.[6]

It is necessary to mention that the concession granted to the Kavir-i-Khurian Company by the Government to the Soviet Union did not receive the approval of the Majlis as a part of the nationalizations that occurred later and the effect of the nationalization was to forbid the granting of any such concessions in future. The Iranians rejected the concession because it had never been ratified by the Majlis and because the supervening Soviet-Persian Treaty of 1921 had annulled all previous concessions granted to the Tsarist government or to Russian subjects. Therefore, there existed no other concession clearly giving rise to industrial operations except that granted to the AIOC.[7]

Similarly, the Egyptian Law No. 285 of 1956 refers specially to the Universal Suez Maritime Canal Company. There too, it could not refer to any other undertaking since the company, by virtue of its nineteenth

5- The name of the company was mentioned in Articles 2, 3, 4 and 7 of that Law. However, there was no other company to be mentioned.

6- Anglo-Iranian Oil Co. Case, I.C.J. Pleadings, op. cit., pp. 93-4.

7- *AIOC Case,* I.C.J. Pleadings, op. cit., p. 497; see also in Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., pp. 20-21.

century concessions, had the sole right to maintain, operate and develop the Suez Canal and the collect the Canal dues. But the United Kingdom Government believed that a measure of expropriation which affects only foreign nationals may be contrary to international law.[8] It clearly might be if it was considered, as it was mentioned in the Indonesian expropriations of the Dutch properties by the Bremen Court, that unequals are not necessarily to be treated equally.[9]

The argument of the UK Government has not been supported by eminent writers. Brownlie observes that the test of discrimination is the intention of the government. The fact that only aliens are affected may be accidental and, if the taking is based on economic or social policies, it is not directed against particular groups simply because they and they alone own the property involved.[10]

The Civil Court of Rome did not recognized the legality of those discriminatory laws which enacted out of hatred against aliens or against persons of any particular race or category or against persons belonging to special social or political groups, for they run counter to the internationally-accepted principle of the equality of individuals before the law.[11]

Accordingly, the Iranian nationalization law could not be illegal on the ground that it was discriminatory, since there was no enterprise other than the Anglo-Iranian oil company which fell within its scope. The United Kingdom interpretation of the international rule was that a State incurs international responsibility if it passes a measure which is directed

8- *AIOC Case*, I.C.J. Pleadings, op. cit., p. 97.

9- Loc. cit.

10- Brownlie I., Principles of Public International Law, op. cit., p. 524

11- *Anglo-Iranian Oil Company Ltd. v.S.U.P.O.R. Company,* Court of Venice, op. cit., 22 International Law Reports, p. 40.

solely against aliens, unless this measure is dictated by such overwhelming considerations of public utility and general welfare that the measure cannot be said to be directed against or discriminatory against foreigners.[12] The United Kingdom accepted the view that a State can take a measure which is of vital importance even though the persons affected are foreigners. The implication of this statement is that, in the absence of reasons of vital importance to the legislating State, the measure would violate international law.[13] Therefore, the contention of the British Government was that there were no such considerations of public utility and general welfare present in this case, and that the measure was deliberate attempt at confiscation actuated by anti-foreign prejudice.[14] The term 'vital importance' was not defined and it is not clear who has the authority to determine the appropriate degree of importance necessary to justify such measures.

Meanwhile, there is as yet no rule of international law which provides that a State will be guilty of illegal discrimination should it nationalize alien property in a field where there are no national interests capable of being affected. Indeed, it was declared in the *Oscar Chinn* Case:

> "The form of discrimination which is forbidden is, therefore, discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups."[15]

12- *AIOC Case,* I.C.J. Pleadings, op. cit., p. 97.

13- Loc. cit; the United Kingdom cited the decision of the Permanent Court of Arbitration in *The Administration of Posts and telegraphs of the Republic of Czechoslovakia v. The Radio Corporation of America, 1932,* see in 30 A.J.I.L., 1936, p. 523; If the expropriating state is to judge the importance of the action, it would be difficult to challenge the measures. Surely, definition has been introduced in this regard.

14- *AIOC Case,* I.C.J. Pleadings, op. cit., p. 98.

15- P.C.I.J., Series A/B, No. 63, p. 87; Lauterpacht, The Development of

It is said that the rule is based on the principle that no one might be deprived of his rights merely by reason of his nationality.[16] On the other hand, no one might be exempted from the taking of the property on the basis of nationality. The Iranian measure apparently conformed to these rules, but the approach of the Iranians had a different basis.

The example given for illegality of discriminatory practice is the Romanian nationalization which exempted expressly soviet-owned enterprises from other alien-owned property.[17] But, as was indicated in the previous chapter, it cannot be concluded that there is a positive rule of international (universal) law prohibiting the expropriation of alien property on grounds of discrimination in cases such as the Iranian, Egyptian, Indonesian, Mexican or other similar countries in which some groups of aliens had established monopolies, not with the free concurrence of the governments of those countries, but as the result of the influence of the investor countries. The properties were usually unique and the owner of those properties were mostly privileged individual aliens.[18]

The AIOC was the single monopoly carrying out the operations of exploration, exploitation and marketing of the Iranian oil. Thus, any decision of the Iranian authorities relating to the oil industries would, of necessity, only affect that company. There is no doubt that Iranians had

---

International Law by the International Court, London, 1958, pp. 262-3.

16- White G., Nationalization of Foreign Property, op. cit., p. 137.

17- Reprinted in White White G., Nationalization of Foreign Property, op. cit., p. 120, and in Akinsanya A. A., The Expropriation of Multinational Property in the Third World, op. cit., p. 21.

18- Iraq nationalizing the Karkuk oil industries exempted the French company which owned 23/75 per cent of the shares. The other companies involved did not protest to the Iraqi measure; Movahed M. A., Our Oil and Its Legal Problems, op. cit., pp. 188-9.

been in dispute with the company for a long time. One of the reasons for this had been that the company, among other things, had prevented the Iranian government from granting any concessions to other companies with different nationalities.[19] Therefore, the Iranians sought a way to exclude the company from the Iranian economic sphere, so as to end the monopoly position and political influence of the company.

If the law was directed against the AIOC company in favour of others, the balance would have been changed unjustly against the company, and the action would have constituted an unequal treatment which would have meant illegal discrimination.[20] However, as with the nationalization of Dutch property in Indonesia, the change was designed to bring an end to the privileged position of the company, rather than to create an advantageous situation for Iran or other companies.

Therefore, it is impossible to prove that the Iranian nationalization of the oil industry were discriminatory. For, the company operated all of that section of the economy, and the only section of the oil industry affected was the company's concession.

Therefore raising the principles of the international minimum standard in this case would be unreasonable and unjust. For, at a period of struggle against colonialism which was carried out by the underdeveloped countries, Iran could not be blamed for renouncing the capitulatory terms of the concession and trying to establish equal relations with others by concluding treaties and contracts based on the principles of equality and self-determination.[21] The only application of the rule of

19- Parliamentary debates in Makkey H., Ketabe Siyah, op. cit.

20- Loc. cit., p. 135.

21- International Court of Justice believed it unlikely that Iran have been willing to agree any dispute relating to such treaties be internationalized; Anglo-Iranian Oil Co. Case, Judgement of the Court P. 16.

non-discrimination in the Iranian nationalizations was to protect the company from disadvantages that might suffer as a foreigner under the national law, or to determine whether the decision had been on the public policy of the government or not. Otherwise, as was stated earlier, the concession was granted under pressure, by a corrupted government which was ignorant about the advantages of the concession, and in desperate economic need.[22] It was after the Second World War, the situation having changed, that Iran felt expropriation to be an appropriate remedy for this unacceptable concession, even though that remedy might be discriminatory against the company. Therefore, it is not enough to preach to the developing countries like Iran, which were bending under the burden of economic and other difficulties, the principle of the sanctity of contracts nor the rule of non-discrimination.[23] The new situation after the Second World War developed the international law in such a way that third world countries like Iran could take some discriminatory measures against certain group of the investors.

Therefore, there were many arguments which Iran could have relied upon in order to justify ending the company's operation in Iran, whether as an act of nationalization, struggle for self-determination, sovereignty over and revindication of the natural resources or security measure against intervention and threat against the national sovereignty. Sir Gladwyn Jebb, the British representative to the United Nations, referred significantly to "old imagined wrongs", and he urged Iran to forget them.[24] Therefore, it was not necessary for a country like Iran to

22- About the degree of the corruption of the regime of Pahlavi see Memoirs of General H. Fardoust, Raise and Fall of Pahlavi Dynasty, op. cit.

23- Brown R., The Relationship Between the State and the Multinational Corporation in the Exploitation of Resources, op. cit., p. 222.

24- U.N.S.C. Official Records, op. cit., p. 3.

examine carefully to see whether the nationalization measures would be discriminatory against the company or not. In a telegram from Iranian Minister for Foreign Affairs to the Secretary General of the United Nations it was contented that:

> "Relying on paramount national considerations and in conformity with Article 1, paragraph 2, of the Charter of the United Nations, which proclaims the right of people to self-determination, and with a view to liberating themselves from the clutches of a usurping company which for many years has served as an instrument of interference in the economic, social and political affairs of Iran, the People and Government of Iran have, without any distinction as between nationals and aliens, proclaimed the nationalisation of the petroleum industries throughout Iranian territory."[25]

However, the question of non-discrimination must be evaluated in connection with the other conditions of a nationalization. It must be considered in relation to the other principles, such as public utility or public policy, payment of compensation and so on. Considering the Iranian measures in relation to these principles, the idea of discrimination fades in the Iranian nationalization of the oil industries.

Judge Carneiro supported the view that the two Nationalization Acts did not contain a single word indicating discrimination between nationals and foreigners. What was involved was nationalization and not State acquisition, which is often designated by the same word, and that must mean the exclusion of foreigners.[26] However, he concluded that the Government of Iran had violated the principles and practice of ordinary international law which it had undertaken to observe in relation to British nationals.

Judge Carneiro referred to the undertakings contained in the treaties of 1934 and 1937, which operated in conjunction with the Article 9 of the Treaty of 1857 and Article 2 of the Treaty of 1903 between the United

25- *AIOC Case*, I.C.J. Pleadings, op. cit., pp. 130-131.

26- Dissenting opinion of Judge Levi Carneiro, I.C.J. Reports, 1952, p. 159.

Kingdom and Iran, containing a most-favoured-nation clause.[27] These were considered by Iran as capitulatory treaties and had been denounced by Iran on May 10th 1927. Moreover, they were claimed to be replaced by new treaties based on the principle of equality.[28] The United Kingdom referred to Article II of the Commercial Convention of 1903 which had established the regime of the most-favoured-nation, the Treaty of Friendship, Establishment and Commerce concluded between Iran and Denmark on February 20th 1934, the Establishment Convention concluded between Iran and Switzerland on April 25th 1934 and the Establishment Convention concluded between Iran and Turkey on March 14th 1937 as evidences to its argument. Therefore, any discriminatory treatment between those foreign nationals and Britons constituted a breach of those conventions which were recognized by international law.[29]

The Conventions between Iran and Denmark, Switzerland and Turkey similarly contained the provision that;

> "the nationals of each of the high contracting parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory for their persons, property, rights and interests."[30]

However, reference to those treaties is relevant when the nationals of the other parties are involved. Even if the United Kingdom was right in its contention based on these treaties, still there was no indication that Iran acted in a discriminatory manner against a British national and left the nationals of the other countries untouched.

27- Statement on behalf of the United Kingdom before the Court, 6 (i), in Anglo-Iranian Oil Co. Case, I.C.J. Pleadings, op. cit., p. 10.

28- *AIOC Case,* I.C.J. Pleadings, op. cit., p. 16.

29- Loc. cit., pp. 18-20.

30- Loc. cit., p. 19.

The Supreme Court of Aden in *the Jaffrate case* concluded, correctly, that the main aim of the law was to nationalize the company. It is not clear however why the court considered the unapproved concession to the Soviet Union as valid and in force and compared the treatment towards the AIOC company with that company which was practically and theoretically nationalized and reached the question that the law was passed to exclude the plaintiff company only.[31] The Court in its arguments entirely relied on the Western cases decided on the basis of international minimum standards.[32] With reference to that category of the cases, no other conclusion could be expected, but application of those cases to the Iranian measures was not a reasonable approach. Indeed, the municipal courts of Italy and Japan did not reach the same conclusions as the Court of Aden.

The Court of Venice did not find, underlying the Iranian nationalizing legislation, the such sort of predominantly political and persecutory purpose which characterizes the political, racial, expulsory laws which have been met with elsewhere. The court argued that the intention of the oil nationalization law was to protect the interests of Iran, not to attack the interests of foreign nationals as such.[33] This conclusion was derived by the Court from the provisions of the Nationalization Act of November 26, 1953, whose aim was expressed as being to safeguard national prosperity and not the persecution of aliens.[34]

The statement of the District and High Court of Tokyo in this respect was more general. The Court explained that the Nationalization Law cannot simply be regarded as a law by which the rights of foreign

31- *AIOC v. Jaffrate*, 1 The Weekly Law Report, 1953, pp. 251-2.

32- Loc. cit., pp. 258-9.

33- *AIOC v. S.U.P.O.R. Company*, Court of Rome, op. cit., p. 40.

34- Loc. cit.

nationals are confiscated. The Court failed to find any established rules of international law governing the matter.[35] This ambiguity in the governing rules was also reflected in the 1954 Agreement between Iran and the Consortium which referred to varied legal sources to fill the gap.[36]

2 - The Principle of Payment of Compensation:

To find out whether nationalization measures are legal or not, the issue of payment of compensation plays a controversial role. As is common between the parties to such disputes, each side tries to gain the maximum benefit from the opposite party. After nationalizing the oil industries, the Iranian government's attempts to obtain recognition for the Iranian nationalization by the United Kingdom were designed to prevent any claim for future profit, good will and so on, and to reduce any possible claims of compensation for the assets.[37] On the other hand, Britain and the company insisted on breach of contract in order to secure the flow of oil, and obtain reparation for the damage sustained as a result of the breach of the contract - a higher award than might have been expected by way of compensation for a lawful expropriation. However, the Government of Iran was to pay compensation only for the physical assets of AIOC and its subsidiary, the Kermanshah Petroleum Company. This amount of compensation was later suggested to Iranians through negotiations by the company.[38] But the company was anxious to obtain

35- *AIOC v. Idemitso Kosan Kabushiki Kaisha*, 20 I.L.R., op. cit., p. 316.

36- Article 46 of Part one of the 1954 Agreement, op. cit.

37- Musaddiq's Memoirs, op. cit., p. 232.

38- The suggestions reprinted and quoted by Ford A. W., The Anglo-Iranian Oil

compensation for the good will of the business or for the future profit, indirectly by way of a fifty-fifty profit-sharing provision in the long-term purchasing contract. The good will was not adduced in the pleadings; what was actually claimed was the value of the property at the time of dispossession plus interest to the day of judgement, to be paid immediately so as to enable the owner to use it to set up a new enterprise to replace the taken one.[39]

The Oil Nationalization Act did not provide a fixed amount to be paid for certain claims, but it was left to the two Houses to determine the amount giving consideration to the claims of the both sides in the dispute. This fell short of the requirements of the above mentioned conditions which are based on the international minimum standard rules.

The reply of the Iranian delegation to the Security Council to the British suggestion of 15th October on renegotiation for a new agreement indicates that the payment of compensation was not the priority of either party. Iran suggested that, in respect of the claims of the AIOC regarding compensation payments, the Iranian Government was prepared to settle that question in any of the three following ways: (1) on the basis of the quoted value of the shares of the company prior to the passage of the Oil Nationalization Law; (2) on the basis of the procedures followed by other countries where industries had been nationalized; (3) on any basis which might be mutually satisfactory to both parties, having due regard to the counter-claims of the Iranian Government.[40] The Iranian Prime Minister while renouncing any intention on the part of Iran to confiscate the properties of the company, suggested that the 'just claims' of the

Dispute, op. cit., p. 110.

39- *AIOC Case,* I.C.J. Pleadings. op. cit., pp. 104-106.

40- U.N.S.C., Official Records, 560th Meeting (October 1951), pp. 24-25.

company be settled equitably on the basis of quoted value of shares of the company at prevailing quotations prior to the passage of the oil nationalization law, or on the basis of the rules and regulations relative to the nationalization in general which have been followed in democratic countries, or any other method adopted by mutual consent of the two parties.[41]

In the Anglo-Iranian oil dispute, it is obvious that Iran had not afforded prompt compensation. If it was to be evaluated according to the traditional international rule of minimum standard, it would be a prima facie illegal confiscation for which Iran was internationally responsible. But, from the suggestion of the Iranian Prime Minister, it becomes clear that they did not recognize the international minimum standard rules as accepted international law.

Up to the Iranian Nationalizations, the international minimum standard had been affirmed and upheld by the practice of Western States against the Soviet Union, the Eastern European agrarian reforms, at the League of Nations and in the negotiations of the United States with Mexico.[42] It was also reaffirmed by some treaties[43] and some writers.[44] But immediate payment has been less practiced by the

41- *AIOC Case*, I.C.J. Pleadings, op. cit., p. 141.

42- Kunz J. L., the Mexican Expropriations, op. cit., p. 13.

43- Treaty of Establishment annexed to the Treaty of Laussanne, 1923, Art. 2; German-American Treaty of Commerce, Dec. 8, 1923, Art. 1; Polish-Turkish Treaty of Establishment, July 23, 1923, Art. 1; German-Soviet Treaty of Oct. 12, 1925, Art. 8; Italo-Albanian Treaty of Establishment, Jan. 21, 1926; German-France Treaty of Commerce, Oct. 10, 1925, Art. 6; German-Turkish Treaty of Establishment, Jan. 12, 1927, Art. 2; American-Polish Treaty of Friendship, Commerce and Consular Rights, June 15, 1931, Art. 1; They contented the clause that their property shall not be taken without due process of law and without payment of just compensation.

44- Schwarzenberger G., Foreign Investment and International Law, london, 1969, p. 10; Ch. Dupuis, Some Opinions Bearing Upon the Claims of the

underdeveloped countries, and deferred payment in installments has been widely accepted in practice by these countries. Expropriation measures by developing countries prior to the Iranian oil nationalization are few. They paid, or accepted to pay, compensation, mostly for economic, political and other non-legal reasons.[45] Mexico, which initially rejected any obligation to pay compensation, compromised and paid lump-sum compensation in annual installments over varying periods.[46] A similar procedure was adopted after the Mexican Agrarian Reform. The Claims Commission set up in 1924 proved unable to dispose of the many United States claims, and an Exchange of Notes of November, 1938, provided for the valuation of the properties by a mixed commission of experts, and for the Mexican Government to pay one million dollars on or before May 31, 1939, and subsequent annual payments of not less than that amount.[47] Even in the *Chorzow Factory case* which was regularly referred to by Britain as a norm-making case, it was stated that the full compensation was due as a result of the illegal act of Poland which was prohibited from expropriating even against payment of compensation. Otherwise, the payment of fair compensation would have been sufficient.[48] Without defining the precise meaning of the term, payment of 'reasonable

Hungarian Nations with Regard to Their Land in Tranvylvania, London, pp. 77-92; Kunz J. L., the Mexican Expropriations, op. cit., pp. 123-142; Borchard E. M., The Diplomatic Protection of Citizens Abroad, op. cit., Vol. II, pp. 23-44; A. P. Fachiri G., Nationalization of Foreign Property, op. cit., pp. 229-242.

45- White G., Nationalization of Foreign Property, op. cit., p. 14.

46- Schwarzenberger G., The Protection of British Property Abroad, 1952, 5 Current Legal Problems, p. 295; compensation paid was estimated at about one-third of the real value of the oil properties, see also Cmnd. 7275, 1947, p. 7.

47- Hyde C. C., Compensation for Expropriations, 33 A.J.I.L., 1939, p. 108.

48- Quoted in *AIOC Case*, I.C.J. Pleadings, op. cit., pp. 110-111.

compensation' has always been considered necessary. Without it the measure would be contrary to the principle of international law.[49] The Court of Venice rejected the principle of the necessity of payment of prompt, adequate and effective compensation, but declared that compensation should be evaluated in relation with other elements, proportionate to the nature and importance of the property in question.[50] The Civil Court of Rome considered the nationalization measures valid on the ground that some compensation was provided for. The Court declared that the power of expropriation is provided even if the Administration has undertaken not to expropriate, and, in the case of personal rights of use which come to an end as the result of expropriation, no compensation whatsoever is due under the Italian legal system.[51] The concept of fair, reasonable and just compensation which has been used by these courts might be interpreted differently and evaluated in regard to, among other things, excess profit of the property. The Court declared that it is not required by international law that the *quantum* of the compensation must be equivalent to the value of the property. It is enough that there is some compensation for the expropriation to be lawful. The Court continued:

> "Dissentient opinions among writers who endeavour to maintain the necessity of payment of compensation equivalent to the 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."[52]

Meanwhile, the Supreme Court of Aden did not hesitate to declare that, because compensation had not been paid, the measures were

49- *AIOC v. Kaisha,* 20 I.L.R., 1953, p. 306.

50- *AIOC v. S.U.P.O.R.,* 22 I.L.R., 1955, pp. 22-23.

51- Loc. cit., p. 25.

52- Loc. cit., p. 36.

confiscation.[53]

However, the Iranian suggestion that they were ready to pay compensation on the basis of procedures followed by other countries would not have been acceptable to the company. Mexico had rejected in theory any payment of compensation in international law, the Soviet Union and the Eastern European countries had already refrained from paying compensation according to the traditional international rules. Mexico, while admitting the rule that expropriations must be accompanied by prompt, adequate, and effective compensation, contended that it was not a universal rule applicable to all expropriations,[54] particularly when there had been a clear and meaningful distinction between the developed and developing countries, with a separate legal relations between them. In a case where the expropriation had been carried out by a developing country like Iran or Mexico especially where it had been of a general and impersonal character for the purposes of social reform, there was no universally-accepted international norm that imposed a binding obligation on the expropriating State to pay prompt, adequate and effective compensation.[55] Mexico was successful in this matter and agreed to pay only relatively small amount of compensation.[56]

In fact, the contention put forward by the Mexican government made an indirect distinction between the different groups of the countries according to the kinds of economic relations that existed between them. The economic situations of developing countries has made different

53- *Rose Mary Case,* Supreme Court of Aden, The Weekly Law Reports, 1953, p. 253.

54- Mexican foreign minister to United states secretary of state, August 3, 1938, Hackworth G. H., Digest of International Law, op. cit., vol. III, p. 657; he renounced obligatory as international rule even deferred compensation.

55- Loc. cit.

56- Kunz, J. L. The Mexican Expropriations, 1976, p. 23.

compensation inevitable. Therefore, the Iranian nationalization of the oil industry was more than a simple nationalization, in that it included considerations of self-determination, development, and consequently revindication. Iran was not able to pay compensation promptly, and appeal to the standard of "prompt, adequate and effective" compensation was not only unrealistic, but would have effectively frustrated any effort by Iran to nationalize that vital section of its economy.[57]

If Iran had been in a stronger position, it would never have allowed itself to be in a situation in which it might find itself unable to pay compensation. However, if Iran were powerful no such an agreement would have been signed. If such an agreement had been concluded, no compensation would have been offered to the company; Iran would simply have confiscated it as a penal measure against the company. This suggestion would be neither contrary to the principles of international law nor to the general norms of the law of expropriation, which prevent states from pleading financial embarrassment in order either to relieve them of their legal obligations or to infringe international law with impunity. For these reasons, the principles of international minimum standard can neither be acceptable by all States in theory nor carried out in practice,[58] and international judiciary bodies could not adopt a uniform position.

Therefore, the Iranian nationalization measures were not taken on the basis of international minimum standard principles, but were of a special character which makes it doubtful whether even a deferred full compensation was obligatory under international law.[59] One of the

57- Dawson F. G., Weston B. H., Prompt, Adequate and Effective: A Universal Standard of Compensation?, 30 Forham Law Review, 1962, p. 749.

58- Hackworth G. H., Digest of International Law, op. cit., vol. III, p. 657.

59- By "Natural International Law" here it means the norms which have become international conscious eventhough they may not be practiced by States.

reasons is that Britain was still a second power after the Second World War, and the offer of payment of compensation was as the result of the weakness of Iran rather than fulfilling its obligation under international law. The minimum demanded by Britain was still unacceptable to Iran which had to avoid any pressure and threat from a powerful country not keen to loose its interests. Iran was aware of the rule of prompt, adequate and effective compensation but the fact was that Iran did not feel any obligation and was unable to pay it promptly.

Iran was not the only State which in payment of compensation did not comply with the international minimum standard rules. Many states expropriated the property of aliens on a large scale in the period immediately after the Second World War, and most of them have been unable and unwilling to pay compensation, while the political atmosphere of the post-war world prevented any attempt at restitution.[60] Ford notes this trend by "underdeveloped" countries which have been traditionally "debtor" countries.[61] Otherwise, it would deprive the underdeveloped countries from their basic right to pursue development.[62] Therefore, any condemnation of the developing countries like Iran is unnecessary and improper.

The political relationships of the nineteenth century that had made

60- Doman, N. R., "Compensation for Nationalized property in Eastern Europe" and Hornsey, G., Foreign Investment and International Law, 3 I.L.Q., pp. 323-342 and 552-561; Gutteridge J., Expropriation and Nationalization in Hungary, Bulgaria and Roumania, 1 I.C.L.Q., 1952, pp. 14-28; Rado A. R., Czechoslovak Nationalization Decrees: Some International Aspects, 41 A.J.I.L., 1947, pp. 795-806.

61- Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., pp. 202-3.

62- The suggestion would be contrary to the determination, purposes and principles of the United Nations, see the preamble to and Article 1 of the Charter of the United Nations; See Hyde, Compensation for Expropriations, p. 112.

for the efficient and effective functioning of the international minimum standard changed dramatically after the War, with the creation of a new political and economic system which reshaped the traditional patterns of international trade and investment.[63] The change in the system affected the pattern of the traditional rules and encouraged the developing countries like Iran to nationalize foreign property. But it was not enough to let the countries decide freely on their economy or commit a wrong against aliens. The French solution is to consider all circumstances specific to the case, excess profits in the past as well as reasonable expectations in the future.[64]

It was clear from the arguments of the parties to the dispute that *AIOC* had become a battlefield over the reference and applicability of the traditional rules which were being challenged by Iran, and the new emerging rules which were being challenged by the United Kingdom. Therefore, they had to compromise by granting minimum concessions to the other party.

There was the danger of the use of force against Iran. Therefore, one of the signs of that compromise was that Iran declared that it was ready to pay compensation in any way satisfactory to the parties. Compensation was to be paid from the future sale of oil which was not prompt.[65] With economic sanctions by British and the oil companies, there was no hope that Iran could make sizeable profits to enable it to pay a considerable amount of compensation.

63- Jessup, P. C., A Modern Law of Nations, 1949, p. 97.

64- Geiger R., The Unilateral Change of Economic Development Agreements, op. cit., p. 103.

65- The Iranians had offered compensation paid in an undetermined amount installments different from those, for example, of Bolivia and Mexico (10 per cent and 25 per cent respectively as compensation).

One of the suggestions made by the AIOC was to settle the dispute according to the conditions fulfilled by the Mexicans in the nationalization of the oil industry in Mexico. There, the concessionaire was also a British company which had exploited four million tons of petroleum per year. The Mexican government paid eighty millions US dollars and settled the dispute.[66] AIOC was exploiting eight time that amount in Iran at the time of the nationalization, *i.e.* thirty two millions ton per year. In line with the Mexican procedure, Iran had to pay $640 million for the investments and $160 million as interest to the company. The Iranian government refused to agree to this suggestion,[67] although it had already suggested a willingness to make payment in accordance with the practice of other states, This apparent contradiction is further evidence for the present argument that Iran followed the policy of revindication rather than expropriation in the sense of the international minimum standard. The only other reason that could explain the new situation is that the amount of compensation demanded had created a new condition different from that in Mexico, and that Iran was unable to pay this amount of compensation. Moreover, the later tripartite agreement between Iran - AIOC - the Consortium supports this view.

The question of compensation ultimately was solved through a unique dual function agreement which was signed in 1954 by the government of Iran and the National Iranian Oil Company on the one hand and a consortium of eight American oil companies[68] on the other.

66- Musaddiq's Memoirs, op. cit., p. 268.

67- Loc. cit.

68- Forty per cent of the shares were allocated to the AIOC and another forty per cent to five US companies. The rest twenty per cent was divided as fourteen peer cent to the Shell Company and six per cent to the France oil company. the agreement was amended three times in 1965, 1967 and 1971; for more information see Movahed M. A., Our Oil and Its Legal Problems, op. cit.,

The Agreement was a mixture of provisions relating to restitution, indemnification and sale of the good will of the company. Part one of the Agreement established an alternative system of operation for the Iranian oil industry, and part two settled the dispute between the Iranian Government and the AIOC arising out of the 1951 nationalization. Under the provisions of the agreement, Iran agreed to pay the sum of twenty-five million pounds to the AIOC in addition to the sum of fifty-one million pounds revenue which would have accrued to Iran under the Supplementary Agreement of 1949.[69] The companies were discharged from liability for any claim which might have been made against them, and Iran agreed to indemnify those companies for any claims and demands which might be made against them by any person arising out of oil operations prior to the events of 1951.[70] The liability of fifty-one million pounds was set off against the amount payable to the company after the examination of the claims and counterclaims of the two parties. The payment of the compensation was not prompt-it was to be paid in ten equal annual installments of £2,500,000 beginning on January 1, 1957.[71] Agreements under which compensation was paid in installments over a period of years were not unusual, and the United Kingdom made similar agreements with countries like Yugoslavia, Czechoslovakia, Poland, Bulgaria and Hunguary.[72] Moreover, the Iranian government and the

pp. 88-106.

69- The 1954 Iranian Oil Consortium Agreement, Article 1(A) of Part II.

70- Article 40B(1, 2(a, b)) of part I and Article 2(C) of part II of the 1954 Agreement.

71- Article 1(B&C) of part II of the 1954 Agreement.

72- U.K. and Yugoslavia, Agreement Regarding Compensation for British Property, Rights and Interests Affected by Yugoslav Measures of Nationalization, Expropriation, Dispossession and Liquidation(with exchange of notes), London, 23 December 1948, 81 U.N.T.S., p. 121, U.K. and

National Iranian Oil Company agreed to pay the AIOC compensation in respect of certain claims which might be made against the company by third parties concerning any matter arising out of the company's oil operations in Iran.[73] The AIOC also received the amount of £67 million for the installations in use. The new government of Iran was ready to pay as much as was necessary to satisfy the company. The compensation agreement with the new Iranian government was offered to Britain for its role in the *coup d'etat* which overthrown the Mussadiq's government and brought the Shah back to power.

The AIOC received payment from the other consortium members for the right to the other 60 per cent share which they acquired in 1954. The payment amounted to £214 million to be paid over a period of 25 years.[74] It was to be paid ultimately by Iran. Moreover, the company retained a 40 per cent interest in the operation of the oil industry.[75]

Yugoslav, Trade Agreement(with schedules, exchange of notes and appendices), Belgrade, 26 December 1949, 87 U.N.T.S., pp. 71, 402; U.K. and Czechoslovakia, Trade and Financial Agreement, Lodon, 28 September, 1949, 86 U.N.T.S., p. 141; U.K. and Czechoslovakia, Agreement Relating to the Settlement of Certain Intergovernmental Debts, London, 28 September, 1949, 86 U.N.T.S., p. 175; Exchange of Note Between U.K. and Czechoslovakia Concerning the Agreement on Compensation for British Property, Rights and Interests Affected by Czechoslovak Measures of Nationalization, Expropriation and dispossession, London, September 28, 1949, U.K.T.S., 1957, No. 5, Cmnd 56; U.K. and Poland, Agreement(with exchange of notes) relating to a Settlement of Financial Matters, Warsaw 11 November 1954, 204 U.N.T.S., p. 137; Agreement Between U.K. and Bulgaria Relating to the Statement of Financial Matters, London, September 22, 1955, U.K.T.S., 1955, No. 79, Cmd. 9625; Agreement Between U.K. and Hungary Relating to the Settlement of Financial Matters, London, June 27, 1956, U.K.T.S., No. 30, 1956, Cmd. 9820.

73- Article 2(c) of the Agreement; This payment was more likely compensation against breach of the contract.

74- Longhurst, Adventure in Oil, London, 1959, p. 159.

Neither the compensation offered by the Musaddiq's Government nor the new offer seems prompt in the sense of the principles of the international minimum standards.[76] But, it was more than adequate. Moreover, it included loss of profit which had not previously been a standard part of compensation for expropriation and was only payable for breach of contract. The compensation was so unusual that it actually boosted the company's shares. The price of the shares of the company, which was five pounds per share in 1951, increased to eighteen pounds and in 1954 enabled the company to offer the shareholders for every share four new shares free of charge.[77]

After three years, the practical result of the nationalization of the oil industry in Iran was a new agreement without gaining any considerable benefit for the country. Iran, which was unable to transport and market the oil internationally, had to submit to the oil cartels[78] which were enjoying substantial privileges in the developing countries like Iran.

Therefore, payment or non-payment of compensation by countries like Iran could not be evaluated under the traditional principles accepted by developed countries. Rather, it should have been assessed having regard to other considerations and principles, such as the way the property was obtained, the behaviour of the aliens, self-determination, the bargaining power of the host State and the need for development. Since the Iranian nationalization, these issues have been discussed in the General

---

75- Movahed M. A., Our Oil and Its Legal Problems, op. cit., pp. 90-1.

76- The suggested valuation of the Abadan refinery alone was £350 million. If the loss of future profit under the 1933 concession was to be added to this amount would made it much higher than that amount.

77- Movahed M. A., Our Oil and Its Legal Problems, op. cit., p. 91.

78- About 90 per cent of the oil produced outside of the North America and the Communist countries in 1952 was in the hand of those oil cartels.

Assembly of the United Nation and have many times been emphasized in different resolutions. United Nations resolutions constantly emphasized that a developing country must benefit more from the foreign investments.[79] All these legal instruments improved the legal position of developing countries and, in some cases, might allow them not to pay the amount of compensation expected by the investor companies in order to put an end to their underdevelopment. Investor countries have always refused to recognize this fact as a legal term essentially to prevent developing countries confiscating the alien investments and properties.

What Iran achieved, through the International Court of Justice and the Security Council of the United Nations, was not on the basis of the interpretation of the law by those international organs, but from their silence on the issue. Few resolutions had been adopted by the General Assembly of the United Nations on the sovereignty right to the natural resources and new international economic order. The earlier examples, such as the Mexican oil nationalization, did not help practically. This ambiguity still exists, particularly when contracts or concessions are the subject of the expropriations.

It is more likely that Iranians tried to balance any overestimate of the property value as happened in the Bolivian expropriation of the Standard Oil Company. There, the company claimed its properties were worth $17 million, while it was agreed compensation of $1.5 million with 3 per cent interest, and Bolivia received a development assistance loan of $25 million.[80] On the other hand, as payment of compensation was

79- Resolutions 1240(XIII), 1521(XV), 1803(XVII), 2029(XX), 2626(XXV) of U.N.G.A. are among those resolutions.

80- Ingrm G. M., Expropriation of U. S. Property in South America, Second ed. U.S., 1975, pp. 119-120; there was dispute between the the U.S. government and Bolivians whether the measures was expropriation or

conditional on the approval of the two Houses of Parliament, if one of those Houses was to refrain from ratifying, the company might be totally deprived of compensation and the measures might have constituted an act of confiscation. That was a further reason which forced Britain to emphasise the international minimum standard rules. This was important especially when it became clear from the contents of a note to British ambassador in Teheran that the Iranian government had used the right of nationalization as the result of the illegal and unjust measures of the company in Iran.[81] If the nationalization measures were as the result of the illegal actings of the company, the taking of the property of the company would be a penal confiscation, not nationalization or expropriation, and would deserve no compensation. The company and Britain never admitted any illegal involvement in the internal affairs of the country and considered the non-payment of compensation by Iranian government as illegal and confiscatory, obliging Iran to restore the situation and indemnify for the damage caused by nationalization measures.[82] If Britain was sure that adequate compensation would have been paid, as it was admitted in the pleadings and practiced in the later agreement with the government and the Consortium, deferred payment would be satisfactory if (1) the total amount to be paid was fixed promptly; (2) allowance for interest for late payment was made; (3) the guarantees that the future payments would in fact be made were

confiscation.

81- The approach was similar to that of Bolivian's; see the Note of the August 6th 1952, reprinted in Makkey H., the Years of National Movement (Persian), Vol. 6, Tehran, 1990, pp. 59-61.

82- *Anglo-Iranian Oil Company V. Idemitsu Kosan Kabushiki Kaisha,* I.L.M., 1953, pp. 305-6; *Anglo-Iranian Oil co. Ld. V. Jaffrate* (the Rose Mary), the weekly law report, 1953, Vol. 1, p. 248; *Anglo-Iranian Oil Company Ltd. V. S.U.P.O.R. Company,* I.L.R., 1955, Vol. 22, p. 22.

satisfactory, so that the person to be compensated might, if he so desired, raise the full sum at once on the security of the future payments.[83]

However, it had already become the general practice of the developing countries like Iran to expropriate either without payment of compensation or paying compensation in installments only after years of negotiations.[84] Expropriations in Poland, Czechoslovakia, Hungary, Mexico, Bolivia, Peru, and many other underdeveloped countries provide examples of cases where, although liability to pay compensation is recognized, the general financial and economic position has prevented prompt payment.[85]

3 - Security Reasons:

As a motive to nationalize the oil industry there is nothing more ridiculous than speaking about the issue of security in Iran. The oil industry by itself was not a threat to the security of the country. Concessions were granted when a large part of Iran was under the control of Britain and Russia. Therefore, there was no complete independence which could be threatened by the existence of the company in Iran. But, it was the nationalization measures which had put increasingly the security of the country at risk. That threat became evident when Dr. Musaddiq, in

83- *AIOC Case*, I.C.J. Pleadings, op. cit., p. 106.

84- Ingram G. M., Expropriation of U.S. Property in South America, op. cit., p. 359.

85- U.S. and Poland, exchange of Notes Constituting an Agreement Relating to Economic and Financial Cooperation, Washington, 24 April 1946, 4 U.N.T.S., p. 155;U.S. and Czechoslovakia, Exchange of Notes Constituting an Agreement Relating to Commercial Policy, Washington, 14 November 1946, 7 U.N.T.S., p. 119; see also the monographs by Foighel and White, op. cit.

reply to the call of Mr. Morrison for negotiation, reaffirmed his intention to implement the nationalization laws, The United Kingdom government gave warning that a refusal to negotiation or any attempt to proceed with the' implementation of the legislation would have the most serious consequences.[86] Britain had acquired 53 per cent of the shares in the company and brought a detachment of Sikhs from India to protect the installations. An open threat against the country arose after the nationalization measures when Britain warned Iran that forces might be sent to the region.

On May 15, it was announced that a brigade of paratroopers was being held in readiness, and then moved to Cyprus to protect the lives of British nationals and prevent seizure of the property of AIOC. The Iranian Embassy in London also issued a statement to the press protesting the presence of a British warship off the Iranian coast. There was also the report that additional British naval units, including an aircraft carrier, three destroyers, and several troopships, were present in the Kuwait area of the Persian Gulf.[87] Britain threatened both directly and indirectly the use of force against Iran, the British navy started maneuvering near the coasts of Abadan, and her airforce violated the Iranian airspace.[88]

The elections in the southern province of Khuzestan were suspended for the security reason and, on June 21, 1951, the Iranian government presented the Majlis with a "double urgency"[89] sabotage bill, the text of

86- The U.N.S.C., Official Records, 559th Meeting (October 1, 1951), p. 16.

87- Makkey H., Expropriation, (Persian), Vol. I, Tehran, 1982, p. 280; Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 95.

88- Loc. cit., pp. 531, 560, 571.

89- A double urgency bill is one that can be debated and passed at one sitting of the Majlis. The ordinary bill must have three readings on three separate days; see Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., p. 157-8.

which is reported as follows;

> "For a year from the date of approval of this law, any persons engaging treacherously or with ill-intent in activities in connection with the operation of the Persian National Oil Industry, resulting in cutting oil pipelines or rendering unserviceable refineries or facilities for transport of oil, or causing fire in oil wells or oil storage tanks or causing destruction of railway lines, railway tunnels, railway bridges or rolling-stock, shall be condemned to penalties ranging from temporary imprisonment with hard labour to execution. This same penalties will be applied to instigators and accomplices as to those actually committing the crime."[90]

However, the Act did not remove the danger, but it became a source for new danger of British direct interference. A statement issued by the British government indirectly rejected any Iranian sovereignty right to nationalize the oil industries. The statement said:

> "The action of the Persian Government in arbitrarily ordering the expulsion of some 350 British technicians is contrary to the elementary principles of international usage, and has created a situation which might well be thought to justify the use of force in order to preserve the British rights and interests involved."[91]

President Truman urged the British government not to use armed force to prevent the expulsion of the British staff at Abadan, and indicated that the United States would not support the use of force by the British. The situation had become so tense that President Truman also appealed to Iran to cancel the operation, saying that execution of the order would aggravate the situation and make settlement much more difficult.[92]

There is no comparable case in which a developed country, having nationalized some properties, other countries have threatened to use force against the nationalizing State. To the contrary, security, as a legitimate reason to expropriate aliens' property, has been taken to mean where foreign property is a threat against security of the country or is vital to

---

90- The translation reprinted in Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., pp. 70-71.

91- The Times, 29 September 1951.

92- The San Francisco Chronicle, September 28, 1951, p. 1.

national security.[93] Foreign investments in telecommunications, public utilities, radio and television in Bolivia, Chile, Ecuador, Peru, Venzuela, Elsalvador, Guatemala, Barazil, Syria, Malagasy Republic and Mexico were nationalized primarily because of the desire to establish national controls over some areas considered vital to national security. The accepted important sectors for national security are banking, insurance, agriculture, mineral resources projects and petroleum exploration and distribution. Other countries like Congo, Afganestan, Bangladesh, Kenya, Colombia, Nigeria, Qatar, India, Moritania, Moroco, Sudan and Burma also nationalized more than 51 per cent of similar industries on the ground of security.[94] The incidents after the nationalization in Iran illustrated that the existence of the company was a potential threat to the Iranian national security and seem to have provided authority for the Iranian government to nationalize the company. In a note to the British ambassador, Prime Minister Musaddiq charged British officials with "open interference" in the internal affairs of Iran. Musaddiq asked them to leave the country and contended that the decision was a necessary measure to remove the danger to the country and an obstacle to the nationalization process.[95]

At the same time, oil was very important for the British navy. That said, Iran had guaranteed the supply of oil to previous customers of the AIOC, which included Britain.[96] Therefore, there was no ground for the view that the nationalization measures had endangered international peace and security. There was no basis for such a danger while Iran had

93- Akinsanya A. A., The Expropriation of Multinational Property in the Third World, op. cit., p. 101.

94- Loc. cit.

95- Musaddiq's Memoirs, op. cit., pp. 234-5.

96- Iranian Oil Nationalization Act, op. cit.

committed itself to settle the international dispute by peaceful means, and not to endanger international peace, security and justice.[97]

Iran was not going to nor was it able to, use force against Britain; rather, it was Britain which threatened use of force against Iran as was asserted in the statement to the Security Council of the United Nations.

The Iranian government did not use this contention to defend the act against the company, but it used this language to persuade the Iranian people and the other Members of the Houses of Parliaments to approve the nationalizing Bill presented to them.[98] It might be argued that it was natural for Britain to try to use its international position to protect its interests. However, Iran had the right to try to defy any potential danger to the security of the country.

4 - Political Reasons:

It is not acceptable internationally to expropriate property of aliens for political reason as a pressure against the investor's government. Using the property of the nationals of a country as an instrument to influence the policy of that country has not been acceptable in international law. But, when the investment itself becomes a political instrument, that principle would no longer apply.

From the investor's standpoint a commercial enterprise has two elements - profit and control. For the host countries, those elements are also of importance, although in a different order.[99] To secure their

97- Article 2(3, 4) of the U.N. Charter

98- Makkey H., Ketabe Siyah, op. cit, passim; The National Front Members of Parliament which established the government and undertook the oil nationalization were 8 Members of Majlis and were in minority in the Majlis.

benefit, the investors must be sure that they would have enough control over their enterprise. In other words, they want to be sure that they would have enough freedom to benefit from their investments as much as possible. In the developed countries' system, it has become a common practice and tradition to practice the accepted degree of freedom and the political system of the country is rarely affected by foreign investments. The difficulty arises in respect to the developing countries with political and economical instability. Investors like the AIOC and the East Indian Company secured their interests in the shape of concessions like the Oil Concession of 1933 in Iran and prevented these countries from pursuing an independent policy.[100] To secure this freedom and assurance, the investors usually got the benefit of the political and economic influence of their governments, in such a way that sometimes they interfered in the internal affairs of the country through their governments.[101] On the other side, the developing host states, jealous of their independence, sovereignty and economic rights, were unable to challenge these investments and establish equal and equitable economic relations. Consequently, the political friction between the host countries and the investors was manifested in some practices adopted by these countries with little influence on the international scene. The fear of Britain and the company was that political considerations affected the nationalization measures in such a way that compensation would either not be paid or be paid inadequately and with delay.[102]

99- Nelson R. W., Avoidance and Settlement of International Disputes, Proceedings of the A.J.I.L., (1983-84), April 12-14, 1984, pp. 38-39.

100- The return for the investments in the developing countries is so high that the investors accept the risks including political risk of the investment.

101- This principle would be also considered from the point of view of the investors' behaviour.

One of the main motives for the nationalization measures taken by the Iranian government was to take the control of the oil industry in Iran. The continuing desperate situation of the economy had deteriorated and the low living standards had brought the country to a political crisis. It became a matter of some urgency to adopt effective means for the improvement of the general living standards of the country and to bring an end to the country's economic subordination. On the other hand, oil was of very great strategic importance to both parties.[103] This importance, together with some other considerations, prevented the parties from reaching a just agreement in the AIOC dispute.[104] Under international minimum standards principles, political motivation has not been admissible in order to prevent suppression of the foreign investments unjustly. In countries like Iran, the measures taken were politically motivated in order to end the political suppression of the country by aliens. While some countries like Libya and Indonesia have been accused of acting for political reasons forbidden under international law, the majority of practices of developing States have been to end political suppression of their people. Therefore, according to the principles and the trend of international law developing countries like Iran have not been forbidden from taking such measures of a political character.

Accordingly, the Iranian government avoided any more dealings with the company, refused to sell any of its oil production to AIOC, and instead made individual contracts with AIOC's former customers and permitted them, if they wished, to hire AIOC as their carrying agent. Iran had offered to deliver any amount of oil bought by the UK to any

102- *AIOC Case,* I.C.J. Pleadings, op. cit., p. 108.

103- Mussadiq's Memoirs, op. cit., p. 268.

104- See the parliamentary debates in Makkey H., Ketabe Siyah, op. cit., passim.

company which produced a receipt from the UK government.

However, one of the main reasons for nationalization was the interventionist policy pursued by Britain in Iran which had continued from the last century.

Britain had prevented other countries from buying oil from Iran, deterring tanker owners from taking advantage of the low prices offered by the Iranian government. This measure was understood in Iran as continuing British intervention in the internal affairs of the country. Indeed the anti-British spirit figured prominently in the demonstrations which deposed Qavam after only four days in office. The political atmosphere in Iran thus made it impossible for the Iranian Government to renew the contract under new terms.[105]

In fact, the AIOC was a manifestation of the kind of relations which then existed between Iran and the United Kingdom. The United Kingdom had such a direct control over the company which claimed that the concession had a double character, being a concessionary contract between the Iranian government and AIOC and a treaty or convention between Iran and the United Kingdom.[106] The political character of the measures, together with lack of any indication as to an applicable law within the contract, prevented the International Court of Justice from settling the dispute which was fraught with political problems and tensions, many of which went far beyond the regulating influence of international law and international judicial procedures. Therefore, the company had created a situation in which the measures came to be regarded as part of the struggle for self-determination. This aspect of the Iranian oil nationalization was expressed by the World Bank's representative who,

105- Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., pp. 118-9.

106- I.C.J. Reports, 1952, p. 147.

after failing to reach any agreement with the Iranian authorities, stated that the oil problem in Iran was mainly a political one.[107]

There are similar examples of major nationalizations, such as those in Mexico, Egypt, South America and Indonesia, in which settlement was not made according to the requirements of the rules applied by the developed countries, nor through the employment of impartial international judicial tribunals. It follows that, neither international law, nor international tribunals, have always been or will always be able to reconcile nationalistic aspirations of the expropriating developing states against the interests of nationals and the governments of the developed countries. The reason for this disability is clear and simple, and lies in the unequal and inequitable relations which exist between the third world and the developed countries. That is why the the measures taken by third world countries have not complied with orthodox preferences, but have instead severely challenged, if not totally rejected, them.

The achievements which Iran was able to derive from the nationalization of the oil industry bear clear evidence to the existence of this new situation. Thus, the only tangible difference between the Consortium Agreement and the 1933 Agreement with AIOC had been the acknowledgement of Iran's ownership of the Iranian oil, which acknowledgement is of a more academic than practical significance. Therefore, in 1979 the Revolutionary Council of the Islamic Republic of Iran passed a law which nationalized the oil industry in Iran, resulting in all the equity shares held by various foreign oil companies, acquired under joint venture and partnership agreements signed during the 1954-1978 period, being expropriated. The text of the Single Act reads as follows:

107- World Bank and Persian Oil, The Economist, vol. 162, February 9, 1952, p. 328.

> "All oil contracts which in the opinion of a Special Committee set up under the Minister of Oil are considered as contrary to 'the Nationalisation of Oil Industry Act of (1951) Iran' will be deemed null and void. All claims which may arise in connection with the conclusion or performance of such contracts can be settled according to decisions made by this Committee."[108]

Asserting every right to "economic sovereignty", the Iranians denied the jurisdiction of any international judicial or arbitral forum to decide the fate of those nullified contracts, and declared the various oil contracts made by the previous regime null and void. The Iranian Ministry of Oil in a letter dated 11 August 1980, communicated to *Amoco*, a United States company, that the Committee had decided to end the joint structure agreement concluded in 1958 between Iran and the company.[109]

Therefore, the consequence of the 1951 nationalization of the oil industry in Iran was not recognized by the new regime in Iran. In fact, the expropriation of the oil industry of 1951 had not achieved its aim - that was to gain complete control of the oil industry. The post-nationalization contracts with the Consortium were regarded by the new regime as a reward for the return of the Shah to power. Therefore, Iran renationalized the industry to gain complete control of the industry again.

****
****
****
*****
***
*

108- The Single Article Act, the Law No. 1408 of February 7, 1980 (Bahman 18, 1358).

109- See more in Amin S. H., Commercial Law of Iran, 1986, pp. 114-116.

CHAPTER FOUR

THE POST-REVOLUTION EXPROPRIATIONS IN IRAN

Background:

Immediately before the 1978-79 revolution, the United States had by far the largest share of the Iranian import market. However, after the revolution, the new regime terminated hundreds of major contracts with the West, particularly with the United States, and U.S. property was expropriated.[1] The measures included both large scale nationalizations by direct legislative means and expropriations of relatively smaller properties by the application of the general legislation and regulations. Before any discussion of the post-revolution expropriations in Iran, it is necessary to look at foreign investment in Iran before 1978.

The United States' massive involvement in Iranian economy of prior to the revolution of 1979 was the result of the 1951 oil nationalization.[2] As a consequence of the role which the United States government had played in bringing the Shah back to power, American companies and investors were in a favourable and selective position to enter the Iranian market.[3]

Immediately after the *coup d'etat,* on 15 August, 1955, Iran and

1- Amin S. H., Commercial Law of Iran, Tehran, 1986, p. 92.

2- See the previous chapter on nationalization of oil indystry in Iran.

3- Amin S. H., Commercial Law of Iran, op. cit., p. 83.

the United States signed the Treaty of Amity, Economic Relations and Consular Rights to protect future American investments in Iran.[4] A further advantage occurred for American investors when the two countries exchanged a note on investment guarantees according to which when the government of the United States guaranteed American investment in Iran, the government of Iran undertook obligations of indemnity pursuant to that guarantee. The note also provided that the Iranian government would recognize any transfer of title or interest from the investor to the government of the United States.[5]

The welcoming policy of the Iranian Government and the favourable ground for investment in Iran caused the massive foreign involvement in the Iranian economy. Thousands of American nationals and corporations entered Iran and the number and the size of the American claims presented to the Iran-U.S. Claims Tribunal indicates the volume of the American involvement in the Iran's economy.[6]

4- Treaty of Amity, Economic Relations and Consular Rights Between Iran and the United States, in 284 U.N.T.S., p. 93; persian text in Official Gazette No. 3589, 15 Khordad, 1336 (June 5, 1957).

5- Exchange of notes between the Government of Iran and the Governement of the United States of America regarding the guarantee of the investments by the United States nationals in Iran, Official Gazette No 3642, 22 Mordad, 1336 (13 August, 1957).

6- The years just before the 1979 revolution, more than 40,000 Americans were working in Iran, see in Brower C. N. and Davis M. D., The Iran-U.S. Claims Tribunal After Seven Years: A Retrospective View From the Inside, 43 Arbitration Journal, 1988, p. 18; about 3,000 claims for billions of dollars were presented to the Tribunal by the U.S. nationals and corporations.

(SECTION ONE)

THE POST REVOLUTION EXPROPRIATION MEASURES IN IRAN

Following the 1979 revolution in Iran the capitalist economic policies of the former regime were changed by the Revolutionary Government. The Revolutionary Council which was set up as an acting legislative body was responsible for the adoption of all the important measures for the nationalization of the different economic sectors of the country.

Nationalization of the Banking System was one of the earliest nationalization measures taken by the new revolutionary regime.[7] Thirteen out of some 36 existing banks were formed through foreign partnership, the share of the foreign capital therein ranging from 15 to 40 per cent.[8] The reason for their expropriation was, *inter alia*, that many of those banks had extended loans to industrial units and those units themselves had come, or were going to come, under the control of the government and were unable to repay the loans. Some of those loans were illegally expatriated and had become bad loans.[9] Therefore, leaving banks in that situation would have bankrupted those banks totally. There was no economic justification behind the nationalization as the measures left the Government with many obligations which those banks had undertaken.

7- Law of Nationalization of Banks, Official Gazette No. 10012, 17 Tir 1358 (July 8, 1979).

8- The Iran-Rusia Bank, as an exception, had special status and and was allowed to operate with 100 per cent ownership.

9- Piran H., Nationalisation of Foreign Property in International Law and Iran-U.S. Claims Tribunal, op. cit., p. 150.

Meanwhile, the law of nationalization of banks recognized the legitimate rights of the private persons in those banks. Article 1 of the Law stated:

> "In order to safeguard the national rights and wealth and to run the production wheels of the country and to guarantee the deposits and savings of people in banks, while accepting the principle of legitimate and conditional ownership and with due regard to the following:
> - The way banks have earned their income and have illegally transferred the sums abroad,
> - The fundamental role of banks in country's economy and latter's natural relation to the banking institutions,
> - The facts that the banks are indebted to the Government and need to be supervised by the Government,
> - Necessity of coordination between banks' operations and other organizations in the country,
> - Necessity of directing those operations towards the Islamic administration and exploitation,
> From the date of the ratification of this act, all banks are declared nationalized."[10]

The Law did not expressly provide compensation for the dispossessed owners, but provided for compensation according to the legitimacy of their ownership. Accordingly, small shareholders were protected by the law enacted one year later which permitted the payment of compensation for their nationalized shares. According to that law, compensation was not to exceed the normal value of the shares.[11]

Expropriation of the insurance and credit enterprises was the next measures. This was enacted on June 25, 1979.[12]

The Law provided that:

10- Law of Nationalisation of Banks, Official Gazette No. 10012, dated 17 Tir, 1358 (8 July, 1979).

11- The Law of Protection of the Iranian Minor Shareholers of the Nationalized Banks and Credit Institutions, Official Gazette No. 10352, 16 Mordad, 1359 (August 7, 1980).

12- Law of Nationalization of Insurance and Credit Enterprises, Official Gazette No. 10264, 1 Khordad, 1359 (May 22, 1980).

"To protect the rights of the insured, and to expand the insurance industry in the country and to place it at the service of the people, from the date of this law, all insurance enterprises in Iran are declared nationalized with the acceptance of the principle of legitimate and conditional ownership."[13]

Here again, the legitimacy of the ownership became a condition for recognition of any right in the property. The Law of Protection of the Iranian small Shareholders of the Nationalized Banks and Credit Institutions, covered the new expropriation measures, but for the Iranian minor shareholders. Ten years later, the Iranian Parliament permitted the payment of dues to the persons for the value of the nationalized insurance companies.[14] American shareholders had already been compensated through the Iran-U.S. Claims Tribunal.

Following the nationalization of the insurance industry, on 8 January 1980, the Revolutionary Council renationalized the oil industry. The Revolutionary Government of Iran regarded the oil agreements, particularly those with the International Oil Consortium, made after the 1953 *coup d'etat* as being in violation of the 1951 nationalization. The Agreement with the Consortium (1954) was considered as a reward for the American backing for the 1953 *coup d'etat,* which brought back the Shah to power. It was also considered as a mockery to the 1951 nationalization of the oil industry in Iran.[15] Therefore, a special commission was set up to consider all oil agreements concluded by the previous regime and to nullify those found contrary to the 1951 Law of Nationalization of Oil Industry in Iran.[16] The Oil Nationalization Law

13- Loc. cit., Article 1 of the Law.

14- Article 1 of the Law of the Management of the Insurance Companies, adopted on 15 February 1989, Official Gazette No. 12819, 7 Esfand, 1389 (February 26, 1989).

15- The 1954 Agreement was replaced by the 1973 Sale and Purchase Agreement between the same parties.

16- Single Article Act Concerning the Oil Agreements, Official Gazette No. 10185,

reads as follows:

> "All oil contracts which in the opinion of a Special Committee set up under the Minister of Oil are considered as contrary to 'the nationalization of Oil Industry Act of (1951) Iran' will be deemed null and void. All claims which may arise in connection with the conclusion or performance of such contracts can be settled according to decisions made by this Committee."[17]

The law amounted to the nullification of majority of oil agreements with foreign companies, including the agreements for gas and oil exploration, and even agreements in the petrochemical sector.[18] The reason for their expropriation was evident, but none of the affected companies referred their claims to the designated Commission and instead sought other means of settlement. Disputes with non-American parties were settled by negotiations between the National Iranian Oil Company and those foreign companies and compensation to them mainly took the form of supplying them with oil. American companies, if they were unable to reach agreement with Iran on any terms, brought their claims before the Iran-U.S. Claims Tribunal.

Some other expropriations occurred in other sectors of the Iranian economy based on general laws and regulations adopted to deal with industry as a whole. The most outstanding one was the Law of Protection and Development of Iranian Industry of July 16, 1979.[19] According to that law, an agenda was set for Iranian industry and the existing industries were divided into four categories. The law provided for further nationalizations in particular sectors. The law states:

---

20 Bahman, 1358 (February 9, 1980).

17- The Single Article Act, the Law No. 1408 of 18 Bahman, 1358 (February 7, 1980).

18- Some agreements such as the Petrochemical plant in Boushehr agreed between Iran and Japan came to an standstill, but it was halted by the foreign companies.

19- The Law of Protection and Development of Iranian Industry, Official Gazette No. 10031, 9 Mordad, 1358 (July 31, 1979).

"Existing industry will be divided into four categories according to conditions, and each category will be dealt with in a specific manner:

(a) In addition to oil, gas, railway, electricity and fisheries which have already been nationalized the following industries shall be nationalized as well:

(a) (1) Industries manufacturing metals with great consumption in industry (such as steel, copper and aluminium) covering hot-rolled operations.

(a) (2) Manufacture and assembly of ships, airplanes and automobiles.

(b) Large scale industry and mines whose *owners have amassed great wealth through illegal relations with the past regime, unlawful abuse of position and trampling of public rights (some of them have fled the country)* and the Government has taken over their management by the legal Bill No. 6738, dated 26-3-1358.[20] The shares of such individuals shall be reverted to Government ownership. Any type of financial, technical and legal investigation with respect to such individuals will be in the Government's authority.

Note- The value of shares which according to the Imam's Decree,[21] belong to the Foundation for the Oppressed, after evaluation, in the event that they exceed debts to the Government, will be paid to the Foundation by the Government.

(c) Factories and institutions which have received substantial loans from banks for establishment or expansion, will be owned by the Government in the event that their total debt exceeds net assets. The remainder of their debt, as the Government and people's claim, will be returned in any manner necessary. In case, the assets of these units exceed the banks' and people's claims, the Government as owner of the banks and in proportion to its and people's claims, will share their ownership.

(d) Factories and manufacturing institutions owned by the private sector, whose financial and economic status is good and which are not covered by paragraph (b), based upon the acceptance of legitimate and conditional ownership, their ownership will be protected by law.

Note- Debts, collaterals and guarantees which owners and managers of the said institutions have placed with respect to bank loans, remain in force and will be claimed."[22]

20- Emphasis added, the date is equal to June 16, 1979.

21- It is a referrence to the Decree of February 28, 1979, establishing the Foundation for the Oppressed to oversee the property confiscated from the former ruling family in Iran, see in Mozafar M., A Digest of Laws and Regulations Approved by the Islamic Revolutionary Government, Tehran, 1979, p. 1.

22- Article 1 of the Law of Protection and Development of Iranian Industry,

The most important parts of this Article are paragraphes (b) and (d) of that law. The Law clearly stated that large-scale industries and mines, whose owners have amassed great wealth through illegal relations with the past regime, would be confiscated. Accordingly, the Bill 6738 mentioned in the law had listed 51 individuals whose property was to be confiscated as having been earned through illegal means.[23] A considerable number of such properties were sharing with American interests in varying degrees and were confiscated altogether. Paragraph (d) clarifies the basis of the takings by declaring that those privately-owned factories which are not covered by paragraph (b), based upon the acceptance of legitimate and conditional ownership, would be legally recognized and protected.

Therefore, among other things, the post-revolution expropriations in Iran comprise large number of such cases. To treat each category of cases, the law did not provide for any detailed procedure for payment of compensation. The issue of compensation was dealt with by the Executive Regulations Concerning the Law of Protection and Development of Iranian Industry which was approved by the Council of Ministers of the provisional Government on 13 August, 1979.[24] The Executive Regulation held that:

> "Implementation of the provision of section (a) of the Law of Protection and Development of Iranian Industry, with regard to the nationalized industries, the executive shall be as follows:
>
> 1- Evaluation of the shares of factories:
>
> The real value of each share shall be determined with the purpose of paying compensation to the holders of shares. Such evaluation shall be made by auditors to be appointed on the recommendations of the Minister of Industries and Mines and approval of the general meeting of The Protection and Development of Iranian Industries Organization. The auditors shall perform their duties under the supervision of the committee as stated in Article 5 of this

Official Gazette No. 10031, op. cit.

23- Official Gazette No. 10031, 9 Mordad, 1358 (July 31, 1979).

24- Official Gazette No. 10049, 1 Shahrivar, 1358 (23 August, 1979).

Regulation, and the evaluated shares in the manner mentioned above shall be the basis of payment of compensation to the shareholders.

2- The auditing institutions shall take into consideration the following points in their evaluation procedure:

- The financial position of the institution at the end of the fiscal year 1357 (1978)
- The profitability of the company during the past five years.
- The ability to compete freely against foreign manufacturers without customs exemptions. .....

Payment of compensation to the foreign shareholders shall take place after the evaluation of the shares, preparation and approval of the report, and taking into account the previous obligations and agreements which may exist. With regard to the Iranian shareholders, if they are not subject to Section (b) of the Law of Protection and Development of Iranian Industries, up to the amount of five million Rials shall be paid in cash and the balance in installment payments in the manner to be determined by the general meeting as mentioned in Article 7.

..... Article 1 of the Supplement deals with the method of valuation of shares in the nationalized industries:

.....

The shareholders' rights are being computed on the basis of the net value of the shares. The value consists of total of the registered and paid capital, free and dividable reserves, the balance of the profit-and-loss statement and the average of the net value of shares at the end of the fiscal period ending to the years 1356 and 1357 (1977 and 1978) stated in the tax declarations submitted or the institution has not reached the stage of production, or violations are noticed in the operation of the institution, it shall be the responsibility of the general meeting of the Iranian National Industries Organization to examine the matter and render a decision thereon.

Note- In case the annual loss, the expenses prior to production, insurance and other dues are not reflected in the tax declaration submitted, the general meeting of the Iranian National Industries Organization shall directly examine all the above points and render a decision thereon. The decision of the said meeting on the subject shall be final"[25]

The Revolutionary Government of Iran was not, as a socialist State, to abandon private ownership, but to take the illegitimate properties and compensate the rest. Private ownership was recognized in the new

25- article 2 of the Executive Regulation ...., Official Gazette No. 10049, 1 Shahrivar, 1358 (23 August, 1979).

Constitution of Iran.[26] Indeed most of the expropriated properties have recently been denationalized, and foreign investments are now welcomed.[27]

Therefore, the recent Iranian expropriations of some foreign property did not comply with the strict letter of traditional rules on expropriation. They were not for a public purpose in the sense of the traditional rules. They were discriminatory and prompt compensation was not provided. In fact, many of the foreign nationals and companies, particularly the Americans, left Iran and abandoned their contracts, properties and interests.

On the other hand, American banks were holding about 12 billion U.S. dollars of Iranian assets. In this way, although the deterioration of relations between the two countries continued after the revolution, the amount of the economic interests held in each of the countries forced both countries to make some arrangements to settle the financial disputes between them.

26- Article 44 of the 1979 Constitution of Iran.

27- Keyhan Havai (Persian Newspaper), No. 929, May 8, 1991, p. 10; and No. 963, January 1, 1992, p. 10

(SECTION TWO)

THE IRAN-UNITED STATES SETTLEMENT OF EXPROPRIATION DISPUTES

Following the detention of the United States diplomats In Teheran in early November 1979, the already fragile relations between the two countries reached its nadir. Iran refused to make payment of compensation for the expropriated property and the Iranian foreign affairs minister demanded that the United State admit that the property and the fortune of the Shah were stolen; promise to refrain from further intervention in Iran's affairs; and extradite the Shah to Iran for trail.[28] It was declared that there could be no respect or immunity for those diplomats who plotted against the revolution in "a centre of espionage and conspiracy" and release of the detainees was made conditional upon handing over of the Shah and returning his property to Iran.[29] The case was brought before the U.N. Security Council, but it could not rule against Iran as the result of the Soviet veto.[30] The International Court of Justice condemned the action and demanded the immediate release of the detainees.[31] However, taking into account all relevant factors, Judge Tazari declared that although the action was illegal under international law, Iran was not responsible for the action.[32]

28- U.S. Dept. of State Cur. Pol. No. 179, May 1980, at 1.

29- Keyhan, Iranian Newspaper, 18th Nov. 1979.

30- Case Concerning the Diplomatic and Consular Staff of the United States in Tehran, International Court of Justice, Judgement of 24 May, 1980, Reports of the Judgements, 1980, p. 17.

31- Loc. cit.

32- Loc. cit.

Before taking these measures, the United States took a number of economic and diplomatic measures against Iran. The United States imposed direct economic measures upon Iran through economic sanctions and froze all Iranian assets by the Executive Order No. 12170.[33] Other non-economic measures, such as military strikes, the seizure of a discrete piece of Iranian territory, like an island, dropping naval mines in Iranian harbors or imposing a military blockade, were also being examined.[34]

On April 24, 1980, the United States forces set out a rescue mission, but, because of a sand storm, the mission failed after the aircraft had landed in Iran.[35] After this attempt, which was considered by Iranians as 'an act of war', the world community became concerned to solve the crisis. After unsuccessful attempts at mediation by the United Nations Secretary General, Kurt Waldheim, a United Nations' Special Commission, Pope John Paul II and (West) Germany, a solution to the crisis was finally found through the mediation of the Government of the Democratic and Popular Republic of Algeria.[36]

1 - The Algiers Accords

All the disputes between the parties, including those relating to the expropriation of the property of each high contracting party, were solved through the Algiers Accords. The so-called "Accords" consist of the

33- Dept. of State Bulletin, July 19th 1980 pp. 10, 71; Wall Street Journal, 20 January., 1981, p. 3.

34- Sick G., American Hostages in Iran, 1985, pp, 144-146.

35- Loc. cit., p. 156.

36- Jordan H., The Last Year of the Carter Presidency; Saunders H., American Hostages in Iran, 1985.

Declaration issued by the Government of Algeria on January 19, 1981, (hereinafter cited as General Declaration), together with the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria of January 19, 1981, (hereinafter cited as Undertakings), and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of January 19, 1981, (hereinafter cited as Claims Settlement Declaration) and the Escrow Agreement.[37] The Accords are unique in some aspects, and include a variety of political, economical, judicial and other issues on a large scale.

What is certain about the Agreements is that they were concluded between two States with the mediation of the Government of Algeria. Private persons became the subject of the Agreements, but were not party to them. However, it was the first agreement, after the World War II, by which a government agreed to sit before a court and be challenged by private parties. It was probably the notion of equality as between the Ruler and the citizens in Islamic law which convinced Iranian authorities to accept such terms, however far removed this might be from international practice.[38] It had been the general attitude of Communist States and developing countries that resort ought not to be had to international adjudication, especially for the resolution of disputes

37- We are concerned with the General Agreement and the claims Settlement Declaration; the text of the Agreements reprinted in 20 I.L.M., 1981, pp. 224-240.

38- The European Court of Justice is an exception to this rule by which governments of the member States may be brought to the Court by individuals.

involving expropriation of foreign property. As was also the case with the Iran-U.S disputes, the vast number of the claims and their complexity, combined with the reluctance of most States to take action provided further reasons for recourse to be had to lump sum settlement.[39] But, this case differed from common practice in two important respects; first, there was the issue of hostages, and secondly the frozen assets of Iran in the United States. Both were used by the parties and played a major role in the final settlement.

However, like most investment disputes, the basic settlement was carried out through negotiations between the two Governments. The Iran-U.S. dispute had become a highly politicized State-to-State dispute and could not be solved otherwise, especially when American nationals and Iranian public assets and political pressures were involved. Had it been otherwise, the American government would probably not have become involved since it was not the practice of the U.S. to intervene directly in investment disputes of the U.S. nationals with foreign countries. For example, in the period of February 1975 to February 1977, from 106 investment disputes 42 were settled and the U.S. Government intervened by negotiations in only one, *Marcona*.[40]

The basic question regarding the Agreements is whether, bearing in mind issues of the hostages and the frozen assets and the consequent duress under which the parties found themselves, they are valid under international law and in the light of Article 52 of the Vienna Convention on the Law of Treaties. Certainly, the United States, which has considered the Accords highly advantageous, has seen little point in

39- Remarks by Lillich on State Responsibility, Self-Help, and International Law, P.A.S.I.L., 1979, p. 245.

40- Remarks by Gantz D. A., Dispute Settlement, P.A.S.I.L., 1979, p. 253.

worrying about the voidness argument as a practical matter.[41] The raising of the question would have been very beneficial to the Iranians, but they have been reluctant to do so for a number of reasons. Thus, although Iranian officials sometimes threatened to withdraw because of the U.S. failure to fulfil its obligations, from the Tribunal, they did not want to contest the validity of the Agreements.[42] It was equally not beneficial to Iran as some of Iranian assets had remained in the hands of the U.S. government, and had not yet been released.[43]

1- 1 - The General Declaration

As was mentioned earlier, the General Declaration as well as the other Agreements, are in fact international agreements concluded between two States. They contain the fundamental commitments of both States. Among the other principles of the Declaration the United States undertook to;

1- Restore the financial position of Iran to that which existed prior to the Executive Order No. 12170 of President Carter, November 14, 1979, and ensure the mobility and free transfer of all Iranian assets within its jurisdiction;[44]

41- Remarks by Owen R. B., in P.A.S.I.L., 1981, pp. 236-7.

42- Interlocutory Award in Case No. A15 (I:C) (ITL 78-A 15 (I:C)-FT) of 12 November 1990, in Albert Jan Van Den Berg, XVII Y.C.A., 1992, pp. 375-381; Iranian Autorities in different occasions have verbally complained about this matter.

43- President Rafsanjani's press conferrence, in Kayhan Havai (Iranian newspaper), No. 1033, June 2, 1993, P. 32.

44- Declaration of the Government of the Democratic and Popular of Algeria,

2- Not to intervene in Iranian affairs;

3- To nullify all trade sanctions declared by the Executive Order No. 12170, and withdraw its claims against Iran before the International Court of Justice and any other claims of the United States or its nationals against Iran in the United States courts;

4- To return the assets of the family of the shah;

5- Terminate all litigation as between the nationals of the United States and the government of Iran, and to bring about the settlement and termination of all such claims through binding arbitration. Iran made a similar commitment in this regard.

The provisions of the Declaration provided for restitution of the assets and properties of Iran held in the United States after the 52 U.S. nationals safely departed from Iran.[45] But the provisions of the Agreement relating to the Claim Settlement Declaration, in which the Parties agreed to deposit some of the money in a third bank's account to be decided by the tribunal, made the earlier provisions fictitious. Moreover, Iranian Officials always have complained about non-observance on the part of the United States of some of the terms of the Agreements.[46]

As far as the measures of the United States are concerned, freezing Iranian assets is an issue different from expropriation, but detention of

General Perinciples, Para. A, reprinted in 20 I.L.M, 1981, p. 224.

45- Point II and III (3,4,5 and 6) of the General Declaration, see appendix II.

46- Points II and III (7) of the General Declaration; in his latest interview in June 2, 1993, President Rafsanjani claimed that the United States has held billions of Iranian assets illegally for more than 13 years; Keyhan Havai, the Iranian Newspaper, No. 1033, June 2, 1993, p. 32; One of the lawers involved in Iran-U.S. disputes stated personally that the United States had offerred about $900 m for the assets of the family of shah which amount more than $11 billion.

property might ultimately lead to confiscation. This has sometimes been practiced by Western Countries, particularly by the United States, in order to bar trade and other financial transactions with countries that have undertaken broad expropriation programs and similar actions. Cuba and China are the other most obvious examples of States which have had their assets frozen, in similar circumstances by the United States.[47] The purpose behind such measures had been apparently a protective one rather than one of public utility, but in the case of the Iranian assets the purpose behind the measure was initially punitive, although the measure later took the character of economic sanctions designed to pressure the Iranian Government into releasing the detainees.[48] The frozen assets were also used as a security for payment of compensation for the claims regarding expropriated property and rights of American nationals and companies in Iran. The Agreement between the parties provided for the restoration of the assets in exchange for the hostages. The restoration was not to be full, but as it was to be, in the language of the Accord, "so far as possible".[49] The possibility depended on the interpretation of the terms by the United States and could justify its non-implementation accordingly.

Under the United State's Sanctions Legislation enacted in 1977,[50] future use of blocking authority is limited to situations where there has been a declaration of war. United States did not use the frozen assets, but

47- Remarks by Lillich on State Responsibility, Self-Help, and International Law, P.A.S.I.L., 1979, op. cit., p. 250.

48- Edwards jr. R. W., Extraterritorial Application of the U.S. Iranian Assets Control Regulations, 75 A.J.I.L., 1981, p. 872.

49- The General Declaration, General Principles, Para. A, 20 I.L.M., 1981, p. 224.

50- P. L. 95-223, December 28, 1977, 91 Stat. 1625; See Determination under Trading With the Enemy Act, House Doc. 95-380, September 11, 1978.

U.S. nationals had started litigation before United States courts. The Court of Appeal of Paris did not recognize such claims against foreign public funds in other countries, and declared the detention of such funds and assets as contrary to international law and thus illegal.[51] However, ultimately, it was agreed to nullify such attachments and judgements obtained against the Government of Iran, but most of the funds remained in the United States to pay the unpaid principal of and interest on all loans and credits held by United States banking institutions and other disputed amounts owing on Iranian deposits in the U.S. banking institutions.[52]

The freezing of Iranian assets in the United States was carried out on the basis of the International Emergency Economic Powers Act (IEEPA) which gives the President of the United States the authority to deal with "an unusual and extraordinary threat to the national security, foreign policy and economy of the United States", emanating from a source wholly or substantially outside the United States which he deems constitutes a national emergency.[53] The Presidential Order was designed, *inter alia*, to protect the national security of the U.S.A., the stability of the dollar exchange control markets and the U.S. economy generally. Where danger to the security of the country is serious, the task of imposing limitations on foreign assets is less complicated. There is a serious doubt as to whether it could reasonably be asserted that a third world country could in any way endanger the security of a Super power like the United States. It has not been practice internationally, and

51- *Iran v. French Atomic Energy Authority and Eurodif,* 65 I.L.R., 1984, pp. 93-99.

52- General Principles (B) of the General Declaration, 20 I.L.M., op. cit., p. 224; the Undertakings, Paras. (A), (B), 20 I.L.M., op. cit., p. 229.

53- D' Orazio, Constitutional Law, Executive Power Presidential Claims Settlement Power, 27 New York Law School Law Review, 1982, pp. 985-999.

particularly in Western States, to take or infringe the property rights of foreigners for the stability of the currency exchange control markets and the economy of the country without payment of compensation. While Iran had taken a similar measures to protect its currency and its exchange reserves in very extraordinary circumstances, the Tribunal did not accept the contention and awarded in favour of a claimant whose nationality was also in dispute between the two States.[54]

One of the important aspects of the freezing of Iranian assets is its extraterritorial application. The Iranian Government had approximately $385 m for the benefit of Central Bank of Iran and $77 m for the benefit of the National Iranian Oil Company held in accounts in the Chase Manhattan Bank's London branch which were working under the laws of the host State. The United States made some amendments to the banking regulations from time to time, among them the Amendments of November 19, 1979 which mitigated the effects of the broad claims of jurisdiction by allowing the Iranian authorities to withdraw deposits from foreign branches and subsidiaries of U.S. banks that were denominated in currencies other than the U.S. dollar.[55]

On November 29, 1979 the Central Bank of Iran filed suit in London against Chase Manhattan asking for the return of its deposits from the Chase Manhattan's branch in London which had obeyed the freeze order.[56] Following the agreement between the two countries, the funds

54- Case No. 31-157-2 *(Nasser Esphahanian v. Bank Tajarat)*, IX Y.C.A., 1984, p. 280.

55- Section 535.566 of the regulations as amended November 19, 1979. 44 Fed. Reg. 66,832, 66,833 (1979); for further information on the restrictions and amendments to the rules in that regard see Edwards jr. R. W., Extraterritorial Application of the U.S. Iranian Assets Control Regulations,op. cit., pp. 872-6.

that were the subject of Iranian Central Bank's suits against the foreign branches of U.S. commercial banks were first transferred to the account of the Federal Reserve Bank of New York (as fiscal agent of the United States) at the Bank of England on January 20, 1981, and then transferred by the Federal Reserve to the account at the Bank of England of Algier's Central Bank as escrow agent. Following the escrow agent's payments of certain interest and principle on Iranian loans to commercial banks, the funds, which exceeded $5.5 billion, were transferred to the Central Bank's account with the Bank of England.[57]

Iranian assets litigation before the courts in London and Paris raised fundamental problems of private international law and public international law, including those to determine the proper law of banking deposits, the place of payment and nature of Eurodollar obligations and the application of the Bretton Woods Agreement concerning the enforcement of other State exchange control regulations.[58] There is no doubt that the foreign subsidiaries of U.S. banks operate under the banking laws of the countries in which they are established, and the

56- *Bank Markazi Iran v. Irving Trust Co.*, the docket No. of the cases against five of the U.S. Banks in the High Court of Justice, Queen's Bench Division, Commercial Court are 1979-B-No. 5873, 1979-B-No. 5903, 1979-B-No. 5907, 1979-B-No. 5908, 1979-B-No. 5955, 1980-B-No. 549; see generally Iranian Assets Litigation Reporter(Edgemont, pa.: Andrews Publication, Inc.), March 7, 1980, pp. 266-316; loc. cit., May 2, 1980, pp. 639-50; loc. cit., May 16, 1980, pp. 790-802; loc. cit., June 20, 1980, pp. 979-80 and 1028-65; loc. cit., July 3, 1980, pp. 1098-1104; loc. cit., October 3, 1980, p. 1561; see also Edwards jr. R. W., Extraterritorial Application of the U.S. Iranian Assets Control Regulations, A.J.I.L., 1981, pp. 870-902.

57- Loc. cit., pp. 872-3.

58- Carswell R., Economic Sanctions and the Iran Exprience, Foreign Affairs, 1981, p. 250; see generally McKinnon R., Money in International Exchange, New York,1977.

measures adopted by President Carter put those countries in which Iran had deposit in U.S. banks' subsidiaries in a difficult position.[59]

Moreover, the extraterritorial effect of the Presidential Act caused great controversy over several principles of international law. One of those principles is the territoriality principle which provides the primary basis for regulating economic activity of a State.[60] Although there is considerable dispute over the precise content of the limitations on extraterritorial application of national laws, it is widely acknowledged that international law does, in fact, place limitations on them.[61] Such limitations tend to foster predictability and certainty which are vital to international trade and investment.

The imposition of "exchange control regulations" against Iranian assets was intended to put pressure on Iran, rather than to protect the currency of the U.S.A. within the meaning of the above mentioned Section 2 (b) of the IMF Agreement.[62] While, under IMF practice, the foreign branches of U.S. banks are residents of the countries where they are located and are not residents of the United States.[63]

If the U.S. were to protect its economy it would be appropriate to

59- Hermann A. H., Conflicts of National Laws with International Business Activity: Issues of Extraterritoriality, London 1982, p. 35.

60- Brierly J. L., The Law of Nations, 1963, p. 162.

61- Brownlie I., Principles of Public International Law, op. cit., pp. 307; Brierly J. L., The Law of Nations, op. cit., p. 45.

62- The Legal Department of the IMF has taken the position that all exchange restrictions (including security restrictions) approved under section 2(a) are "exchange control regulations"; some writers believe in contrary, see generally, Simon, Mann F., The Legal Aspect of Money, (3rd ed. 1971), pp. 431-50; Nussbaum A., Money in the Law, National and International, (revised edition, 1950), pp. 455-57.

63- IMF, Balance of Payments Manual, (4th ed. 1977), pp. 22-23, 146, paras. 63-67, 435.

apply that restriction against all of the countries which used U.S. currency. Iran was not the only country which had exchange deposits and could deposit them, as is the general practice, in any bank and in any country which she wished. The security consideration mentioned in the regulation seems to have no relevance here, particularly when one bears in mind that the Iranian army had disintegrated and had lost the capacity even to defend its own country. Further evidence is provided by the 1981 Agreement between the two countries which allowed the transfer of assets from the U.S. The economic conditions of the U.S. had neither changed before the release of the hostages nor thereafter. However, the U.S. would have lost an advantage in its attempts to achieve settlement of its claims against Iran if it did not freeze the Iranian assets. It would have become more difficult for the U.S. to solve the hostages crisis too.

Although the immediate aim of the Agreement was to solve the hostages crisis, the most important part of the agreement was the provisions on the return of the Iranian assets and settlement of U.S. nationals' claims.[64] The main importance was given to the Iranian assets which were released in exchange with the release of detainees while securing the payment of future claims which would be decided by an agreed tribunal. Accordingly, when the funds had been received, the Algerian Central Bank should have directed the Central Bank to transfer one-half of each such receipt to Iran and place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account reached the level of $1 billion.[65]

Therefore, it is obvious that the detention of the U.S. nationals, as well as freezing of the Iranian assets, played a significant role in

64- Point II of the General Agreement, Appendix II, op. cit.

65- Point II (7) of the General Declaration, Appendix II, op. cit.

determining the agreed terms concerning the property and contractual rights of the parties and their nationals.

One of the principles which was agreed and declared was that the United States should not intervene in Iran's internal affairs. The principle of non-intervention is directly related to the principle of jurisdiction and to the sovereign rights of States which is a fundamental right of each State. Among other jurisdictional rights, it represents an exclusive right of jurisdiction of a State over all territory, things, and persons within its boundaries.[66] In so far as independence is an inherent right of a sovereign State, intervention is a violation of that right and is illegal under international law.[67] The principle was affirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations and is to the effect that no State or group of States have the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, any form of intervention or attempted threats against the personality of the State or against its political, economic and cultural elements would be regarded as a violation of international law.[68] The necessity of full respect for those principles was reaffirmed in the judgement of the International Court of Justice in the *Nicaragua Case*.[69] Therefore, any pledge in this regard

66- Stockton C. H., Outlines of International Law, London, p. 114.

67- Loc. cit., p. 101.

68- The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter of the United Nations, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

69- Case Concerning Military and Paramilitary Activities in and Against Nicaragua,

seems unnecessary and irrelevant.

Under the Agreement, the United States also agreed to freeze and prohibit any transfer of property and assets in the U.S. within the control of the estate of the former Shah or of any close relative of the former Shah claimed by Iran or the assets of the family of the Shah.[70] However, such property became subject to the law of the United States, and it was always open to the United States' courts to exercise their jurisdiction so as to refuse to transfer those assets which amounted to billions of dollars. If the United States were to apply national law, taking the assets of the Shah and his family would be contrary to the terms of the United States' Constitution and the accepted legal principles of that country. The persons concerned had obtained the United States citizenship, and they should be paid compensation for the taking of those properties according to the United States' laws. The United States, on the one hand, accepted the obligation in response to the claims of Iran for the restoration of those assets. On the other hand, any taking of property of U.S nationals should have been compensated according to the United States' law.[71] This dilemma could not be solved by the existing rules which had been canvassed and defended internationally.

However, any undertaking by the U.S. Government would not bar the United States courts from deciding against Iran, and the claims of Iran in this regard would be considered by the agreed tribunal on the basis of the U.S. laws.[72] The provisions allowed the United States to sit in

(Nicaragua v. United states of America), International Court of Justice Order, may 10, 1984, I.C.J. Reports, 1984, 169.

70- Point IV of the Agreement, Appendix II, op. cit., p. 227.

71- 5th amendment of the U.S. Constitution.

72- Paragraphs 12-16 of the General Agreement, Appendix II; (20 I.L.M., pp. 227-8).

judgement of its own actions. At the same time they contain a contradiction between the responsibility of returning the assets to Iran, and the obligation of treating the Shah and his family as the U.S. nationals.

1 - 2 - The Claims Settlement Declaration

The most important part of the Agreement is the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the government of the United States of America and the Government of the Islamic Republic of Iran. Priority was given to the settlement of disputes by mutual agreement between the Parties which was to be done within six months from the date of entry into force of the Agreement, extendible once by three months at the request of either party.[73] There were a variety of controversies to be decided by the Tribunal, including claims and counterclaims of nationals of the United States against Iran and claims of nationals of Iran against the United States which arose out of debts, contracts (including transactions which were the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights.[74]

The Tribunal was to decide who must be compensated, the legality and the kind of property rights which had been affected and how much

73- Article I of the Declartion of the Government of Algeria concerning the Settlement of claims by Iran and U.S., in 20 I.L.M., op. cit., p. 230.

74- Article II, Appendix II, op. cit.; 20 I.L.M., op. cit., pp. 230-1.

compensation should be paid to the claimants. The controversies arose out of the interpretation of the terms of the Declarations as to who actually was a national of the United States and whether Iran had the right to bring claims against nationals of the United States.

On November 13, 1981, Iran requested the Tribunal to decide on the latter issue.[75] Article II (1) of the Claims Settlement Declaration provides that the Tribunal was established for the purpose of deciding claims of nationals of U.S. against Iran and claims of nationals of Iran against the U.S. and any counter claims arising out of the same contract, transaction or occurrence that constitutes the subject matter of the national's claim. Iran contended that it is the stated purpose of both Parties to terminate all litigation between their respective Governments and nationals of the other, and to bring about the settlement of all such claims through binding arbitration. Iran was of the view that the absence of any relevant exclusion in the Claims Settlement Declaration, with respect to the other provisions of the declarations, meant that Iran had the right to bring claims against the U.S. nationals before the tribunal. The United States claimed that such claims were not referred to in either the General Declaration or the Claims Settlement Declaration and that therefore they were not within the jurisdiction of the tribunal.[76]

The tribunal held by 6 votes to 3 in favour of the United States. The reason for the Tribunal's decision was that, in the list of claims and counterclaims established by the Parties, only 'the claims made by nationals of the U.S.' is mentioned, and they are limited to claims made by citizens of one State against the other and excludes any further exception.[77] On the basis of this interpretation, Iran lost the right to

75- Claims Against U.S. Nationals, 62 I.L.R., 1982, p. 595.

76- Loc. cit., p. 596.

bring about 2500[78] claims against the U.S. nationals.[79]

It is doubtful that Iran intended to deprive herself from of this right which probably amounted a huge sum of money, especially when one bears in mind that Iran had agreed to bear one half of the expenses of the Tribunal. The interpretation of the Tribunal was based on the language of the Declarations rather than the intentions and purpose of the Parties. The view of the Tribunal was that the terms of the Claims Settlement Declaration are so detailed and so clear that they must necessarily prevail over the purported intentions of the Parties, whatever they might have been. This was not a view which the Tribunal adopted in all cases. Instead, there are some cases in which Tribunal took the opposite view and awarded in favour of the U.S. claimant according to the intention of the parties to the dispute and not on the basis of the language of the contract.[80]

By such an interpretation, the Agreement lost its apparent balance and became essentially an unilateral agreement. The effect of the Tribunal's interpretation has been so immense that it has made the Agreement inequitable and unacceptable to Iran. As a result, a majority of American companies had become unjustly rich, receiving sums of money without performance of their obligations and have not had any interest to go to the Tribunal. Moreover, the U.S. Government, for all its special administrative and economic structure, does not exert such wide and diverse control over commercial and economic activities as is

77- Loc. cit., Paras. (i), (ii) of the Judgement.

78- Piran mentions some 1400 claims, Piran H., Nationalisation of Foreign Property in International Law and Iran-U.S. Claims Tribunal, op. cit., p. 179.

79- Brower C. N., The Lessons of the Iran-U. S. Claims Tribunal: How May They Be Applied in the Case of Iraq?, Virg.J.I.L., vol. 32:421, p. 422.

80- *Nasser Esphahanian v. Bank Tejarat* (31-157-2), IX Y.C.A, 1984, p. 281.

assumed by the Iranian Government, and basically lacks direct control in conclusion and performance of such agreements. Therefore, the U.S. Government would not be a person against which the Iranian nationals and Government would file claims to any large extent. Therefore, without permitting equal rights to the Iranian Government, it is inconceivable that a government would waive its sovereign immunity in such a way.[81]

However, in cases numbers A2 and A16, the Tribunal rejected its jurisdiction over claims by Iran against United States nationals, and left these disputes to be solved in future through other means. It was emphasized in case no. A16 that the Iranian Government could only bring counterclaims against the relevant United States nationals and companies which had litigated against Iran in the Tribunal.[82]

The parties to the Agreement waived some of their claims against each other, not all of which can be explained under international law, except to say that the parties had the right to agree on any terms they wished,[83] and they did so.

In the Accords, three categories of claims were excluded:

1- Claims as the result of the seizure of the 52 U.S. nationals, their subsequent detention, injury to the U.S. property or property of the U.S. nationals within the U.S. Embassy compound in Teheran and injury to the U.S. nationals or their property as the result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.[84]

81- Claims Against U.S. Nationals, 62 I.L.R., 1982, pp. 597-606.

82- Survey of Awards(Jurisdiction), (Cases A2, A12, A16), X Y.C.A., 1985, p. 189.

83- Their agreement could obviously not be inconsistent with international law.

84- Paragraph 11 of the General Agreement of 19 January 1981 and Article II(1) of

It is a well established principle of international law that States are not responsible for the injuries and damages sustained by foreigners in consequence of insurrection and popular movements which are out of the control.[85] Thus, the first two categories of claims could be agreed under international law, but any agreement on the claims as the result of popular movements is not unnecessary to mention in such an agreement. For, the responsibility of States is clear if a government be the cause of the injuries to aliens. Injury to U.S. property and that of the detainees was excluded in exchange for the injuries caused by the U.S. military response to the detention of the U.S. nationals.[86]

The broad terms of the Agreement did not specify the range of the damages caused by the popular movement for which the Government of Iran was considered to be not responsible. Tribunal did not give much weight to the role of the revolution which was the main source of all those disputes.

2- Claims as the result of the actions of the U.S. in response to the detention of the U.S. nationals.

3- Claims arising under a binding contract between the parties specifically providing that any disputes thereunder should be within the sole jurisdiction of the competent Iranian courts in response to the Majlis (Parliament) position.[87] No reason has been given why these claims have been excluded. Obviously they cannot be justified under traditional rules of expropriation. They should be explained and interpreted in the

, the Settlement Agreement, Appendix II; 20 I.L.M., op. cit., pp. 227, 231.

85- Brownlie I., Principles of Public Intrernational Law, 1990, op. cit., pp. 465-6.

86- Paragraph 11 of the General Agreement of 19 January 1981 and Article II(1) of the Settlement Agreement, Appendix II, Appendix II, op. cit.

87- Article II(1) of the Settlement Agreement, Appendix II, op. cit.

light of other elements which obliged the parties to conclude the Agreements.

2 - Settlement of the Disputes on Agreed Terms

The Iran-U.S. Agreement included a variety of issues to be solved using various procedures. The different categories of claims were to be resolved in three different ways; by agreement between the parties to the disputes, through binding arbitration and through the competent Iranian courts.[88]

Many claims were in fact settled by mutual agreement between the parties to the disputes.[89] Basically, all of the disputes could be settled by agreement and, failing to do so within six months from the date of entry into force of the Algier's Agreement, they were to be submitted to the binding Arbitration Tribunal.[90] This limitation of time did not bar the parties reach agreement at a later date and present it to the Tribunal for recording and reporting it to the escrow agent to be paid from the Security Account.

Agreements by themselves, like most of the lump sum agreements, do not follow any particular pattern. They usually comprise a package which involve various elements depending on the engagements of the parties. With different motives, they choose conciliation and settlement and usually accept reciprocal obligations. The difference of these

88- Articles I and II of the Settlement Agreement, Appendix II, op. cit.

89- The examples are cases no. 5, 15, 19, 42, 79, 119, 136, 297, 387, 427, 488, 501, 807, 11875.

90- Article I of the Settlement Agreement, Appendix II, op. cit.

settlements with the traditional ones is that the previous agreements were concluded between the governments and the recipient government distributed the money, if any, among the affected nationals through the national claims settlements. Under the Iran-United States Agreement, the interested parties, both persons and government, settled their claims under agreements which normally involved a release of all claims and counterclaims. But payment of any compensation to Americans would be through the Security Account.[91]

Thirty-four Awards on Agreed Terms were issued in 1985, with something over 2,500 of the claims have been settled between the two governments.[92] According to the agreed rules governing the dispute settlement procedures in the Iran-U.S. Tribunal, the Arbitrators do not play much of a role in these agreements, merely accepting, recording and reporting the Settlement Agreements as awards which would be final and binding.[93] Proceedings in a contested case would be terminated in such cases.

However, settlement of this group of agreements was not without difficulty and there arose a series of dissents from the judges in some of the settlement agreements. For example, in case no. 488, the American Arbitrator, Howard M. Holtzmann, expressed concern that the party designated escrow agent did not receive instructions to return the

91- The latest of these kind of agreements is apparently the LAPCO Case (ARCO and SUN Cos.) by which $1,300,000,000 was claimed, but the parties agreed on the sum $260,000,000; reported in Jomhourie Islami (Iranian newspaper) No. 3826, August 22, 1992, p. 2.

92- Brower C. N., The Lessons of the Iran-United States Claims Tribunal: Haw May They Be Applied in the Case of Iraq?, Virg.J.I.L., vol. 32, 1992, p. 421.

93- The Tribunal rules were UNCITRAL Arbitration Rules; in this regard see Articles 32 and 34 of the UNCITRAL Rules in UNCITRAL, The U.N. Commission on International Trade Law, New York, 1986, pp. 146-7.

settlement fund to the Tribunal, but rather to the Iranian Ministry of Defence. If the reciprocal obligations in the settlement agreement were not fulfilled, any possible agreement would be plainly inconsistent with the treaty requirements governing procedure before the Tribunal. He also argued, as he did in case no. 136, that the treaty limitations on use of the Security Account placed a burden on the parties to establish that any property to be transferred in a settlement agreement is property covered by a claim within the framework of the Algiers Declarations. In cases no. 15, 19, 42, 79, 119, 279, 387, 427, 488, 807 and 11875, there were dissenting opinions on the question of the authority of the Tribunal on such agreements and of the degree of confidentiality the Tribunal should afford to settlement agreements when requested to do so by the parties.[94] Through these agreements the parties could use the funds from the Security Account for purposes not included in the Statement of Claim and not falling within the framework of the Algiers Declaration.[95] However, the Agreed Terms have been the best and most satisfactory way of settlement of disputes which have the mutual consent of the parties to the disputes and raise few legal questions.

3 - The Other Means of Settlement of Disputes

Under article II of the Settlement Agreement, the disputes mentioned in the Agreements are to be solved through the Binding Tribunal. One of the exceptions to this rule relates to claims arising

94- Awards on Agreed Terms, IX Y.C.A., 1984, pp. 197-205.

95- Cases 80-136-1 is an example which was dissented by M. Holtzmann on 10 October 1983; see in Y.C.A., vol. IX, 1984, pp. 201-2.

under a binding contract between the parties which has specifically provided that any dispute arising thereunder should be within the sole jurisdiction of the competent Iranian courts in response to the Iranian Parliament's position.[96] These provisions comprise a clear recognition of the authority of domestic laws to decide on the claims of aliens and on local remedies. While the United States and some of the Chambers have been of the view that such properties and rights should be governed by international law, insertion of the clause indicates that the rules on expropriation of alien property and rights are not strict and are very dependent on a series of elements which regulate the relation of those nationals and their governments with the host State. Otherwise, if there are clear international rules governing property and rights of aliens, the decision of any court or tribunal should be based on those rules and the consequences should therefore be consistent. It seems to follow that there is no need to make such exemptions to the jurisdiction of an International Tribunal.

4 - Who was to be Compensated?

The Iran-U.S. Claims Tribunal's decisions caused more confusion over the question of responsibility of States for the injuries to aliens, when the rules were challenged in the Tribunal on the question of who were to be compensated for any damage to property or loss of interest.[97] The Tribunal had jurisdiction to decide on claims made by the nationals of

96- Article II of the Settlement Agreement, Appendix II, op. cit.

97- The rules will be discussed in the following section; dual nationality became one of the controvercial issues before the Tribunal.

the United States. The Accords Agreements clearly ignored the responsibility of Iran towards aliens other than the U.S. nationals. In other words, the responsibility was recognized on the expropriated individuals which were U.S. nationals, and left others to seek a way, if any, to be indemnified. On the other hand, the Tribunal decided on the claims of some individuals who were Iranian subjects and had dual nationality. Provisions had been included to clarify who would be entitled to raise a claim before the Tribunal, but a dispute arose on the issue which engaged the attention of the Tribunal considerably.

The Agreement provides that a 'national' of Iran or of the United States, as the case may be, means a natural person who is a citizen of Iran or the United States.[98] A number of claimants before the Tribunal possessed both nationalities. Therefore, the pursuit of claims by U.S. citizens, without regard to their rights and duties in regard to their Iranian nationality, caused some problems.

From the U.S. point of view, they were permissible according to the plain meaning of the provision and disregarding their dual nationality.[99] Directly enforceable rights of the claimants before the Tribunal, the practice of the parties in prior agreements, modern claims settlements in general and the language of the Article IV(3) of the Declaration were other authorities invoked by the U.S.[100] According to the United States, regard to contemporary principles of international law and relevant case

98- Article VII(1) of the Claim Settlement Declaration, Appendix II, op. cit.

99- Memorial of the United States on the Issue of Dual Nationality, November 19, 1982, *Case* A/18, 23 I.L.M. 1984, pp. 493-96.

100- Loc. cit., p. 494; article IV(3) of the Declaration states that any award which the Tribunal may render against either government should be enforceable against such government in the courts of any nation in accordance with its laws.

law would remove any ambiguity in the provision.[101]

Iran took the contrary position that under international law a State could not be held responsible to its own citizens before an international tribunal, and rejected the argument of the U.S. on the basis that the disjunctive "or" in Article VII(1) necessarily excluded a claimant who is a citizen of both Iran and the United States. Further, international law of diplomatic protection also prohibits claims of dual nationals, since recognizing dual nationals as included in the Declaration[102] would violate the sovereign equality of States.[103] Some traditional sources and legal scholars support the Iranian argument that an individual holding dual nationality may not institute action against either of the States of which he is a national. Under customary international law, in so far as it relates to diplomatic protection, a State which puts forward a claim before a claims commission or other international tribunal must be in a position to show that it (the State) has *locus standi* for that purpose. The principal, and almost the exclusive, factor according to Lauterpacht, creating that *locus standi* is the nationality of the claimant, and it may be stated as a general principle that from the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or a series of persons (a) having the nationality of the State by whom it is put forward, and (b) not having the nationality

101- The special reference by the United States was the *Nottebohm case(Liechtenstein v. Guatemala),* in which the I.C.J. Court defined real or dominant and effective nationality based on stronger ties between the person concerned and one of the States whose nationality is involved, I.C.J. 1955, pp. 4, 22; see also *Merge Case,* Italian-U.S. Conciliation Commission, 14 R.I.A.A., 1955, p. 236.

102- Article VII of the Declaration in Appendix II, op. cit.

103- Case A/18, Concerning the Question of Jurisdiction Over Claims of Persons with Dual Nationality, 23 I.L.M., 1984, p. 493

of the State against whom it is put forward.[104] Leigh in this regard states that:

> "It is reasoned that if both nationalities are valid, then to permit one State to represent the individual against his other State would be to give greater effect to the nationality of the claimant State, thus denying this sovereign equality. Therefore, neither State of which the individual is a national may represent him against the other State whose nationality he possess."[105]

Iran argued that, in the event of doubt, a clause submitting a State to the jurisdiction of an international tribunal must be construed restrictively, and that the Claim Settlement Declaration did not depart from and must be interpreted consistently with the traditional rule of diplomatic protection which clearly prohibited claims by persons possessing the nationality of both the claimant and the respondent States; and that a contrary ruling would violate the 'reciprocal nature' of the Accords. Accordingly, the proper principle to be applied was a rule of absolute non-responsibility of States for claims brought by their own nationals before international tribunals.[106] In awards rendered in March 1983, Chamber Two applied the principle of 'dominant and effective nationality'. As a result, two of the claimants were found to be U.S. nationals, and the claim of the third was dismissed because she had acquired U.S. nationality after the Accords had entered into force.[107]

Under customary international law, it has been established that diplomatic protection is the means by which a State gives effect to another

104- Lauterpacht H., Oppenheim's International Law, 1955, pp. 347-48.

105- Leigh, Nationality and Diplomatic Protection, 20 I.C.L.Q., 1971, p. 460.

106- Case A/18, Concerning the Question of Jurisdiction Over Claims of Persons with Dual Nationality, 23 I.L.M., 1984, p. 492-3.

107- *Esphahanian v. Bank Tajarat*, 2 Iran-U.S.C.T.R., Mar. 29, 1983, pp. 157-8, discussed at 77 A.J.I.L., 1983, p. 646; *Golpira v. Iran*, 2 Iran-U.S.C.T.R., op. cit., pp. 171, 178; *Haroonian v. Iran*, 2 Iran-U.S.C.T.R., op. cit., p. 226.

State's responsibility for an act in contravention of international law affecting the person or property of a national of the first State. The State's right to exercise this protection seems, in turn, to follow from the link of nationality existing between the individual and his State. Without this connecting factor of nationality there can be no diplomatic protection.[108] Thus, Iran contended that the parties intended the Tribunal to adjudicate claims on this basis.[109]

Iran viewed the role of the Tribunal as one of resolving "interstate conflicts" between Iran and the United States[110] and saw the Declaration's primary purpose as ending the Iran-United States international crisis rather than as merely settling private disputes. Accordingly, Iran argued that each government must endorse the claims of its nationals. Iran further contended that awards rendered by the Tribunal were to be paid to the government, rather than directly to the claimant, and that awards which were not made on the basis of diplomatic protection could be challenged as contrary to public international law.[111]

The Full Tribunal, on April 16, 1984, rejected the textual arguments of both Iran and the U.S. and rendered an award which in fact affirmed the principle established in the earlier decisions of Chamber Two.[112] The Tribunal applied the standard of Article 31, Paragraph 3(c) of the Vienna Convention on the Law of Treaties, according to which the parties agreed on the rules governing the interpretation of the Accords.

108- Case A/18, Concerning the Question of Jurisdiction Over Claims of Persons with Dual Nationality, op. cit., p. 493

109- Case A/18, Concerning the Question of Jurisdiction Over Claims of Persons with Dual Nationality, op. cit., p. 493.

110- Loc. cit., p. 493.

111- Loc. cit.

112- Loc. cit., pp. 496-9.

The Tribunal held that the stronger factual ties between the person concerned and the State whose nationality is involved would determine the nationality of the individual.[113] The relevant factors were considered by the Tribunal included habitual residence, centre of interests, family ties, participation in public life and other evidence of attachment. Chamber Two, in the *Esphahanian Case* confronted the contradiction between the principles of diplomatic protection and the non-responsibility doctrine. The Tribunal stated that the first principle applies to "cases of espousal of claims", and the second one to the physical presence of the dual nationals. The Tribunal did not make it clear how a person's claims could be protected while he himself was not protected under international law.[114]

There was the caveat added to the decision to the effect that the other nationality may remain relevant to the merits of the claim.[115] The Tribunal did not make clear what the relevance of the other nationality actually was, nor the degree to which it would affect those nationals. Whatever the effect is, it is not based fully on the rules protecting foreigners against host States.

The question of dual nationality has certainly more than one aspect. One feature of the issue is when two States try to give diplomatic protection to a national against a third State, and the other is when a State diplomatically protects a national who possesses the nationality of the respondent State, as it is the case in the Iranian disputes. In the first instance, contrary to the arguments of the Parties which tried to renounce either of those views, there would be no contradiction between the

113- Loc. cit.

114- *Nasser Esphahanian v. Bank Tejarat* (31-157-2), IX Y.C.A., 1984, PP. 277-8

115- Loc. cit.

principles of diplomatic protection and non-responsibility, both being based on the principle of sovereignty rights over nationals. The same principle precludes a State from affording diplomatic protection to one of its nationals against a State whose nationality such person also possesses.[116] This rule which was ratified by Article 4 of the Hague Convention of 1930, reaffirmed by Article 4 of the 1965 Resolution of the Institute of International Law, and restated by the International Court of Justice in its Advisory Opinion of 1949.[117]

The cases before the Second World War and thereafter[118] did not infringe those principles as it was understood by the Tribunal.[119] In the *Nottebohm Case,* the claimant had lost his German nationality upon taking that of Liechtenstein, but the court declared, *inter alia,* that Guatemala was under no obligation to recognize a nationality which was not genuine.[120] According to the practice of States, arbitral and judicial decisions and the opinions of writers, the legal basis of nationality is the social fact of attachment, a genuine connection of interests and sentiments, together with the existence of reciprocal rights and duties. This reciprocity of rights and duties, together with the principle of sovereign equality, distinguishes a dual national from an alien, and excludes, as was stated in *Merge Case,* diplomatic protection in the case of dual

116- Article 4 of the Hague Convention on Certain Questions Relating to the Conflicts of Nationality Laws, 179 L.N.T.S. p. 89; see also Harris, Case and Materials on International Law, 1979, p. 467.

117- *Nasser Esphahanian v. Bank Tejarat* (31-157-2), IX Y.C.A., op. cit., p. 281.

118- *Panevezys-saldutiskis Case,* 1939, P.C.I.J. Reports, Series A/B, No. 76; *Nottebohm Case,* I.C.J. Reports, 1955, p. 4; *Flegenheimer Claim Case,* 1958, 25 I.L.R. p. 91; *Canevaro Case,* 1912, 6 A.J.I.L. 1912, p. 746; *Salem Case,* 1932, 2 R.I.A.A. 1161; *Merge Claim Case,* 22 I.L.R. p. 443.

119- *Nasser Esphahanian v. Bank Tejarat* (31-157-2), op. cit., p. 277.

120- *Nottebohm Case,* I.C.J. Reports, 1955, op. cit. p. 4.

nationality.[121]

The importance of the issue and its effect upon Iranian responsibility in such cases was that, the Iranian Civil Code imposed certain restrictions on ownership of real property and investments in Iran by foreigners.[122] To prevent individuals from using the advantages of both nationals and foreigners together, any Iranian who wanted to abandon his nationality must, *inter alia,* make arrangements to transfer to Iranian nationals all rights in real property in Iran (including that which they may acquire by inheritance).[123] Moreover, the Iranian Civil Code does not recognize the foreign nationality of Iranians which has been gained against the Law and after 1879, except those admitted by the Council of Ministers.[124] Many Iranian, including the family of Shah, had obtained U.S. citizenship and could bring claims against Iran while according to the Accords, the United States was not only barred from supporting their claims against Iran, but should return their properties to Iran. It was not acceptable for Iran to be respondent to a claimant who was Iranian and might be related to the Shah's family and who, in consequence, so far as the Iranian government was concerned, ought to stand trial for the crimes which they were alleged to have been committed. Otherwise, the claimant could go freely to Iran and administer his property or litigate in the domestic courts without any need to get diplomatic protection from the United States. For countries like the

121- *Merge Case,* 22 I.L.R., op. cit., Para. 5 of the opinion of the Commission.

122- See also Concurring Opinion of Judge Mosk in Case A/18, in 23 I.L.M., p. 505.

123- Article 988 of the Civil Code of Iran.

124- Article 989 of the Civil Code of Iran. In the condition that it does not result to economic domination of Foreigners, Iranian women can hold their imovable prorperties; Article 987 (Note 2) of Civil Code of Iran.

United States, in which ownership of real property is available to all persons, the question of dual nationality may not be problematic. But, in Iran there are a number of restrictions upon the acquisition of property rights by foreigners and the issue of dual nationality is therefore controversial. If nationals are not subject to control by domestic law, especially in economic and exchange control affairs, a few wealthy nationals could bring the country's hard currency balance to a standstill and, in so doing, bring the country to the verge of economic collapse. Moreover, it is inconceivable that the Iranian Government would of its own accord undertake to establish an international tribunal to settle disputes between itself and its own nationals.

That was why Iran reacted to the Tribunal's decision so stridently, threatening to boycott proceedings relating to dual national claims and even to leave the Tribunal completely if it continued to arbitrate those claims. The Iranian Arbitrators called it "a bad faith interpretation," "unbalanced," and "void of any credibility."[125]

The question as to who should be compensated as alien is not limited to dual nationals. Americans who owned shares in non-American companies working in Iran also brought claims before the tribunal. The question that who should be compensated has become more complicated and needs more precise definition to end controversial claims and counter-claims.

---

125. Declaration by the Iranian Members of the Tribunal, April 6, 1984, Iranian Assets Litigation Reports, April 13, 1984, p. 8,264.

(SECTION THREE)

THE ISSUE OF EXPROPRIATION BEFORE THE IRAN-UNITED STATED CLAIMS TRIBUNAL

Pursuant to the Iran-U.S Claims Settlement of January 1981 many American oil companies filed claims against Iran. In their claims these companies relied on the respective agreements concluded between them and the pre-revolution government of Iran and alleged that NIOC and/or Islamic Republic of Iran were in breach of the terms of these oil agreements; and accordingly claimed an award on this basis. As was mentioned earlier, Iran had used its sovereign right to nullify the oil contracts, which was declared in the *Khemco* Case not inconsistent with the provisions of the United Nations Resolutions on Sovereign Rights of Nations over their Natural Resources. They were also nullified as they were considered contrary to the 1951 nationalization Law.

Although the Iranian Civil Code does not recognize the validity of contracts which are against law, without any obligation on the parties to compensate the other party,[126] the single Article Act of 1981 provided that all claims which may arise in connection with the conclusion or performance of the oil contracts could be settled according to decisions made by the Committee established by that law.[127]

There was disagreement on whether disputes arising from the nullification of the oil agreements actually fell within the jurisdiction of the Iran-U.S. Tribunal. Iran contended that they were subject to the sole jurisdiction of a Special Committee under the Iranian Minister of Oil.

126- Article 219 of the Civil Code of Iran.

127- The Single Article Act, the Law No. 1408 of 18 Bahman, 1358 (February 7, 1980).

Further disagreement arose as to whether the phrase "in response to the Majlis position", agreed in the Claims Settlement Declaration, excluded such claims from the jurisdiction of the Iran-U.S. Tribunal.

The Iran-U.S. Tribunal accepted jurisdiction in most cases, thus generally rejecting Iran's argument that the proper forum for hearing these cases was the Special Committee established in the Ministry of Oil in Teheran. In a decision pronounced on 5 November 1982 the Tribunal set a precedent as to how it would treat objections to the Tribunal's jurisdiction.[128]

According to the Accords, claims were divided into those arising out of debts, contracts (including transactions which were the subject of letters of credit or bank guarantees), expropriations and other possible measures affecting property.[129] Traditionally, as was indicated in the previous chapters, expropriation included any interference of a government in contractual rights and property of individuals. The distinction between expropriation, interference in contracts and frustration of contracts is essential and has different legal consequences, particularly as it affects the assessment of damage to the claimants. In expropriation, the consent of the party who is affected by expropriation or prejudiced by it is of no relevance as to the validity of the expropriation, nor can it have any influence whatever on its execution. Thus, an expropriation, modifies or suppresses the legal relations between the party affected by takings and the expropriating State.[130]

International judicial practice has differentiated between the cases in which revolutionaries have been defeated and those in which they have

128- Amin S. H., Commercial Law of Iran, op. cit., 123-4.

129- Article II of the Claim Agreement, 20 I.L.M., op. cit.

130- Kotzarov K., The Validity of the Act of Nationalisation in International Law, 22 M.L.R., 1959, p. 641.

been victorious. Clearly, a government would not be responsible if the rebellions or revolutionaries did not succeed.[131] If the revolutionaries were to succeed, the new government would be considered responsible for the actions of the revolutionaries which had resulted in their victory.[132] This contention is based on the assumption that the revolutionaries have been representing the nation since the beginning and are bound to the undertakings of the nation which are manifested in international contracts and conventions. However, revolutionaries could not be held responsible for the actions which have been necessary to attain the aims of the movement.[133] Accordingly, it was provided by the Declaration that the United States will promptly withdraw all claims of the United States or a United States' nationals arising out of the events occurring before the date of the Declaration related to, *inter alia,* injury to United States' nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. Non-United States nationals were also barred from taking similar actions in the United States.[134]

The injuries to property and other rights of the U.S. nationals could have been sustained for various reasons.

First, injuries incurred during the revolution by the actions of the forces within or without the revolutionary government's control. If the actions were beyond control or inevitable, there is a general rule that the government would not be responsible for injuries caused to foreigners as a consequence.[135] Therefore, Iran could not be held responsible for such

131- McNair and Watts, The Legal Effects of War, Cambridge 1966, p. 81.

132- Loc. cit., p. 83.

133- - Safaei S. H., Force Majeure, B.I.L.S.L.R., (Persian), No. 3, p. 134.

134- Para. 11 of the Algeria Declaration, and Article II of the Claim Settlement Declaration, Appendix II, op. cit.

injuries.

Accordingly, in Case 25-71-1, the Tribunal dismissed Mrs. Grimm's claim that such "property rights" were affected by the alleged failure to protect Mr. Grimm as being far from the natural understanding of the circumstances that this failure affected the life and safety of Mr. Grimm.[136]

Secondly, the injury might be as a result of the success of the movement. If property and contractual rights of foreigners are in conflict with the purpose of the movement, frustration of such rights is inevitable. Some properties or the owner of properties may be the target of the movement. As was the case in the Islamic Revolution in Iran, the United States was the dominant power to such an extent that Iran had effectively became a satellites country of the United States. The number of the claimants indicates that the country was the subject of business invasion by U.S. companies. The presence of U.S. companies was not only due to the economic profit they saw as available, but also to the nature of the regime governing the country which had created a favourable climate for U.S. companies. Fighting against the regime would have automatically jeopardized those advantages enjoyed by U.S. nationals by virtue of the dominance of their country in Iran.[137] The revolution was based on new rules and principles which were demanded by the nation through

135- Safaei S. H., Force Majeure, op. cit., pp. 134-5.

136- *Lilian Byrdine Grimm v. Islamic Republic of Iran*, 25-71-1 of 22 Feb. 1983, Y.C.A., vol. IX, 1984, p. 243.

137- Dominence of the U.S. started since the Second World War when American advisers were brought in by Iranian governmant in an attempt to stabilize the economy and the administration. After Pearl Harbor, American troops took over from the British the operation of the southern part of the railroad and the persian Gulf ports; Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., pp. 30-31.

demonstrations and general strikes, and ratified through referendums. They would inevitably rule the country and affect the rights of the foreigners such as U.S. nationals.

It is equally a general rule accepted internationally and practiced by the United States courts that performance of contracts may become physically and legally impossible. Legally, it becomes impossible when its performance is against the law or what amounts to the same government rules.[138] But, when the government itself is a party to contract, it must be proved that the legislation is not an excuse for not performing the contract, *i.e.,* it should be shown that the legislation is designed for public purposes and reflects the general policy of the government.[139]

This is true when there are some political changes at the head of the State. As was stated in the *Consortium Case,*[140] the Revolutionary events, which culminated in the establishment of the Islamic Government, transformed the whole pattern of social relations in the country. In this process, the rights of the people to the natural resources of the country and, consequently, the legal regime of the country became a central issue of the Revolution. It was a revolution generated by the Iranian people's deep resentment toward Western control over their economic affairs. If American multinationals were to remain in the country and to continue to implement their contracts, which had been entered into by the overthrown regime of the Shah, then the labour strike which brought the oil industry

138- Corbin, On Contracts, T. 6, 1962, Para. 1343. In Article 13 of the negotiated contract between Iran and Talbot UK. in 1981-82 one of the elements which was defined exclusively as force majeure was State regulations (Article 13), in Amin S. H., Commercial Law of Iran, op. cit., pp. 95-101.

139- Safaei S. H., Force Majeure, op. cit., pp. 141-144; the Talbot Contract in, Amin S. H., Commercial Law of Iran, op. cit., pp. 95-101.

140- Award No. 311-74/76/81/150-3 (14 July 1987), 16 Iran-U.S.C.T.R., 3, p. 42, para. 123.

to a standstill throughout the rise of the popular movement would become responsible for damages to the foreign oil companies. The revolution had two main objectives: to combat the internal tyranny of the Shah; and to repel any foreign interference in the nation's social and economic affairs.[141]

The oil, as well as the other, companies were associated, in the mind of the nation, with the regime of the Shah, as a result of the events of 1953 when the CIA and British intelligence service overthrew Mosadiq. The oil agreements which followed the American-backed *coup d'etat* of 1953 were regarded as the outcome of that interference which restored the Shah to power.[142] Under the Shah's government, there was always the possibility of applying political pressure through the royal family and their associates in order to obtain more favourable terms.[143] There was also much corruption when, instead of public tendering process in contracts, individual Iranian authorities were allowed to indulge in "insider dealing" by giving highly sensitive information only to selective applicants, which mostly were U.S. nationals.[144]

After the revolution, the Iranian Council of Ministers, in Law No. 51524 dated 16 Mordad 1358/1980, declared all such contracts void and null. Furthermore, Iranian officials who had arranged such contracts were made liable to criminal prosecution both under pre-revolution legislation and, more severely, under the post-revolution laws of Iran. That was why, except for U.S. nationals, the nationals of the other States were not affected in this way by the revolution. Any attachment of

141- Khalilian, Seyed Khalil, Contrversial Theory of frustration Before Iran-United States Claim Tribunal, 7 Journal of International Arbitration, 1990, p. 17.

142- Lapping B., End of Empire, London, 1985, p. 221.

143- Amin, S. H., Commercial Law of Iran, op. cit., p. 85.

144- Loc. cit., p. 83.

responsibility to such a government is a condemnation of a movement which is clearly contrary to the principles of self-determination in international law.

Unfortunately, international law is silent as to the magnitude of the powerful crippling force created by a revolution, which forces the government to do according to the will of the nation. For example, the oil workers in Iran, a force of about forty thousand spread throughout the most vital zone of the country, were prepared to resist any manoeuvre favourable to American multinationals. In this respect, the workers did not obey the instructions of the NIOC management or the government, which were contrary to the aims of the movement.[145]

Surprisingly, the Tribunal's awards have seldom referred to the factors of control, fault and foreseeability in such a situation, and, contrary to expectations, only a few awards have dealt with the elusive doctrine of changed circumstances.

Thirdly, as a result of the changed circumstances, sometimes aliens are not interested in continuing contracts with the new regime. Before the revolution Iran enjoyed friendly relations with the United States. The United States through its companies, was ready to sign contracts with Iran under the Shah, especially in military and strategic fields, in order to strengthen that regime. Accordingly, major political issues created kinds of contracts which are not usual between less friendly States. For example, contracts for the sale of oil and arms were different from general commercial contracts and involved major legal and political issues.[146] In the post-revolution era, the United States was not interested to continue those strategic and non-strategic contracts with Iran. This attitude was

145- Tribunal Document No. 347, pp. 15-18.

146- Amin S. H., Commercial Law of Iran, op. cit., p. 79.

manifested in the Presidential Executive Order of 14 November 1979 which prohibited commercial transactions with Iran and froze all Iranian assets subject to the jurisdiction of the United States, or within the possession or control of persons subject to the jurisdiction of the United States.[147] What is known as "the Iran-Contra Affair" was in fact the performance of contracts signed by Americans with the Shah's regime; and Iran, then at war with Iraq insisted on delivery of the military equipment. Such an action under the previous regime would have been simply considered as fulfilling contractual obligations. Because of a different attitude toward the new regime, it was changed to a political scandal.

Therefore, disputes between the parties were not limited to the contracts breached or properties taken by Iran. There were many cases in which the U.S. parties pleaded the revolution as an obstacle to performance of the contracts. In some cases the Tribunal dismissed the claims against Iran for the injury to the claimants.[148] So, essentially, there is the question as to who was fully responsible for the injuries to the U.S. nationals and their property, and what constituted taking of property? As far as performance of the contracts was concerned, it was necessary to determine whether the withdrawal of U.S. nationals from contracts was a reaction to the revolution, or whether the revolution was, to some extent, a reaction to the presence and behaviour of the U.S. government and companies. It may be difficult to prove that the U.S. companies were individually responsible for any illegal action which

147- Presidential Orders 12170, November 14, 1979 and 12211, April 17, 1980; 20 I.L.M., 1981, pp. 282-3.

148- The claims which were rejected against Iran were, *Loss of Bee Colonies: Hoffland Honey Co. v. National Iranian Oil Co.*,2 Iran-U.S.C.T.R, January 26, 1983, p. 41; *The Frustration Lease: Queens Office Twoer Associates v. Iran National Airlines Corp.*, 2 Iran-U.S.C.T.R., p. 247.

aggravated the situation in Iran. Their collective role seems more relevant, and when they are associated with the U.S. government, their position would change dramatically.

That was the reason that after the revolution, the new regime terminated hundreds of major contracts with the United States and began to withdraw the assets of Iran from the United States.[149]

In order to determine whether Iran was responsible for the injuries to aliens, it is not be enough to find out whether or not the acts of the new regime had broken the chain of causation set in motion by the Shah's regime, thus relieving or imposing liability on the new regime. The new regime did not represent a continuation of the previous legal, economical and political system, but was instead a rebellion against it. What had been transferred to the new revolutionary regime of Iran was not transferred by means of a peaceful political transfer of power, but rather by means of a popular uprising which cost about seventy thousand lives; and the consequent conquest was not against an external enemy alone, but against an internal enemy which was supported by foreigners. Therefore, any application of the traditional rules of expropriation to these takings is against the cardinal principles of international law on the right to self-determination, which naturally would affect the ruling class of the country and their supporters. That this is so is more evident when one bears in mind that the West in general and the United States in particular, have been holding themselves out, as defenders of democratic values throughout the world. This makes it extremely difficult to determine whether the Iranian measures were unlawful under international law. It is sometimes difficult to find evidence of comprehensive rules of State

149- *Loss of Bee Colonies: Hoffland Honey Co. v. National Iranian Oil Co.*,2 Iran-U.S.C.T.R, op. cit., p. 92.

responsibility for expropriating aliens property by relying on Western legal sources.[150] They have mostly tried to rely on the evident causes for the injuries, rather than the basic problems which developing countries have been facing.

However, as was evident in the Agreement, the post-revolution expropriations in Iran did not take place in the course of a "classical" or post-colonial nationalization programme, although they had some of the characteristics of those types of nationalizations. The measures were carried out to exclude the economic and political influence of some States, in particular of the United States. They were designed to reorganize the economy of the country and to place it on a new basis. As a consequence, as it is evident from the Tribunal's decisions, there were many expropriations which were individual expropriations; and a number of others formed part of a scheme to take over complete sectors of the economy. This equivocal aspect of the measures caused quite a lot of confusion with regard to their legal character and the rules which should apply to them. This feature of the expropriations qualifies them for exceptional treatment in regard to the conditions of expropriation.

Through the Claims Settlement Declaration, Iran and the United States agreed to settle the claims and counterclaims arising *inter alia* out of expropriations or other measures affecting property rights.[151] The language of the agreement indicates a distinction between the claims arising out of the expropriations and other claims, and the Tribunal sometimes has decided on this basis.

Although some of the expropriation cases have been well argued, the difficulty arises that the Chambers of the Tribunal have not adopted a

150. See more about the dependence and partiality of international judges in P.A.S.I.L., 1989, pp. 508-529.

151. Article II of the Claims Settlement Agreement, Appendix II, op. cit.

unified approach to the issues decided by them, and the question of expropriation is no exception. The decisions of the Chambers on the responsibility of Iran as the host State towards U.S. nationals' property and contractual rights are based on different legal grounds, including private law on breach of contracts and public law on the sovereignty rights to take the property and terminate the contracts concluded between the parties to the disputes. Some claims were excluded from the jurisdiction of the Tribunal or were left to the mercy of the local authorities.[152] Those claims decided by the Tribunal followed various procedures and, not surprisingly, different results were often reached.

The restriction upon the jurisdiction of the Tribunal indicates that treating aliens under municipal law is not against international law.[153] The reason for this is that choice of forum clauses are common in trans-national contracts including those of pre-revolutionary Iran. Therefore, the construction of Article II (1) may have widespread importance.[154] In 1982 the full Tribunal heard nine cases involving 19 different forum clauses as "test cases". The United States argued that the term "binding" in Article II(1), read in light of its negotiating history, obliged the Tribunal to determine whether such clauses in particular contracts were enforceable. The United States contended that they were not, both because the Iranian legal system had changed fundamentally, and because U.S. claimants could not receive fair treatment in the Iranian courts. The

152- Para. 11 of the General Declaration and Article II(1) of the Dispute Settlement Agreement, Appendix II.

153- Article 53 of the Viena Convention on the Law of Treaties provides that, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.

154- For a more examined 'choice of forum clauses' see Stein, Jurisprudence and Jurist's Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S.Claims Tribunal, 78 A.J.I.L., 1984, p. 1.

Tribunal rejected the U.S. arguments. It held that the word "binding" was redundant and did not authorised consideration of the enforceability of particular forum clauses.[155] Some commentators characterized the critical element of the Tribunal's analysis as "a presumption of incompetence"; the presumption is to the effect that it is not generally the task of this Tribunal, or of any arbitral tribunal, to determine the enforceability of choice of forum clauses in contracts. The Tribunal was reluctant to assume such a task in the absence of a clear mandate to do so in the Algiers Declaration.[156] As usual, the Tribunal did not cite any authority to support this principle.

There were some expropriation claims which were rejected by the Tribunal and distinguished on the basis of a contractual claim for damages. In *Mobil Oil Iran,* the claimants alleged, *inter alia,* that Iran had repudiated a 1973 agreement with a consortium of oil companies for the sale and purchase of Iranian oil and, in so doing, had expropriated valuable contract rights. The Tribunal rejected this claim, finding instead that the parties had agreed to terminate the 1973 agreement and to negotiate compensation as a consequence of the termination. Hence, there was no expropriation claim, but only a contract claim for damages under the new agreement terminating the old one.[157]

In *Houston Contracting Co. v. National Iranian Oil Co.,*[158] the Tribunal again rejected a large expropriation claim where the claimant had left valuable equipment in Iran. The Tribunal decided that some of it had been expropriated, but it dismissed the entire expropriation claim for

155- *Halliburton Co. v. Doreen/Imco,* 1 Iran-U.S.C.T.R., 1981-82, pp. 242, 245.

156- Loc. cit., p. 12.

157- I.A.L.R., July 24, 1987, at 14, 534, 14,554, para. 2.

158- Award 378-173-3, I.A.L.R., August 26, 1988, at 16,176.

failure to identify the particular equipment that had been expropriated. In *Motorola, Inc. v. Iran National Airlines Corp.,* Chamber Three found that interference by Iranian officials in the relationship between the claimant and its Iranian subsidiary was not factually sufficient to constitute a taking; Arbitrator Brower accused the Tribunal of misreading the documentary evidence in the record and ignoring the reality of Iran's involvement.[159] Again in the case *Eastman Kodak Co. v. Iran,* the Tribunal concluded, on the basis of the factual situation, that no expropriation had occurred.[160]

One of the exceptional cases decided by the Tribunal was *Amoco International Finance Corp. v. Islamic Republic of Iran,* in which Chamber Three declared that government entities are different from governments and the contractual obligations undertaken by them do not bind their governments. Therefore, Iran could expropriate or terminate the contract without being restricted by the obligations of NPC, as a government entity toward Amoco. This view was stated despite the knowledge that NPC had acted as an instrument of the Iranian Government.[161] The award of the Tribunal was considerably distinctive in other aspects of the issue too.

The simple individual expropriations of businesses were not referred to as nationalizations generally, or at least they do not seem to have been regarded as such. They seem to have been treated as simple expropriations of an individual nature which were justified because they were for a public purpose. There were cases, such as takings in the oil industries, in which the takings resulted from or were part of the takeover

159- Award 373-481-3, I.A.L.R., July 29, 1988, at 16,043, 16,050.

160- Award 329-227/12384-3, I.A.L.R., Dec. 11, 1987, at 15,156.

161- *AMOCO International Finance Corp. v. Islamic Republic of Iran,* Award 310-56-3, 15 Iran-U.S.C.T.R., 1987 II, p. 189.

by Iran of entire industries in the course of implementing State control over different areas of the economy. However, that was not the sole purpose of the takings. The U.S. nationals' property was expropriated, because they were privileged as the result of the U.S. domination in Iran. But, the measures were also for public purpose.

(SECTION FOUR)

THE APPLICABLE LAW BEFORE THE IRAN-UNITED STATES CLAIMS SETTLEMENT TRIBUNAL

The parties to the Agreement determined that the Tribunal should conduct its proceedings in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the parties or by the Tribunal to ensure that the agreement could be carried out.[162] The UNCITRAL Arbitration Rules are divided into four sections corresponding to the main stages of arbitral proceedings.

Section 1 contains, *inter alia,* provisions dealing with the scope of the application of Rules, the method for calculating periods of time under the Rules and the contents of the notice of arbitration which marks the commencement of the arbitral proceedings.[163]

Section 2 regulates the composition of the Arbitral Tribunal and the

162- Article III(2) of the Claims Settlement Agreement,, Appendix II, op. cit.

163- Articles 1-4 of the UNCITRAL Arbitration Rules, UNCITRAL, The U.N. Commission on International Trade Law, op. cit., pp. 137-8.

number of Arbitrators.[164]

Section 3 is concerned with the conduct of the arbitral proceedings.[165]

Section 4 deals with technical matters concerning the Award, as well as with the costs of arbitration.[166]

According to Article 33, the law applicable to the merits of the case should be clearly distinguished from the law applicable to the arbitral proceedings. The law applicable to the arbitration proceedings should be the arbitral procedural law of the place of arbitration, unless the parties choose another law to be applied.

The UNCITRAL Rules are acceptable in countries with different legal, social and economic backgrounds, and provide international uniformity.[167] They are not subject to nationalistic labels and are considered as a bridge between the arbitration systems of the common law and civil law countries.[168] At the time when the Iran-U.S. Claims Tribunal was created, the UNCITRAL Rules were new and untested. It is said that, by incorporating the UNCITRAL Rules by reference, it has "put some meat on the bones".[169]

164- Articles 5-14 of the UNCITRAL Arbitration Rules, UNCITRAL, The U.N. Commission on International Trade Law, op. cit., pp. 138-141.

165- Articles 15-30 of the UNCITRAL Arbitration Rules, UNCITRAL, The U.N. Commission on International Trade Law, op. cit., pp. 141-5.

166- Articles 31-41 of the UNCITRAL Arbitration Rules, UNCITRAL, The U.N. Commission on International Trade Law, op. cit., pp. 146-9.

167- McClelenand, International Arbitration, 17 Virg.J.I.L., 1977, p. 729; Bellet P., Forward, 16 L.p.I.B., 1984, pp. 671-2.

168- Bellet P., Forward, 16 L.P.I.B., op. cit.

169- Owen R. B., The U.S.-Iranian Hostage Settlement, 75 P.A.S.I.L., 1981, p. 237.

1 - The Procedural Rules

The Rules of Procedure applied are of prime importance when assessing the operation of the tribunal. This work is not concerned with the procedural rules of such institutions. However, the rules and modifications to UNCITRAL Rules, are related to the way of resolving the disputes between the parties and ought to be considered briefly.

One of the rules which might affect the parties to the disputes is any party aggrieved by a decision of the tribunal might seek nullification in the Dutch courts. Iran attempted to do this in some cases, but withdrew the request. This issue gave rise to a controversy as to whether the Tribunal's awards were international or Dutch, and what the legal status of the Tribunal actually was. The point is fundamental. If the tribunal was a creature of Dutch law, the validity of its proceedings and awards would have to be determined under Dutch law. Otherwise, the awards would take their force from the treaty establishing the Tribunal and the Tribunal's actions would be governed by Dutch law only to the limited extent that any international organization is subject to the law of the country that hosts it. Either procedure would have practical importance in determining the extent to which the Tribunal's proceedings might be governed by the Dutch rules and, possibly, the manner in which its awards might be enforced.[170] The considerations supporting the applicability of the Dutch Code to the Tribunal's awards are not inconsiderable. The tribunal is an arbitral court, and the two countries specified The Hague as the place of arbitration in the Claims Settlement Declaration.[171]

170- See the comprehensive discusion in this regard in Lake and Dana, Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal Awards Dutch?, 16 L.P.I.B., 1984, pp. 755-812.

The subject matter of the private claims over which the Tribunal has jurisdiction - principally contract and expropriation - are the same as those of claims heard by many *ad hoc* commercial arbitral panels that act under national arbitral laws. The difference is that it is not an entity called into life by a commercial contract, but is instead an international arbitration tribunal established by two States through an international treaty.[172] If the Accords specified the Hague only to provide a neutral place for the Tribunal's deliberations, it would be a defect in the Agreement which would then have left the parties without any support in the event that one of them was justly dissatisfied with the work of the Tribunal. However, Iran and the United States had no apparent reason to make the Dutch courts the final arbiters of their disputes, particularly when they stressed repeatedly that they intend Tribunal awards to be final.[173] However, if the Hague District Court had chosen to exercise jurisdiction, the challenges filed by Iran would have created serious obstacles on the merits.

The tribunal was also to decide on Small Claims, which amounted to less than £250,000 and which comprised about 2,795 claims. The claimants in these cases were not given an equal right to present their claims to the Tribunal.[174] The Tribunal made little progress in resolving these claims and ultimately all of them were settled between the two States

171- The Accords refer to the Tribunal as an "arbitral" body and to its proceedings as "arbitration", Articles I, II(1) and VI(1) of the Claims Settlement Declaration Appendix II, op. cit.

172- In the *Esphahanian Case* it was stated that the Claims Settlement Declaration and the General Declaration together constitute a treaty under international law, 2 Iran-U.S.C.T.R., p. 160.

173- Articles I, IV(1) of the Claims Settlement Agreement; Para. B, Article VII(2) of the General Declaration; there are similar provisions in the Statute of the I.C.J., Articles 23(1), 34(1).

174- Article 3(4) of the Claims Settlement Agreement, Appendix II, op. cit.

in 1990. In this connection Iran paid a lump-sum amount of $50 million to the United States to be distributed among the claimants.[175]

2 - The Governing Law Applied by the Iran-U.S. Claims Tribunal:

The Claims Settlement Declaration permitted the Iran-U.S. Claims Tribunal to look to a wide range of sources in order to enable it determine the appropriate law to apply. The same provisions were accepted as a modification to UNCITRAL Rules to be applied by the Tribunal. Article V of the Declaration and the modified rules provide that:

> "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commerce and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."[176]

These provisions appear to have been taken from Article 15 of the 1899 Hague Convention for the Pacific Settlement of International Disputes which defines the object of international arbitration to be "the settlement of differences between States by judges of their own choice and on the basis of respect for law."[177] The Tribunal has quite a large choice of law. As was stated by Bellet, the Tribunal adopted its own procedures for determining the appropriate law as to choice of law principles on the view that international arbitrators need no longer be bound by strict rules

175- Award No. 483- claims of less than $250,000/86/B38/B76/B77-FT; see Piran H., Nationalisation of foreign Propert in International Law and Iran-U.S. Claims Tribunal, op. cit, p. 178; Tewart D. P., The Iran-U.S. Claims Tribunal...., 16 L.P.I.B., 1984, p. 685.

176- UNICTRAL Rules modified by the parties, Y.C.A., vol. VIII, 1983, p. 251.

177- Convention for the Pacific Settlement of International Disputes, July 29, 1899, U.K.T.S., 1901, No. 9 (Cmd. 798).

of conflicts of law.[178] The Tribunal also retained a wide discretion as to which rules of law apply to any given issue and this view is supported by the reference to "changed circumstances" and the loose terminology requiring decisions "on the basis of respect for law". The importance of the effects of Article V of the Claims Settlement Declaration is that an international tribunal which, due to its nature, must apply principles of public international law is not barred from applying municipal law or resorting to any mechanism found in private international law.[179]

Recourse by an international tribunal to municipal laws and rules of private international law is rather common and, sometimes, even indispensable. This is so, not because private international law is desirable from the point of view of governments, but is a result of the defects and inadequacy of public international law. International tribunals refer to pertinent rules of municipal law to settle preliminary or incidental issues such as the nationality of natural persons, the status of heirs, or the conditions of validity of a contract, as well as other formalities which must be resolved at an early stage. However, it seems that the function of an international tribunal applying municipal law in regard to an international issue is different from that of a municipal court.

The main issue which an international tribunal is called upon to decide is whether the respondent State has complied with its international obligations, which question must be settled in light of the principles of international law. However, expressions as to the supremacy of international law over municipal law in international tribunals should not

178- Bellet P., Forward, 16 L.P.I.B., op. cit, pp. 667-74.

179- Jones D. L., The Iran-U.S. Tribunal: Private Rights and States Responsibility, 24 Virg.J.I.L. 4, 1984, pp. 259-60.

be taken to mean that the provisions of domestic legislation are either irrelevant or unnecessary. The role of domestic rules might be vital to the working of the international legal machine, and that is one of the ways to understand and discover a State's legal position on a topic to international law.[180] The necessity for examining the relevant municipal law was indicated in the *Serbian* and the *Brazilian Loans cases,* by the Permanent Court of International Justice in 1929.[181] In those cases, the Court was faced with the problem whether, in its application of municipal law, it should consider itself bound by, or free to disregard, the decisions of the national courts in those cases.

The Court stated that:

> "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country".[182]

Moreover, the Court in its decision referred to rules of private international law and municipal statutes of the Serbian and Brazilian States as evidence in its judgement.

Similarly, a majority of the claims before the Iran-U.S. Tribunal have been decided entirely or substantially on the basis of the parties' contracts. Where there was no contract, or where it did not provide a sufficient basis for decision, the Tribunal applied other rules. Therefore, the provisions of Article V of the Agreement do not depart materially from the usual practice of international courts. The provisions to the effect that cases should be decided on the basis of respect for law were not essentially new. They were in fact based upon both Article 37 of the Hague Convention of October 18, 1907 on the Pacific Settlement of

180- *The Anglo-Iranian Oil Co.,* I.C.J. Reports, 1952, p. 93; the position of Iran on the question of dual-nationality indicates the relevance of municipal laws.

181- P.C.I.J. Sers. A, Nos. 20, 21, pp. 16-49, 101-126.

182- Loc. cit., p. 41.

International Disputes, by which international arbitration had for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Because of practical and political necessity, Iran and the United States introduced some broad and imprecise standards to the tribunal through the Agreements. When the Claims Settlement Declaration was negotiated in 1980-81, the parties to the Agreement could not have agreed on any legal system of law or of conflict of laws to govern the claims. The task of identifying applicable law, a subject of great complexity and importance, was regulated in a single sentence and was left within the discretion of the tribunal.[183] The ordinary meaning of the text allowed the Tribunal to determine which substantive law be applied without reference to any choice of law rules. Under the provisions of the International Convention on Settlement of Investment Disputes (ICSID) Between States and Nationals of Other States of 1965, an ICSID tribunal must decide a dispute in accordance with rules of law agreed upon by the parties. If there were no such agreement, the tribunal was to apply the law of the contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as might be applicable. Arbitration under the ICSID or the European Convention is authorised by treaty and rests on public law foundations.[184] The rules of both ICC Court of Arbitration[185] and UNCITRAL[186] have followed the

183- Owen R. B., The Final Negotiation and Release in Algiers, in American Hostages in Iran, (Kreisberg ed.), 1985, p. 297; Crook J. R., Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Exprience, 83 A.J.I.L., 1989, pp. 280-81.

184- ICSID Convention, 575 U.N.T.S., p. 159; 17 U.S.T., p. 1270; European Convention on International Commercial Arbitration, April 21, 1961, 484 U.N.T.S., p. 364.

185- Article 13(3), 28 I.L.M., 1989, p. 231.

European Convention approach, allowing broad discretion to the parties.

However, the Tribunal has typically avoided any decision upon the actual basis for the application of national rules, even in cases where the parties might arguably have agreed on them as the basis of decision. The Tribunal has regularly applied non-national principles derived from the parties' contracts, general principles of law or public international law. To avoid applying particular national law rules, the Tribunal sometimes disregarded the principle of party selection of applicable law which is fundamental to the ICC and UNCITRAL.

C. M. I. International, Inc. v. Iran involved a claim for breach of contract arising out of equipment purchase orders that incorporated the laws of the state of Idaho. The Tribunal decided that it was not bound by party's choice of law. The Tribunal held:

> "It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining, case by case, the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only claims of a commercial nature, such as the one involved in the present case, but also claims involving alleged expropriations or other public acts, claims between the two Governments, certain claims between banking institutions, and issues of interpretation and implementation of the Algiers Declarations. Thus, the Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national laws, "taking into account relevant usages of the trade, contract provisions and changed circumstances", as Article V directs".[187]

The case was subject to the laws of the state of Idaho and, although the application of the law of that state would have led to the same result in determining damages, the Tribunal preferred to analyse the damages questions in accordance with general principles of law.[188] The Tribunal

186.- 15 I.L.M., 1976, p. 701; 24 I.L.M., 1985, p. 1302.

187.- Award No. 99-245-2, 4 Iran-U.S.C.T.R., 1983 III, pp. 267-8.

188.- Loc. cit., p. 268; see also Bellet, Forward, 16 L.P.I.B., op. cit., p. 674.

considered that its task was to determine what losses had actually been suffered by the claimant and to award compensation on the basis of the somewhat nebulous principles of "justice and equity" under customary international law, while it did not give detailed analyses or explanations of its choices of law.[189] Equally in *Craig v. Ministry of Energy,* the Tribunal rejected the application of rules of domestic law, stating that such a law is not binding on an international tribunal.[190]

However, there are cases in which Tribunal applied national laws.[191] Where the Tribunal applied the rules stated in the terms of the contracts, application of domestic law as the proper law of the contracts was inevitable. In *Economy Forms Corp. v. Iran,* the Tribunal's award was based entirely on national law. The Tribunal held United States law governed the contract and its formation, since "the centre of gravity of these business dealings was in the United States, that being the test under general principles of conflicts of law."[192] A similar analysis was applied in *Harnischfeger Corp. v. Ministry of Roads and Transportation* which involved cranes manufactured and delivered F.O.B. in Iowa. The Tribunal Stated:

> "The agreement ..... makes no reference to governing law; however, under general choice of law principles, the law of the United States, the jurisdiction with the most significant connection with the transaction and the parties, must be taken to govern in this specific case.....
> The United States law applicable to this commercial transaction is the Uniform Commercial Code..... ."[193]

189- Award No. 99-245-2, 4 Iran-U.S.C.T.R., op. cit., pp. 263, 267-68.

190- Award No. 71-346-3; see also Stewart D. P., The Iran-U.S. Claim Tribunal: A Review of Development 1983-84, 16 L.P.I.B., 1984, p. 713.

191- *Sea-Land Service, Inc. v. Iran,* 6 Iran-U.S.C.T.R., 1984 II, p. 149.

192- *Economy Forms Corp. v. Iran,*3 Iran-U.S.C.T.R., 1983 II, pp. 42, 48.

193- *Harnischfeger Corp. v. Ministry of Roads and Transportation,*7 Iran-U.S.C.T.R., 1984 III, pp. 90,99.

3 - Iran-United States Treaty of Amity; Its Application to the Expropriation Cases Before the Iran-U.S. Claims Tribunal

Immediately after the *coup d'etat,* on 15 August, 1955, Iran and the United States signed the Treaty of Amity, Economic Relations and Consular Rights to protect the future of American investments in Iran.[194] The Treaty dealt, *inter alia,* with the protection of investment and the standard of compensation in the event of the expropriation of properties. The Treaty, among other things, provided that:

> " 1- Each High Contracting Party at all times accord fair and equitable treatment for nationals and companies of the other High Contracting Party, and to their property and enterprises, and shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests, and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.
>
> 2- Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken, and adequate provision shall have been made at or prior to the time of taking for the determination and payment of thereof."[195]

The position of the Tribunal under the Treaty of Amity varied in different cases, and the interpretation of the treaty was self-contradictory. In some cases, the Treaty was considered as valid, prevailing over general rules,[196] while in some others it was considered null and void.

194- Treaty of Amity, Economic Relations and Consular Rights Between Iran and the United States, in 284 U.N.T.S., 93; persian text in Official Gazette No. 3589, June 5, 1957 (15 Khordad, 1336).

195- Article IV of the Treaty of Amity, op. cit.

In the *Phelps Dodge case,* the Tribunal expressly declared that Article IV-2 of the Treaty of Amity was clearly applicable at the time the claim arose and, whether or not the Treaty was still in force, it was a relevant source of law on which the Tribunal would be justified in relying upon in reaching its decisions.[197] Equally in *INA Corp. v. Iran,* the Tribunal took a firm stance and based its decision on the quantum of compensation payable to the dispossessed owner entirely on the provisions of the Treaty in this respect. The Tribunal argued that:

> "The continued validity and effect of the Treaty have not been contested by the Respondent in any of the written pleadings in this case. ..... Nor did the parties invoke any 'changed circumstances' or principles of international law, capable of invalidating, suspending or modifying the Treaty, which the Tribunal is bound to take into account or apply in all cases according to the provisions of Article V of the Claims Settlement Declaration. ..... The Tribunal must therefore assume that for the purpose of the present case the *Treaty remains binding* as it is drafted."[198]

However, the Tribunal did not consider the provisions of the Treaty as an extension of the scope of either State's international responsibility beyond those categories of acts already recognized by international law as giving rise to liability for taking.[199] Applying the provisions of the Treaty of Amity, the Tribunal's Chambers, on different occasions, have produced different interpretations.[200]

Iran denied that the Treaty had any effect with regard to the events

196- *INA Corp. v. The Government of the Islamic Republic of Iran,* Case No. 184-161-1, 8 Iran-U.S.C.T.R., 1985 I, pp. 373, 378-79; see also in XI Y.C.A., 1986, p. 313.

197- *Phelps Dodge Corporation and Overseas Private Investment Corporation* (OPIC) v. *Iran,* Award No. 217-99-2, March 19, 1986, 10 Iran-U.S.C.T.R., p. 132.

198- Emphasis added, Loc. cit.

199- Loc. cit.

200- For example see Separate Opinion of Judge Lagergren, the Chairman to Chamber 1 on 15 August 1985.

of 1978-1980. Iran argued that the Treaty terminated on the grounds that circumstances had changed and that the United States Government had breached the Treaty by imposing economic sanction against Iran, blocking Iranian deposits and assets, and intervening to rescue the American nationals held in Iran in 1980. In other words, Iran considered the Treaty terminated by implication.[201] The American claimants, on the other hand, regarded the Treaty as valid and applicable to the legal relations of the parties before the Tribunal.[202]

The Tribunal sometimes avoided reaching a decision solely on the basis of the Treaty, referring instead to customary international law as the source of applicable standards.[203] For example, in the *Sea-Land case,* the Tribunal did not apply the Treaty and stated:

> "Aside from any conclusion as to the continued validity or effect of the Treaty ..... there is nothing in either Article II or Article IV of the Treaty which extends the scope of State's international responsibility beyond those categories acts already recognized by international law as giving rise to liability for taking."[204]

In some other cases, the Tribunal did not even mention the Treaty and based its decisions on customary international law.[205] In yet others,

201- *Phelps Dodge Corporation and Overseas Private Investment Corporation* (OPIC) v. *Iran,* Iran-U.S.C.T.R., op. cit., p. 130.

202- The pleadings in *the Khemco case,* op. cit., Claimants' Brief of August 2, 1982; see also Memorandum of the Department of State ....., in Lillich R. B., Valuation of Nationalized Property in International Law, vol. 4, op. cit., p. 207.

203- *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA,* 6 Iran-U.S.C.T.R., 1984 II, pp. 219, 225; *American Int'l Group, Inc. v. Islamic Republic of Iran,* 4 Iran-U.S.C.T.R., 1983 III, pp. 96, 105, 109; *Starrett Hous. Corp. v. Iran,* 4 Iran-U.S.C.T.R., op. cit., pp. 122, 157.

204- *Sea land Sevices Inc.* v. *The Islamic Republic of Iran and Ports and Shipping Organization of Iran.,* Award No. 135-33-1, June 22, 1984, 6 Iran-U.S.C.T.R., p. 168.

205- *Tippetts, Abbett, McCarthy, Stratton,* v. *The Islamic Republic of Iran,* Award No. 141-7-2, June 29, 1984, 6 Iran-U.S.C.T.R., p. 219.

the Tribunal appeared doubtful whether the Treaty was relevant or applicable at all.[206]

Therefore in some cases, the Tribunal applied the Treaty of Amity and its "just compensation" standard, which was sometime interpreted as "full",[207] and at other times as "partial"[208] compensation. Chamber One of the Tribunal applied the Treaty as *lex specialis,* requiring full compensation equal to the "fair market" value of the expropriated property.[209] The "fair market" value admitted under the Amity Treaty was suggested by Lagergren to be not equal to the traditional rule of "prompt, adequate and effective" compensation, although modified so as to allow partial compensation where a government has nationalized property in the implementation of fundamental and large-scale economic reform.[210]

However, the legal position of the Treaty of Amity, Economic Relations and Consular Rights between Iran and United States under the Shah's regime clearly should not be defended as a treaty between the two nations, since it was in fact a reward for the U.S. support and action in 1953 *Coup d'etat.* Moreover, the fact that the revolution was a popular one demonstrated that the Shah's regime was not a democratic regime representative of the Iranian people. Its legitimacy was doubtful, at least

206- *American Int'l Group, Inc. v. Islamic Republic of Iran,* 4 Iran-U.S.C.T.R., p. 105.

207- Crook J. R., Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Exprience, 83 A.J.I.L., 1989, p. 301; Separate Opinion of Judge Holtzmann, 8 Iran-U.S.C.T.R., 1985 I, p. 391.

208- Separate Opinion of Judge Lagergren, 8 Iran-U.S.C.T.R., op. cit., p. 385; Ameli joined in Lagergren's opinion, loc. cit.

209- 8 Iran-U.S.C.T.R., 1985 I, pp. 378-79; see the summerized in 80 A.J.I.L., 1986, p. 181.

210- Loc. cit.

since the 1953 *Coup d'etat,* which brought Shah back to the power. Therefore, any treaty and contract with such a regime would have been in violation of the principles of international law.

This uncertainty was indirectly recognized by some Chambers of the Tribunal by not invoking the Treaty in their judgements. Chamber Two in the cases of *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA,*[211] *American Int'l Group, Inc. v. Iran,*[212] *Starrett Hous. Group. v. Iran,*[213] did not rely on the Treaty of Amity between the two countries as a source of law, but referred to customary international law and general principles of law to decide on compensation rights of the claimants.

Therefore, with respect to the events in Iran, and the involvement of the United States in the country, it seems inequitable to apply the provisions of the treaty as a basis for amity and friendly relations between Iran and the United States. Any reference to that Treaty as a source of international law governing the relations of the parties would be one-sided and unacceptable.

4 - Application of the Contracts Rules:

A large majority of the cases, in which there was held to be jurisdiction, have been decided on the primary or exclusive basis of the terms of the parties' contracts, without substantial reference to any other system of law. In this sense, the Tribunal has frequently given the parties

211- *Tippetts, Abbett, McCarthy, Stratton,* v. *The Islamic Republic of Iran,* Award No. 141-7-2, June 29, 1984, 6 Iran-U.S.C.T.R., 1984 II, pp. 219, 225.

212- *American Int'l Group, Inc. v. Islamic Republic of Iran,*4 Iran-U.S.C.T.R., 1983 III, pp. 105, 109.

213- Loc. cit., pp. 122, 157.

the controlling voice in determining the applicable law. The fundamental role assigned to contract has been construed to be the most important reason for the limited use of choice-of-law analysis in the Tribunal's jurisprudence.[214]

Contracts do not exist in a vacuum and some systems of law regulate their formation, interpretation and implementation. However, the Tribunal addressed them in terms of general principles of commercial law or public international law. In the *Mobil Case,* it was declared that the Tribunal does not consider it appropriate that such an Agreement be governed by the law of one Party. The Tribunal concluded that the contract, which was a sale and purchase agreement between a consortium of Western oil companies and Iran, was governed for most purposes by the general principles of commercial and international law.[215]

In the claims involving simple demands for payment in sale transactions, choice of law issues rarely arose. The Tribunal was generally required to determine simply whether the goods were shipped, services performed or payment made. All legal systems require payment for goods and services sold; thus, if default was found, the contract standard was applied to establish damages.[216] In *Iran Nat'l Airlines v.*

214- Crook, Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Exprience, 83 A.J.I.L., 1989, p. 288.

215- *Mobil Oil Iran, Inc. v. Iran,* I.A.L.R., July 24, 1987, at 14,543.

216- *Endo Laboratories v. Iran,* 325-366-3, I.A.L.R., Nov. 13, 1987, at 14,999; *Exxon Corp. v. National Iranian Oil Co.,* 322-154-3, I.A.L.R., Nov. 13, 1987, at 15,011; *Parguin Private Joint Stock Co. v. United States,* 13 Iran-U.S.C.T.R., 1986 IV, p. 261; *Oil Field of Texas, Inc. v. Iran,* 12 Iran-U.S.C.T.R., 1986 III, p. 308; *McLaughlin Enter., Ltd. v. Iran,* 12 Iran-U.S.C.T.R., op. cit., p. 146; *Litton Sys., Inc. v. Iran,* 12 Iran-U.S.C.T.R., op. cit., p. 126; *Columbia Univ. v. Iran,* 10 Iran-U.S.C.T.R., 1986 I, p. 319; *Lischem Corp. v. Atomic Energy Org.,* 7 Iran-U.S.C.T.R., 1984 III, pp. 18, 22-23; *R. J. Reynolds Tobacco Co. v. Iran,* 7 Iran-U.S.C.T.R., op. cit., pp. 181, 190-91; *Ram Int,l Indus., Inc. V. Iranian Air*

United States,the Tribunal explicitly rejected the parties' calls to refer to national law in analysing simple transactions, The Tribunal stated:

> "the Tribunal decides that all questions may be resolved by reference to the practice of the Parties and the relevant provisions of the contract".[217]

Similarly in *Dames and Moore v. Iran*, Chamber Three applied the term of the contract and stated:

> "It is a well established general principle in various legal systems that in commercial relationships one party may be obligated to pay another party, with which it has been doing business, a sum specified in an invoice if it receives the invoice but does not object to it within a certain period of time."[218]

Some other cases were complex and involved long-term contracts whose performance was interrupted in 1978 and 1979. Disputes over these contracts were complicated and the Tribunal looked to the terms of the contracts in order to determine the parties' legal rights and obligations. In *Charles T. Main International, Inc. v. K. W. P. A.*[219] and *Richard D. Harza v. Iran cases*,[220] the Tribunal had to determine whether the companies' works satisfied the contract standard of good engineering practice by referring the cases to engineering experts.

General principles also have been applied to deny effect to contract provisions. In *Harnischfeger Corp. v. Ministry of Roads and Transportation*, Chamber Three found that it is a generally accepted principle in various legal systems that an essential error regarding the conditions upon which a party has entered into a contract may relieve that

---

Force, 3 Iran-U.S.C.T.R., 1983 II, pp. 203, 206; and *Intrend Int'l Inc. v. Iranian Air Force*, 3 Iran-U.S.C.T.R., op. cit., p. 110.

217- *Iran Nat'l Airlines v. United States*, 336-B-12-2, I.A.L.R., Dec. 11, 1987, pp. 15, 137, 15, 139.

218- *Dames and Moore v. Iran*, 4 Iran-U.S.C.T.R., 1983 III, pp. 212, 221.

219- *Charles T. Main International, Inc. v. K. W. P. A.*, 11 Iran-U.S.C.T.R., 1986 II, p. 259.

220- *Richard D. Harza v. Iran*, 11 Iran-U.S.C.T.R., 1986 II, op. cit., p. 76.

party from liability, at least where the other party knew or should have known about the error.[221]

5 - The Principles of International Law:

The principles of international law which constitute the Tribunal's third significant source of law were accepted by the parties as governing the disputes between the two countries. It has also been inserted in the provisions of the ICC, ICSID (Article 42), and other institutions, and was applied by most tribunals as the law governing trans-national contracts. Examples are the cases of *Agip Company v. Popular Republic of the Congo*[222] and *Benvenuti et Bonfant v. People's Republic of the Congo*[223] where the contract did not stipulate a governing law and the tribunal applied the principles of international law as well as Congolese law. A similar result was reached in the case of *Saudi Arabia v. Arabian American Oil Company*[224] in which the concession contract did not specify a governing law and it was provided that the Tribunal should decide the dispute in accordance with Saudi Arabian law insofar as matters within the jurisdiction of Saudi Arabia were concerned, and decide in accordance with the law deemed by the Arbitration Tribunal to be applicable, insofar as matters beyond the jurisdiction of Saudi Arabia were concerned.[225] In that case, the Tribunal applied principles of

221- *Harnischfeger Corp. v. Ministry of roads and Trasportation,* 8 Iran-U.S.C.T.R., 1985 I, pp. 119, 133.

222- *Agip Company v. Popular Republic of the Congo,* 21 I.L.M., 1982, p. 726.

223- *Benvenuti et Bonfant v. People's Republic of the Congo,* op. cit., p. 752.

224- *Saudi Arabia v. ARAMCO,*27 I.L.R.pp. 117, 154.

225- Loc. cit., pp. 168, 194, 212.

customary international law. Similarly, in *the Aminoil Case*, the Arbitration Tribunal applied public international law, even though the Arbitration Agreement did not specify that international law should be applied.[226]

The principles of international law are created through the sources of international law which themselves are dependent on common consent. As was stated in *Lotus Case*,[227] States are not bound without their consent, which may be expressed either directly by an express declaration or conclusion of a treaty stipulating certain rules for the future international conduct of the parties, or indirectly by conduct which implies customary submission to certain rules of international conduct. Reference to principles of international law requires "common consent" as the binding force and the main source and evidence of international law. Therefore, the "principles of international law" in the Algiers Agreement bears the same meaning as that in Article 38(1) of the Statute of the International Court of Justice. The principles of international law, as stated by Dupuy in *the Texaco v. Libya*,[228] include general principles of law with elements of international custom and practice which are accepted by the law of nations. The Permanent Court of International Justice in the *Lotus Case* defined the principles of international law to mean international law as it is applied between all nations belonging to the community of States.[229]

The Iran-U.S. Claims Tribunal is undoubtedly entitled to apply international law, as was agreed by the parties to the Agreement. The Tribunal in cases No. 2 and 7 based their decisions on international law

226- *Aminoil Case*,66 I.L.R., pp. 561, 587, 591.

227- *Lotus Case*, P.C.I.J.,1927, No. 10, Ser. A, P. 16.

228- *Texaco v. Libya*, 53 I.L.R., 1977, p. 452.

229- *Lotus Case*, op. cit., P.C.I.J.

and customary international law.[230] In *Oil Field of Texas, Inc. v. Iran*, the Tribunal stated that the controlling rules had to be derived from principles of international law applicable in analogous circumstances or from general principles of law.[231] It was added:

> " The development of international law has always been a process of applying such established legal principles to circumstances not previously encountered."[232]

In *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, American Int'l Group, Inc. v. Iran, and Starrett Hous. Corp. v. Iran.*,[233] the Tribunal referred to customary international law as the source of applicable law in assessing the required compensation.

The role of public international law reflects the Tribunal's unique mixed jurisdiction, embracing both inter-State disputes governed by this body of rules, and Iranian or U.S. nationals' claims against the other Government arising out of debts, contracts, expropriations or other measures affecting property rights.[234]

In practice, the Tribunal has comfortably applied both public international law and private law (and often the two together). Iran has contended that U.S. nationals' claims come before the Tribunal only through diplomatic espousal by the United States.[235] According to Iran, the Tribunal's jurisdiction was limited to claims arising under public

230- See survey of Awards in X Y.C.A., 1985, p. 192.

231- *Oil Field of Texas, Inc. v. Iran,* 1 Iran-U.S.C.T.R., 1981-82, pp. 347, 361.

232- *Oil Field of Texas, Inc. v. Iran,* 1 Iran-U.S.C.T.R., op. cit., pp. 347, 361.

233- *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA,* 6 Iran-U.S.C.T.R., 1984 II, pp. 219, 225; *American Int'l Group, Inc. Iran,* 4 Iran-U.S.C.T.R., 1983 III, pp. 96, 105, 109; *Starrett Hous. Corp. v. Iran,* 4 Iran-U.S.C.T.R., op. cit., pp. 122, 157.

234- Article II(1) of the Claims Settlement Agreement, op. cit.

235- Dessenting Opinion of Member M. Kashani regarding Order of 15 December 1982, 1 Iran-U.S.C.T.R., 1981-81, pp, 455, 463, 465.

international law and the Tribunal itself was subject to rules applicable to diplomatic protection and espousal. The Tribunal did not agree.[236]

In the Case of *Sea-Land Service, Inc. v. The Islamic Republic of Iran, Ports and Shipping Organization of Iran,* the Tribunal considered an argument in which the claimant corporation invoked rights under customary and conventional international law of which it asserted it was the beneficiary. The Tribunal ruled that, on the facts of the case, no expropriation had taken place which contravened the concepts and standards of customary international law or those of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.[237] Bockstiegel, the Chairman of the Tribunal, stated that no information or comments had been received to the effect that a choice of law clause in the contract which governs public international law on the contractual relationship should not be respected. He continues that:

> "In fact arbitration practice, especially with regard to investment contracts, shows that arbitrators have accepted such a choice and decided on that basis."[238]

All these cases and international practice indicates that there is general agreement that international law should be applied to expropriations of aliens property, but still it does not solve the problem of the norms by which international law can be asserted. The expressions are general without saying how they reached that conclusion. A general observation concerning the Iran-U.S. Tribunal's decisions indicates that, in applying customary international law, each Chamber has adopted quite different approaches.[239] Meanwhile, the effects and results of

236- *Iran v. United States,* Case A 21, 14 Iran-U.S.C.T.R., 1987 I, pp. 324, 330.

237- *Sea-Land Service, Inc. v. Iran,* 6 Iran-U.S.C.T.R., p. 149; 25 I.L.M., 1986, pp. 619-629.

238- Bockstiegel K., Arbitration and State Enterprises, 1984, p. 33.

239- Crook, Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Exprience, 83 A.J.I.L., p. 302.

international judicial and State practice are varied and confusing.

6 - Principles of Commercial Law:

It is not clear, that by inserting "principles of commercial" law as the rule to be applied by the Tribunal, whether the parties intended to apply international commercial law or domestic commercial law. The increasing expansion of modern international trade and its complexity have made co-operation at an international level not only desirable but essential to the free flow of trade among nations. Much has been achieved by the establishment of free trading associations such as the EEC or EFTA, and by the harmonization of trade law by international conventions and agreements such as GATT, and by model codes produced by international organizations such as the International Chamber of Commerce (ICC). However, there are many different opinions as to the existence and character of the law of international trade. But it is believed that the concept of *lex Mercatoria* comprises the rules which have been developed to regulate and facilitate international trade relations and the customs and practices which have been achieved universal, or at least very extensive, recognition in international trade. Some of these rules are general, others relate to specific areas of commerce.[240] Accordingly, it was for to the arbitrators to decide which law is common to most of the States and includes all legal systems.

Some writers believe that the attraction of the notion is the personal views of an arbitrator which is unknown to the parties at the time when

240- Lew J. D., Applicable Law in Interantional Commercial Arbitration, 1978, p. 436.

the contract is made.[241] The impartiality of international arbitrators is under serious doubt. The least that can be said is that an arbitrator, as an individual, inevitably belongs to a legal system and presumably and naturally favours one legal system more than others.[242] Therefore, the result of arbitrations could be different from what the parties to the agreement intended to achieve.

Numerous sources have been mentioned for modern *lex mercatoria* which cover nearly all area of private and public international law, and they are:[243]

1. Public international law;

2. Uniform laws, such as the Uniform Law on the Sale of Goods of 1964,[244] or the Convention on Contracts for the International Sale of Goods of 1980;

3. The general principles of law which have been adopted by nations and trading customs.

4. The laws of international organizations such as the United Nations Conference on Trade and Development, or the Organization of Economic Co-operation and development (OECD).

5. Custom and usage of international commerce such as internationally used commercial terms.

6. Standard form contracts such as general conditions for the supply of plant and machinery for export.[245]

241- Mustill M. J. and Boyd C., The Law and Practice of Commercial Arbitration in England, 1982, p. 611.

242- The Difference of the judgements in the Libyan expropriation cases is a good example.

243- Lew J. D., Applicable Law in Interantional Commercial Arbitration, op. cit., p. 442.

244- Loc. cit., p. 443.

245- Lew J. D., Applicable Law in Interantional Commercial Arbitration, op. cit., p.

7. Arbitration awards.

Under these sources of law, an arbitrator would have a wide range of choices and could apply more flexible rules of law. However, these rules have developed in the area of trade and commerce. How can one use them as applicable to the law of expropriation?

Moreover, the conflicts between these sources has remained unsolved, and there is not a unified position on this rule. In English law, doubts have been expressed as to whether a *lex mercatoria* even exists, in the sense of an international commercial law, divorced from any other law; or at least there are doubts as to whether it exists in any sense useful for the solving of commercial disputes.[246]

There is a further confusion over the acceptance of the principle by the disputing parties, Iran and the United States. Iranian business law prior to the 1978-79 revolution was fundamentally a Western code. In addition to the Civil Code of 1927-32, there were several other codes and statutes covering the various aspects of commercial law operating in Iran prior to the revolution 1979 which were derived from the 'Code Napeleon' and other European, *i.e.* German, codes. The Westernization of law meant the adoption of European models.[247] That process of law had encouraged nationals of the Western countries, particularly of the United States, to invest in Iran.

After the revolution of 1979, there was a major restructuring of the entire legal system, which affected all aspects of public and private law, including commercial law. Whatever changes they brought to the legal system of Iran, except the explicit terms mentioned in the Agreement,[248]

456.

246- Mustill M. J. and Boyd C., The Law and Practice of Commercial Arbitration in England, op. cit., p. 611.

247- Amin S. H., Commercial Law of Iran, op. cit., pp. 36-37.

it was not applied by some Chambers of the tribunal.

One of the significant principles which the Tribunal resorted to was that of "unjust enrichment". The principle was cited in *Ultrasystems Inc. v. Iran Case,* in which Ultrasystems claimed for work performed at Iran's request. The parties disputed whether it fell within the scope of their contract. The Tribunal held that "the request for work, and the performance provided pursuant to that request, rendered Isiran [Information Systems Iran] liable at least *in quantum meruit,* without regard to the contract."[249] The principle was further explored in *Isaiah v. Bank Mellat.*[250] Isaiah claimed that Bank Mellat had been unjustly enriched by receiving his funds in exchange for a dishonored cheque. The Tribunal, citing a comparative law study of unjust enrichment, the Iranian Civil Code, Whiteman's Digest and a treatise on public international law, determined that unjust enrichment was a general principle of law and, it could thus be applied. The Tribunal added that there was no reason to believe the result would be different if only Iranian law were applied.[251] Similarly, in the case *Sea-Land Service, Inc. v. Iran,* the Tribunal found that unjust enrichment had been codified or judicially recognized in the great majority of municipal legal systems of the world, and was widely accepted as having been assimilated into the catalogue of general principles of law to be applied by international Tribunals.[252]

However, there were cases in which the Tribunal rejected claims

248- Article II of the Claims Settlement Agreement, op. cit.

249- *Ultrasystems Inc. v. Iran,* 2 Iran-U.S.C.T.R, 1983 I, pp. 100, 111.

250- *Isaiah v. Bank Mellat,* 2 Iran-U.S.C.T.R, 1983 I, op. cit., p. 232.

251- Loc. cit., p. 237.

252- *Sea-Land Service, Inc. v. Iran,* 6 Iran-U.S.C.T.R., 1984 II, pp. 149, 168; X Y.C.A., 1985, p. 250.

based upon the principle of unjust enrichment. For example, in the recent case of *Lockheed Corp. v. Iran,*[253] the Tribunal held that prudent businessmen would not have continued to provide benefits in the circumstances involved.

7 - The Principle of *Force Majeure*:

As was expected in the aftermath of the revolution, many contract claims involving pleas of excuse for non-performance. The pleas have come from both sides, from contractors wishing to be excused for not having completed their contracts, and from Iran as an excuse for not making payments in accordance with contractual provisions, and for ending contracts which was found not in its interest. In most of the cases the excuse pleaded was that of *force majeure*, and the Tribunal has found the principle of *force majeure* and changed circumstances to be general principles of law applicable even to contracts that did not contain clauses providing for them.[254]

However, beyond the findings as to what constitutes '*force majeure* conditions', the Tribunal's awards have varied in their determination of the consequences of these conditions for the contract.

253- *Lockheed Corp. v. Iran,* 367-829-2, I.A.L.R., June 24, 1988, at 15,887.

254- *Mobil Oil Iran Inc. and Mobil Sales ans Supply Corporation v. The Government of the Islamic Republic of Iran and the National Oil Co.* Award No. 311-74/76/81/150-3, July 14, 1987, 16 Iran-U.S.C.T.R. 1987III, p. 3; *Anaconda-Iran Inc. v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company,* 13 Iran-U.S.C.T.R. 1986 IV, PP. 199, 211; see also Crook, Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Exprience, 83 A.J.I.L., op. cit., pp. 278, 293.

What has been described as an "expansive view" of the existence and consequences of *force majeure* was taken in *Gould Marketing Case.*[255] In that case the Tribunal held that *force majeure* conditions prevailing in Iran during 1978-79 justified non-performance by both parties. This view was stated by the Tribunal, although the claimant and the respondent each denied the existence of *force majeure* conditions excusing the other's performance. The Tribunal also observed that a suspension of the parties' obligations could not continue indefinitely and found that by mid-1979 neither party could realistically hope for resumption of the other's performance. Accordingly, the Chamber Two concluded that the continued existence of *force majeure* conditions had, by mid-1979, ripened into a termination of the contract.[256]

Revolution as *force majeure* was recognized in numerous cases where the Tribunal, dealing with the question of remedy, decided that, "the loss must lie where it falls, *i.e.* unless the contract itself provides otherwise, the losses should be allocated equitably between the parties in proportion to the amount of performance completed to the date of termination".[257]

On the question whether an event had occurred, or circumstances had changed, which gave rise to an excuse for non-performance, the Tribunal has repeatedly declared that the revolutionary conditions that

255- *Gould Marketing Inc. v. Ministry of National Defence of Iran,* 3 Iran U.S.C.T.R. 1983 II, p. 147 and 6 Iran-U.S.C.T.R. 1984 II, p. 272; see also the summerised text in 77 A.J.I.L., 1983, pp. 893-95.

256- Loc. cit.

257- *Gould Marketing Inc. v Ministry of National Defence of Iran,* 3 Iran-U.S.C.T.R., 1983 II, p. 154; *Cumputer Science Corp. v. The Government of the Islamic Republic of Iran,* 10 Iran-U.S.C.T.R., 1986 I, p. 289; *International Schools Services, Inc. v. The Islamic Republic of Iran,* 14 Iran-U.S.C.T.R., 1987 I, p. 75; see more in Westberg J. A., Contract Excuse in International Business Transactions: Awards of the Iran-U.S. Claims Tribunal, ICSID Review-Foreign Investment Law Journal, p. 222.

existed in Iran in late 1978 and early 1979 amounted to *force majeure*. The drawing of an analogy between the revolution and mob violence and the paying of scant regard to the cause and the aims of the revolution on the part of the Tribunal resulted in findings to the effect that those conditions existed only for a limited period of time. In the *Gould Marketing Case*[258] which involved a contract for the supply of radios and related services to the Iranian Ministry of Defence, Chamber Two rejected the parties' reciprocal claims of breach and instead concluded that the *force majeure* conditions in Iran had broad consequences. The Tribunal applied a general principle that it found in the laws of the United States, the United Kingdom and France, and decided that pervasive and long-lasting *force majeure* conditions obtained in Iran and had rendered performance impossible.[259] Consequently, the Tribunal found that the contract was ended by mid-1979 because of frustration or impossibility of performance. The Tribunal, offering a definition of *force majeure* in the context of a revolution, found that such conditions existed in the major cities of Iran as of December 1978. By *force majeure* the Tribunal meant:

> ".....social and economic forces beyond the power of the state to control through the exercise of due diligence. Injuries caused by the operation at such forces are therefore not attributable to the state for purposes of its responding for damages. Similarly, as between private parties, one party cannot claim against the other for injuries suffered as a result of delays in or cessation of performance during the time *force majeure* conditions prevail, unless the existence of the conditions is attributable to the fault of the respondent party."[260]

258- *Gould Marketing Inc. v. Ministry of National Defence of Iran*, 3 Iran-U.S.C.T.R., op. cit., pp. 152-3.

259- *Gould Marketing Inc. v. Ministry of National Defence of Iran*, 6 Iran-U.S.C.T.R., p. 274.

260- Loc. cit.

Similarly in the *General Dynamics Telephone case*[261] a contract with the Ministry of Defence to install military communications equipment at remote air force bases in Iran was found to have been interrupted by *force majeure* conditions in Iran, which existed from "November 1978 to mid-1980," preventing the return of American personnel to Iran. When the claimants in this case terminated for *force majeure* pursuant to a clause in the contract, the Ministry of Defence argued that no *force majeure* conditions existed at the remote sites where the contract work was to be performed. The Tribunal rejected the Ministry's argument.[262]

The question was not as simple as the Tribunal considered it to be. It was not only *force majeure* which had compelled the parties to cease performance, but also frustration of purpose. The United States, as a major supporter of the deposed Shah, was no longer willing to strengthen the new regime by performance of some contracts, especially those in the military sector. Equally the U.S. was no longer considered a friend of Iran which ought to be trusted to have access to military secrets of the country. One of the most evident cases is *Touche Ross,* in which the *force majeure* question arose in the context of a contract between an American accounting firm and the Iranian Air Force under which the accounting firm had contracted to furnish auditing services for the IBEX project, a major undertaking of the Shah's government intended to modernize the Air Force's electronic intelligence gathering system.[263]

261- *General Dynamic Telephone Systems Center, Inc.* and *General Dynamics International Corp. v. The Government of the Islamic Republic of Iran, the Telecommunications Co. of Iran* and *Bank Melli Iran,* 9 Iran-U.S.C.T.R. 1985 II, p. 153.

262- Loc. cit., pp. 159-60.

263- *Touche Ross & Co. v. The Islamic Republic Of Iran,* 9 Iran-U.S.C.T.R., 1985 II, p. 284.

Almost all of the contractors services were to have been performed not in Iran but in the United States using information supplied by the several IBEX contractors that *Touche Ross* was auditing. Therefore, any plea to *force majeure* as the main reason of frustration of the contract would have been incompatible with the concept as used in municipal and international laws.

In *International Schools Services, Inc. v. National Iranian Copper Industries Co.,* the Tribunal found on its own motion that *force majeure* conditions in the vicinity of the Sar-Cheshmeh copper mine frustrated a contract to operate a school there. As a result, the Tribunal found that both sides were excused from further contract performance, and that losses incurred after termination remained where they fell.[264]

There are other cases in which a different view of *force majeure* was taken. In *Sylvania Technical Systems, Inc.* v. *Iran,* the Tribunal emphasized that *force majeure* defences "must always be analysed in the context of the circumstances causing *force majeure,* taking into account the particular party affected by those circumstances and the specific obligations that party is prevented from performing."[265]

While in many cases, and in the cases heard before the Tribunal in particular, governments have been held responsible for the actions of the entities or even companies controlled by them, in *Blount Bros. Corp. v. Iran,* the Tribunal applied *force majeure* when a State-controlled entity was prevented from contract performance by the government's actions. Starting with a premise that the separation between a State and its controlled enterprises should be respected, the Tribunal held that acts of a

264- *International Schools Services, Inc. v. National Iranian copper Industries Co.,* 9 Iran-U.S.C.T.R., 1985 II, p. 272.

265- *Sylvania Technical Systems, Inc.* v. *The Islamic Republic of Iran,* 8 Iran-U.S.C.T.R., 1985 I, pp. 298, 309.

State's other public authorities may constitute *force majeure* shielding the State's enterprise.[266]

In different judgements of the Tribunal, one reality was not taken into account and that is that, in most of the contracts concluded between Iran and U.S. companies, either party, or sometimes both parties, had no will to continue with the contract. That was the natural result of the attitude of both parties towards each other. This missing element played a significant role in termination of the contracts, but it was given no weight by Tribunal.

8 - Usage of Trade and Contracts:

The further norms which were taken into account by the Agreement were usages of the trade and contract provisions.[267] These norms are common to almost all legal systems. They appeared in Article 33(3) of UNCITRAL Rules, in Article VII of 1961 European Convention and Article 13(5) of the ICC Rules of Arbitration. Equally important as a source of contractual obligations in commercial contracts are the unwritten customs and usages of merchants in particular trades. It is this feature of contract terms which distinguishes commercial contracts from other contracts. Oppenheim distinguishes between custom and usage which are used synonymously but have different meanings.[268] Contrary to the meaning of 'custom', usage is a habit of doing certain actions, without the existence of a conviction that these actions are, according to

266- *Blount Bros. Corp. v. The Islamic Republic of Iran,* 10 Iran-U.S.C.T.R., 1986 I, pp. 56, 75.

267- Article V of the Claims Settlement Agreement, op. cit.

268- Lauterpacht, Oppenheim, International Law, op. cit., p. 26.

international law, obligatory or right. Trade usages constitute an important aspect of international custom and thus of the law merchant. Professor Schmitthoff defines trade usages as a part of international custom,[269] and Professor Goldman refers to it as the "essential element of *lex mercatoria.*"[270] According to Professor Goode, trade usages are of cardinal importance. In his opinion, the impact of unwritten customs and usages of merchants on the content and interpretation of contract terms cannot be overstated. It is perhaps this feature which distinguishes commercial contracts from other contracts.[271]

However, there are writers who have rejected both 'trade usage' and 'commercial custom' as a legal source in a technical sense.[272] As international trade has two sources, international legislation and international trade usages, there has been the attempt to describe the latter as an 'autonomous law' which functions independently of municipal law and encompasses rules which have been accepted by businessmen engaged in the practice of international commercial trade.[273] Goldstajn points out that this autonomous commercial law is a body of rules not made by legislators but arising out of business practices within the framework set up by municipal law.[274]

269- Cheng Chia-Jui, Clive M. Schmitthoff's Select Essays on Interantional Trade Law, London, 1988, pp. 206, 220.

270- Goldman B., "*Lex Mercatoria*" in Forum Int., London, 1983, pp. 3-6.

271- Goode R. M., Commercial Law, (Harmonsworth), 1982, pp. 36, 40.

272- Horn N., "Uniformity and Diversity in the Law of International Commercial Contracts" in N. Horn and C. M. Schmitthoff, (eds.), The Transnational Law of International Commercial Transactions, Deventer, 1982, p. 15.

273- Goldstajn A., Reflections on the Structure of the Modern Law of International Trade, in P. Sarcevic, International Contracts and Conflicts of Laws, London, 1990, pp. 14-22.

274- Loc. cit., p. 18.

Thus, while the application of an international convention which has been incorporated into municipal law may depend on the will of the parties, and while the parties have extensive freedom of contract, the usage of trade becomes increasingly controversial in the changing international commercial law and practice. Moreover, there is not a unified usage of trade practiced in international commercial relations, which is in some degree manifested in the GATT and practiced in countertrade transactions. The traditional law and usages have not always been the same as the living law which focuses on those legal norms which are part of the social life of the community and can be enforced in practice.[275]

However, the Iran-U.S. Tribunal has relied on trade usage and practice on a few occasions. In the case of *American Bell International v. Iran* the Tribunal held that the parties should consider providing material, including evidence of custom and usage, to assist the Tribunal in making a determination.[276]

In the case of *Esphahanian v. Bank Tejarat* the Tribunal applied the usage of trade and concluded that under the law of New York, "a bank that draws a cheque is responsible to ensure that sufficient funds are available in the bank on which the cheque is written to cover the cheque". Application of such a usage to the post-revolutionary situation of Iran is questionable. The Tribunal is right that trade usage which is based on customary international law[277] obliges a bank to be sure that there are

275- Schmitthoff C. M., Commercial Law in a Changing Economic Climate, 2nd edition., London, 1981, p. 15

276- *American Bell International v. The Islamic Republic of Iran*, 6 Iran-U.S.C.T.R., 1984, p. 97.

277- Nasser *Esphahanian v. Bank Tejarat*, 2 Iran-U.S.C.T.R., 1983, p. 168; see also Geneva Convention on Bill of Exchange of 1932, Uniform Law on

sufficient funds available to cover the cheque, but such a bank is functioning under the normal condition of a bank in New York, and not amid the mayhem and disorder of post-revolutionary Iran. The same banks under the laws of New York had already acted against that law and the U.S. Constitution, when they froze the Iranian Assets without any payment of compensation.[278]

The practice and the attitude of revolutionary Iran is manifested in the post-revolution contracts. For example, in the case of Talbot U.K. it was agreed that both the procedural and governing law of the contract be the relative law of Iran, and the place of the arbitration would be in Teheran. More importantly, the umpire (the third arbitrator) might not be a national who bears the nationality of either Iran or the United Kingdom. Nor could he be a national of the British Commonwealth countries; nor a national of a member State of the European Economic Community; or a national of the United States of America. The other proposal was that the disputes be settled by way of resorting to Public Courts in the Islamic Republic of Iran.[279]

9 - The Impact of Changed Circumstances:

By inserting the provisions "changed circumstances", the parties to the Agreement followed quite different aims. For the United States, it was added specifically to authorize the Tribunal to disregard Iranian Law

· Cheques, Art. 12.

278- Iranian Assets were not admitted to be used by Iran while they were not compensated.

279- Amin S. H., Commercial Law of Iran, op. cit., pp. 100-101.

that might give effect to an Iranian forum clause.[280] For Iran, it meant a change of responsibility toward the claims which arose against it.

One of the main elements involved in nullification or frustration of the contracts between Iran and the U.S. companies was the changed circumstances created by the 1979 revolution in Iran. It is a fundamental principle, which most of the developed legal systems have provided in some measure, for relief from contractual obligations whose strict enforcement appears impossible or unjust in light of a fundamental change in circumstances.[281] The rules of particular legal systems vary in approach with regard to this question. In English law, it is titled as frustration and the United States Uniform Commercial Code has addressed the question as "commercial impracticability". In French law, it is based on the doctrine of 'imprecision' and in international law the concept is known as *rebus sic stantibus*.[282]

"Frustration" or "implied conditions" in common law countries or the theory of the "foundation of the contract" in German and Swiss law are examples of the operation of the concept.[283] All these rules provide that in limited circumstances, relief from the literal purport of contractual obligations may be afforded in case of a fundamental change of circumstances. There is a similar concept in the Iranian Civil Code when the performance or the commercial aims which the parties had in mind at the time of the conclusion of the contract are defeated through no fault of

280- Crook J. R., Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Exprience, 83 A.J.I.L., p. 282,

281- Smit H., Frustration of Contract, A Comparative Attempt at Consolidation, 58 Columbia Law Review, 1958, p. 287; Treitel G. H., An Outline of the Law of Contract, 4th ed., 1989, pp. 298-311.

282- See generally Cattan H., The Law of Oil Concessions in the Middle East and North Africa, 1967, p. 74.

283- Treitel G., An Outline of the Law of Contract, op. cit., p. 298.

their own, but by force of supervening events and circumstances.[284]

There is no doubt that the situation at the time of the conclusion of contracts was changed fundamentally by the revolution in Iran so that Western companies in general and U.S. companies in particular were no longer encouraged to make contracts with Iran. Performance of the contracts became impossible and a new condition was implied. It seems generally acceptable that the unforeseen termination or prevention of a contract by reason of the destruction of the subject-matter or other common ground forming the basis of the agreement would frustrate that contract. There were many contracts between Iran and U.S. nationals which were unforeseen for the parties to the agreements at the times of the conclusion. As was also stated in *Doherty v. Mornoe Eckstein Brewing Co,*[285] the principal purpose of contracts was completely frustrated by the revolution and that frustration was almost total.

In *Starrett Housing Corporation v. The Government of the Islamic Republic of Iran,*[286] the corporation and two of its wholly-owned subsidiaries, Starrett Systems Inc., and Starrett Housing International Inc, asserted claims on their own behalf and on behalf of foreign corporations controlled by them against the respondents for damages alleged to have been suffered due to events which occurred in the course of the development of a large housing project in Iran. In this regard, the Tribunal stated that, the claimants assert that the effects of what is referred to as "virulent anti-American and other policies and actions of the Revolutionary Group and Islamic Republic" both before and after the

284- Article 229 of the Civil Code of Iran.

285- 198 App. Div., 708, 191 N.Y.S. 59 (ist Dept. 1921).

286- *Starrett Housing Corporation et. al. v. The Government of the Islamic Republic of Iran et. al.* Award No. ITL 32-24-1, December 19, 1983, in 4 Iran-U.S.C.T.R., 1983, p. 122.

establishment of the new Government rendered it impossible for Starrett to continue operation at the project, and that this amounted to an unlawful expropriation under general principles of international law and under the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran of 15 August 1955. Thus, the claimant's argument was that they were deprived of the effective use, control and benefits of their property rights in the project much earlier than by the end of January 1980. The Court stated that, there was no reason to doubt that events in Iran prior to January 1980, to which the Claimants referred, seriously hampered their possibilities to proceed with the construction work and eventually paralysed the project. Nevertheless, investors in Iran, like investors in all other countries, had to assume a risk that the country might experience strikes, lockouts, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized did not necessarily mean that property rights affected by these events could be deemed to have been taken. According to the Tribunal, a revolution as such did not entitle investors to compensation under international law. Considering the events prior to January 1980, the Tribunal did not find that any of those events individually or taken together could be said to amount to a taking of the claimant's contractual right and shares.[287] The Tribunal accepted that the revolutionary conditions in Iran created frustration, and the Iranian government was held not to be responsible for the aims of the revolution expressed through the revolutionary process, but for the acts of the popular movement and insurgent people in the course of the revolution in Iranwhich was tantamount to *force majeure*. Accordingly, it is irrelevant that victorious rebel movements are responsible for illegal acts

287- *Starrett Hous. Corp. v. The Islamic Republic of Iran,* op. cit., pp. 155-6.

or omission by their forces occurring during the course of the conflict. More irrelevant still is their responsibility for the illegalities of the previous government.[288] The concept of changed circumstances introduced in Article V of the Claims Settlement Agreement is important, particularly in light of the period of revolution in Iran.

There is no definition of "changed circumstances" in the declaration to indicate whether the concept is used as an international principle or as principle common, to civilized nations. It must be judged by the Tribunal according to 'law' which is vague and controversial. The provisions of the Vienna Convention on the Law of Treaties do not seem be applicable to contracts other than those between the two States.[289] Those contracts in dispute between Iran and the U.S. nationals were not international treaties. They were the subject of the Treaty of Amity concluded by Iran and the United States. However, it is clear that the principle of "changed circumstances" in both fields of law, private and international, lead to the termination or withdrawal from a treaty or contract.

As was stated in *Fisheries Jurisdiction case,*[290] a fundamental change in the circumstances which induced the parties to accept a treaty, if it resulted in a radical transformation of the extent of the obligations imposed by that treaty, might, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. Moreover the Court stated that the traditional view is that the change of circumstances to be effective must be regarded as fundamental

288- Brownlie I., Principles of Public International Law, op. cit., pp. 446, 451, 453.

289- Article 61 "imposibility of performance" and Article 62 "change of circumstances" of the Viena Convention on the Law of Treaties.

290- *Fisheries Jurisdiction case,* I.C.J. Reports, 1973, pp. 19-20.

or vital, and, according to the provisions of the Vienna Convention, the doctrine may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it.[291] The Court ruled out the responsibility that change in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of treaty.[292] It should be noted that, when a treaty is not terminated under the doctrine, that treaty will still be interpreted by the tribunal in the light of changes in international law itself. This is a basic rule of treaty interpretation that is well established, as reflected in the work of the Institute de Droit International, in the provisions of the Vienna Convention of the Law of Treaties and in decisions of the International Court of Justice.[293]

Moreover in *Tyrer Case* the European Court of Human Rights stated:

> "The Court must also recall that the Convention (i. e. the European Convention on Human Rights) is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present day conditions".[294]

Schwarzenberger, criticizing the view of the International Court of Justice that the Vienna Convention may be relied upon in that case in so far as they reflect customary international law, stated that:

291- Loc. cit., p. 33; Article 62(2) of the Viena Convention on the Law of Treaties.

292- Loc. cit., p. 32.

293- Article 31(3)(c) of the Viena Convention; 1 Annuaire de l'institut de Droit International, 1975, p. 537; *Aegean Sea Continental Shelf Case*,I.C.J., 1978, p. 33, the International Court of Justice stated that, "The Court is of the opinion that the expression in reservation(d) "dispute relating to the territorial status of Greece must be interpreted in accordance with the rules of international law as they exist today not as they existed in 1931".

294- *Tyrer Case,* European Court of Human Rights, Judgement of 25th April 1973, p. 18.

> "In a swiftly changing world, the dynamic principle underlying the "Causula" has much to recommend itself, yet, in the absence of an automatic decision by an impartial organ on all the issues involved, the "Causula" is open to abuse as a handmaid of evading compliance with burdensome treaty obligations. Although the Vienna Convention of 1969 on the Law of Treaties has not made provision for any such decision with binding force, it has tried to discourage abuse by formulating the "Causula" rule in negative terms and laying down a procedure for its invocation (Articles 62 . 63 and 66)"[295]

The changes in Iran, contrary to the contention of the Court in the *Fisheries Jurisdiction Case,*[296] did not increase the burden of the obligations to be fulfilled, in comparison with those originally undertaken by the parties, but made the performance of the Treaty and the contracts practically impossible.

In the case of *Questech Inc. v. Iran,* the claim arose out of a contract that was part of a project to modernize and expand Iran's electronic intelligence gathering system. The claimant asserted that *force majeure* conditions arising out of the Islamic Revolution in Iran prevented it from fulfilling its contractual obligations. The Tribunal held that in fact the Iranian Government had made a deliberate policy decision not to continue with the American contractors in a project that related to secret military intelligence operations. The Tribunal admitted that Iran had a right to terminate the contract under the doctrine of changed circumstances, but concluded that the consequence of the termination of the contract was that the respondent would be obliged to compensate the claimant who had suffered from such a termination.[297] With regard to a contract which related to a highly secret intelligence system and a highly sensitive military field, neither of the parties would be able to continue

295- Schwarzenberger and Brown, A Manual of International Law, 1976, p. 139.

296- *Fisheries Jurisdiction Case,* I.C.J. Reports, 1973, op. cit., p. 21.

297- *Questech Inc. v. The Islamic Republic of Iran,* 9 Iran-U.S.C.T.R., 1985, p. 123.

their undertakings and termination of these kind of contracts would be the most natural consequence of the new situation resulting from the revolution.

The *Halliburton Company* was another case in which change of circumstance was referred to. The U.S. claimant argued that, under the provisions in Article II of the Declaration where the contract had contained a choice of forum clause which provided for the jurisdiction of the "competent Iranian courts", the clause should be regarded as void because of changed circumstances. The argument was that the fundamental changes in the Iranian legal system after the revolution created a different situation than that which had obtained when the contract was concluded.[298] The claimant argued that, in view of changed conditions in Iran, there was no longer any binding contract which excluded the Tribunal's jurisdiction under the provisions of the Claims Settlement Declaration. The claimant was correct in contending that the changed circumstances frustrated the contract, but the new Treaty concluded between the two Governments in fact revalidated such forum clauses, giving Iranian courts jurisdiction to decide those cases. The Iranian Government rejected the American argument on the basis that Article II of the Claims Settlement Declaration excluded from the jurisdiction of the Tribunal claims "arising under a binding contract between the parties specifically providing that any disputes there under shall be within the sole jurisdiction of the competent Iranian court." The Tribunal tried to avoid the controversy over the issue by holding that the parties did not wish the Tribunal to determine the enforceability of contract clauses which specifically provided for the sole jurisdiction of Iranian courts.[299]

298- *Halliburton Company case*, 1 Iran-U.S.C.T.R., 1981-82, p. 242, 244.

As was mentioned earlier, the revolutionary government of Iran was not the successor to the Shah's regime, that is, it did not represent a continuation of that regime, but was in fact a total replacement for the previous regime which was thereby extinguished. Succession in this sense would limit application of the principle of "State responsibility" and brings in the principle of "changed circumstances". This was the argument used by the former Soviet Union in 1922.[300]

In the context of treaty law, the doctrine was stated by the 'Harvard Research into International Law' to be that, a treaty becomes legally void in case there occurs a change in the state of facts which existed at the time of the parties entered into the treaty. It is generally admitted that not every change in those facts terminates the binding force of a treaty. Many writers affirm that a change in the state of facts terminates the binding force of a treaty only when the parties entered into the treaty with reference to that state of facts and envisaged its continuance unchanged as a determining factor which moved them to undertake the obligations stipulated.[301]

The doctrine of "changed circumstances" has been used by both Iran and the United States, and its use by the parties could be useful in some cases and inconvenience in the others.

As the foregoing discussion indicates, the tribunal has treated numerous doctrines as general principles, usually without detailed explanations of their bases. Most are simple and familiar to international commerce and to many legal systems. Nevertheless, the Tribunal's

299- Loc. cit., p. 245.

300- Revolution, Treaties and State Succession, 76^2 Yale Law Journal, 1967, pp. 1669-1687; see also Korvin E. A., Soviet Treaties and International Law, 22 A.J.I.L., 1928, pp. 753-763.

301- Bishop W., International Law, Cases and Materials, Third ed., 1953, P. 218.

jurisprudence also shows the temptations that general principles can offer to arbitrators facing difficulties and sensitive issues. The general principles of law run the risk of being exploited as an ideological cloak for self-interest. Therefore, it is essential that their scope and substance be clearly defined and understood.[302]

(SECTION FIVE)

CONDITIONS FULFILLED IN THE POST-REVOLUTION EXPROPRIATIONS IN IRAN

1 - Public Utility:

It can be said that all the takings in Iran's post-revolution era have been for public purpose. However, there was not a designed policy made by the government of Iran for every single expropriation. The inspiration of the revolution was that such properties would be taken. Some companies, particularly from the U.S., found that they were no longer welcomed and left their property behind, or their contracts unperformed. In such cases, the Government had to take the control of the properties in order to preserve them.

However, the purpose of the expropriations in Iran have been generally to:

1- re-order Iranian industry which was in a chaotic state before and

302- See more on the Issue in Cheng B., General Principles of Law as Applied by International Courts and Tribunals, 1953, p. xiv.

during the revolution.

2- redistribute wealth and ameliorate the harsher aspects of the capitalist system.

3- remove dependence on foreign capital,[303] and end to the influence of the foreign countries which was enforced through their companies.

In *INA Corp. v. Iran,* the Tribunal declared that the case represented a formal and systematic nationalization by decree of an entire category of commercial enterprises considered of fundamental importance to the Iranian economy and was, therefore, subject to customary international law. This principle was recognized in other cases too. The Court declared that:

> "It has long been acknowledged that expropriation for a public purpose and subject to conditions provided for by law - notably the category which can be characterized as nationalizations - are not per se unlawful."[304]

In *the Khemco case,* the discretionary power of the State to determine the public purpose of its action was emphasized. The claimant had alleged that the main motive for the expropriation of Khemco was simply to free NPC from the obligations created by the Khemco Agreement and, particularly, from the obligation to share the profits of the venture.[305] The Tribunal held that:

> "A precise definition of the public purpose for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even

---

303- Brower and Olson, Learning from the Iranian Experience: Doing Business in High-risk Countries, 1980, p. 274.

304- *INA Corporation v. The Government of the Islamic Republic of Iran,* Award No. 184-161-1, August 12, 1985, 8 Iran-U.S.C.T.R., pp. 373, 378.

305- *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Limited,* Award No. 310-56-3, July 14, 1987, in 15 Iran-U.S.C.T.R, p. 233; the Claimant in this case argued that the expropriation of its interests by the Government of Iran had been unlawful for a number of reasons including the fact that the action was not for a public purpose but for pure financial gain.

suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is probably interpreted, and that States, in practice, are granted extensive discretion."[306]

The Tribunal also declared that:

"In recent practice and mostly in oil industry States have admitted expressly in a certain number of cases, that they were nationalizing foreign properties primarily in order to obtain a greater share, or the exploitation of a natural resources which, according to them, should accrue to the development of the country. Such a purpose has not generally been denounced as unlawful and illegitimate."[307]

The Tribunal's decision acknowledged that, first, as the authorities quoted made clear, the judgement as to the public purpose of an action rests with the State, and States are entrusted with great discretionary power in this respect. Secondly, in the case of nationalization, the public purpose test does not seem to be necessary since nationalization, by definition, is for a public purpose.

2 - Non-discrimination:

The post-revolution Iranian expropriations were as a result of a general policy which the revolution established. This general policy in its nature was discriminatory against the West in general and against the United States in particular. The measures were discriminatory in order to remove the discriminatory position in Iran of U.S. companies. The Tribunal called these discriminatory expropriation cases "individual expropriations", and refrained from declaring them illegal.

The Tribunal's position on this issue indicates that, although the Iranian expropriations of U.S. nationals' property was discriminatory in

306- Loc. cit.

307- Loc. cit.

one sense, it was nevertheless legitimate under the special circumstances and purposes of the revolution. It was this same implicit meaning which was used by Bremen Court in regard to the Indonesian expropriation of the Dutch nationals property.[308] Therefore, the principle should be considered in the light of the other conditions which ultimately would affect the amount of compensation payable to U.S. nationals.

In *the Khemco* Award, which is the most authoritative and articulated decision of the Iran-U.S. Claims Tribunal on the subject of the non-discrimination rule, the claimant, as in *the Aminoil case,* proposed that the Iranian Government's measures in expropriating Amoco's interest in the Khemco petrochemical complex was discriminatory, since another joint venture in the same sector, namely the Iran-Japan Petrochemical Company, was not expropriated. The Tribunal, almost exactly in line with the decision of *Aminoil* Tribunal,[309] held that:

> "The Tribunal finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or both may justify such a difference of treatment."[310]

Citing the *Aminoil* Award, the Tribunal declared:

> "A coherent policy of nationalization can reasonably be operated gradually in successive stages. In the present case, the peculiarities discussed by the parties can explain why IJPC was not treated in the same manner as Khemco."[311]

Therefore, the "discriminatory" measures against U.S. nationals

---

308- 1 U. 159/1959; see also Domke M., Indonesian N. Measures Before Foreign Courts, 54 A.J.I.L., 1960, pp. 3, 5.

309- *Aminoil Case,* 21 I.L.M., 1982, p. 967.

310- *Khemco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Limited,* Award No. 310-56-3, July 14, 1987, in 15 Iran-U.S.C.T.R., p. 232.

311- Loc. cit.

were not considered as illegal by the Tribunal.

3 - Standard of Compensation Applied by the Iran-U.S. Tribunal:

In expropriating foreign property, Iran never denied the duty to pay compensation to the legitimate owners. This feature of the measures was clearly stated in the laws expropriating those properties.[312] Thus, not all the oil companies, despite their very large claims, brought actions against Iran before the Iran-U.S. Claims Tribunal, because they were negotiating with Iran over the amount of compensation; and the amount of compensation for non-American was settled in such negotiations. Therefore, as some writers have suggested,[313] Iran is not in an entirely antagonistic environment, but, in the one in which one party demands full compensation for the expropriated property and Iran offers on the basis of the legitimacy of the property.

The biggest difficulty in relation to the Tribunal's work has been that each of the three chambers of the Tribunal renders its decision independently and does not necessarily follow the others' precedents. Moreover, substitutions among the neutral arbitrators[314] has caused different approaches to the questions before each chamber. This has caused serious confusion over the standard of compensation payable to

312- See the early pages of this chapter.

313- Piran H., Nationalisation of Foreign Property in International Law and Iran-U.S. Claims Tribunal, op. cit., p. 356.

314- The Iran-U.S. Claims Tribunal's Chambers are each composed of three judges; one from Iran, one from the United States, and the third one is a neutral judge chosen by the two States.

dispossessed individuals or companies. The first awards of the Tribunal related to the expropriated insurance companies which had been nationalized after the revolution by the Iranian Revolutionary Council on 25 June 1979.[315] This nationalization included all Iranian private companies and related foreign businesses in Iran. The law nationalizing the insurance industry did not mention the valuation and the payment of compensation procedure.

Subsequently, American and other foreign insurance companies brought actions against Iran claiming damages for uncompensated nationalizations. The disputes between Iran and United States centre mostly, not on the legality of the taking, but on valuation, the determination of the compensation owed through translation of the property loss into monetary terms. Because of this, the Tribunal declined to hold that the nationalization was unlawful.

In the *American International Group, Inc., and American Life Insurance Company v. Islamic Republic of Iran and Central Insurance of Iran,* American claimants asserted that Iran was obliged to pay "prompt, adequate and effective compensation" under international law and also the Treaty of Amity between the two countries, and its failure to do so violated customary international law.[316] Iran denied that the standard of compensation invoked by the claimant was a norm of international law. Therefore, it denied that either the nationalization or the failure to provide immediate compensation violated international law. Defending the unchallenged right to nationalization, Iran admitted that there was a

315- *American International Group Inc.* and *American Life Insurance Company* v. *The Islamic Republic of Iran* and *Central Insurance of Iran,* Award No. 93-2-3, December 19, 1983, in 4 Iran-U.S.C.T.R., p. 96.

316- *American International Group v. Islamic Republic of Iran,* (93-2-3), 7 Iranian Assets Litigation Rep., p. 747.

duty to compensate the former owners of nationalized property, but it denied that the standard of "prompt" compensation was a norm of customary international law. The approach of Iran toward the question was that:

> "Instead ..... the international legal duty to pay compensation requires only an early indication of an intention to compensate and ..... compensation paid even during forthcoming years still come within the reasonable time permitted by the Standard."[317]

On the standard of compensation Iran further argued:

> "Even assuming, Arguendo , that Iran violated principles of customary international law in the course of nationalizing the insurance industry, there is no international legal entitlement to compensation equal to the 'full value' of the property nationalized. The suggestion of full compensation derives from the traditionally asserted standard of 'prompt, adequate and effective' compensation which has been repudiated by modern developments in international law; instead, a standard of 'partial compensation' should be applied, based on reference contained in resolutions of United Nations organs and from post-war settlement practice."[318]

The claimants argument that Iran's failure to provide prompt compensation violated the provisions of the Treaty of Amity was rejected by Iran on various grounds, including that the Treaty was no longer in force.[319]

Therefore, Iran did not reject a duty to compensate *AIG* for the nationalization of its property.[320] However, the Tribunal refused to discuss or pronounce upon the view that, in certain circumstances of expropriation, less than full compensation would meet the requirements of customary international law.[321]

317- Loc. cit. pp. 747-48.

318- Loc. cit.

319- See Iran's position on the Treaty in this chapter.

320- *American International Group v. Islamic Republic of Iran* (93-2-3), Iranian Assets Litigation Rep., op. cit., p. 749.

321- Judge Mosk, the American judge, in a concurring opinion, rejected the view that less than full compensation could be appropriate compensation in customary international law; see 4 Iran-U.S.C.T.R., 1983, pp. 105-6.

In *INA Corp. v. Iran,* the Tribunal held that the Treaty of Amity, which was equivalent to customary international law, was applicable. Under either law, what was payable was "compensation equal to the fair market value of the investment"[322] which, by implication, in the opinion of the Tribunal, meant full compensation. But, in the *Philips Petroleum Company of Iran,* the Tribunal made a distinction between the standard of compensation embodied in the Treaty of Amity and that of customary international law, holding that the former was strict, whatever the latter was, and required just compensation representing the full equivalent of the property taken.[323]

In *American International Group case,* the Tribunal judged the Iranian measures in the light of the traditional rules by declaring that there is not sufficient evidence before the Tribunal to show that the nationalization was not carried out for a public purpose as part of a large reform program or was discriminatory.[324] After recognizing the legality of the nationalizations, the Tribunal declared that even in case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken.[325]

The parties to the dispute disagreed as to the method of valuation. The claimants maintained that the American company should be valued as a going concern, including such elements as good will and prospects of future profit. Iran contended that the assessment should be made exclusively on the basis of the 'net book' or 'break up' value of the company.[326]

322- *INA Corp. v. The Islamic Republic of Iran,* 8 Iran-U.S.C.T.R., 1985, p. 373.

323- *Philips Petroleum Company of Iran case,*21 Iran-U.S.C.T.R., 1989, p. 79.

324- Loc. cit., p. 105.

325- Loc. cit.

Calculating the amount of compensation, the Tribunal applied the standard of full compensation, including an element of lost profit which is deemed to be applied in unlawful expropriations. The Tribunal declared in this regard:

> "The most important element of the compensation claimed by the Claimants for the taking of their shares in Iran America is the loss of prospective earnings. When making its own assessment of the market value to be given to these shares, the Tribunal will therefore have to conclude, inter alia , which assumption could reasonably be made, with a sufficient degree of certainty, in July 1979 regarding the future life and profitability of the company in view of the relevant conditions then existing in Iran. ..... The Tribunal holds that the appropriate method is to value the company as a going concern, taking into account not only the net book value of its assets but such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management."[327]

It is not clear how the Tribunal reached this conclusion, when this method of valuation has not even been used in cases which were considered as unlawful.[328] The Tribunal did not made it clear what might be the consequence were the nationalization measures to be held unlawful. The Tribunal apparently utilized the statement of Judge Arechaga concerning the forms of reparation for breach of an international obligation which is an illegal act.[329] As was mentioned in earlier chapters, the majority of writers in the field and judicial decisions have drawn a distinction between legal and illegal expropriations and have declared that different rules and obligations are applicable to these two cases. Disregarding the other facts, which were ignored in this case, the legal value of this award seems rather small when one bears in mind that

326- *American International Group v. Islamic Republic of Iran* (93-2-3), X Yearbook Commercial Arbitration, 1985, p. 212.

327- Loc. cit.

328- In this regard see generally *Chorzow Factory and Libyan cases,* op. cit.

329- *American International Group case, op. cit.*

even the American Arbitrator had been reluctant to confirm this judgement by declaring that he joined the other arbitrators in order to make it possible that some award could be issued. Otherwise, this case, which took one year to decide would have remained undecided.[330]

In *INA Corp. Case,* the standard of 'market value' or 'fair market value' was applied, but the concept was use in a quite different way. The Tribunal stated that 'fair market value' meant the amount which a willing buyer would have paid a willing seller, disregarding any diminution of value due to the nationalization itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares.[331] The Tribunal did not explain how it was possible to evaluate the compensation on the basis of market value while certain events had affected the business and any buyer had to take them into account. Moreover, market value takes no account of any conflict between the private and public interest when such a conflict is the very reason for the nationalization. This was particularly so when investors had gained preferential rights and might obtain a disproportionate amount of profit at the expense of the domestic economy.[332] Compensation based on the present value of future revenues in such circumstances implies that Iran would have had to pay in advance for future advantageous gains to the owners that it considered to be against the public interest. In other words, the expropriations would be rendered meaningless and uneconomic, while the Revolution had created circumstances which had left no choice to the Government but that of

330- Separate Opinion of Richard Mosk, AIG Award, X Y.C.A., 1985, op. cit., p. 215.

331- *INA Corp. v. Islamic Republic of Iran,* No. 184-161-1, in XI Y.C.A., op. cit., pp. 314-15.

332- Joffe G., and Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose....., 55 M.L.R., 1992, p. 362.

taking control of those properties. Compensation on such a basis enormously benefited the companies which had exercised normal prudence in undertaking the risk of the advantageous activities in a developing country like Iran, and might have expected to bear the consequence of their judgement and measures which had been calculated according to the economic as well as political conditions and stability of the host State. Accordingly, they had planed to take as much profit as they could as early as possible. However, in *INA Corp.*, the Tribunal admitted that the case presented a classic example of a formal and systematic nationalization by decree of an entire category of commercial enterprises considered of fundamental importance to the nation's economy and in "the event of such large-scale nationalizations of a lawful character, international law has undergone a general reappraisal, the effect of which may be undermine the doctrinal value of any "full" or "adequate"(when used as identical to "full") compensation standard as proposed in this case"[333] The Tribunal held that;

> "However, the Tribunal is of the opinion that in case such as the present, involving an investment of rather small amount shortly before the nationalization, international law admits compensation in an amount equal to the fair market value of the investment."[334]

The Tribunal did not explain the doctrinal basis of this judgement nor the relationship between the amount of the investment and the compensation which should be paid. Moreover, the Tribunal considered the controversial Treaty of Amity as valid, and prevailing over general rules,[335] while the Chambers had normally tried to circumvent the question of the Treaty and base their decisions on other grounds.

333- *INA Corp. v. Islamic Republic of Iran,* XI Y.C.A., op. cit., pp. 314-5; 8 Iran-U.S.C.T.R., op. cit., p. 378.

334- *INA Corp. v. Islamic Republic of Iran,* 8 Iran-U.S.C.T.R., p. 378.

335- Loc. cit.

However the Tribunal declared:

> "In view of the circumstances in this case the Tribunal holds that the words 'the full equivalent of the property taken' entitles the Claimant to be granted compensation equal to the fair market value of its shares in Bimeh Shargh, assessed as of the date of nationalization."[336]

Judge Lagergren in his separate opinion argued that although "full compensation" has been awarded in cases of unlawful expropriations and had been specifically adopted in many bilateral treaties, it was not mandatory by international law. Relying on statements of international law scholars,[337] and a U.N. General Assembly resolution,[338] Lagergren suggested that the traditional rule of "prompt, adequate and effective" compensation should be modified to allow partial compensation when a government nationalizes property in the implementation of fundamental and large-scale economic reform. He added that the appropriate and most regularly applied modern standard of compensation has been a flexible one of "just," "appropriate" or "partial" compensation.[339] Drawing a distinction between a lawful measure of expropriation and an unlawful one, and their consequences, he concluded that:

> "It is generally accepted that some types of expropriations are inherently unlawful ..... Here it is well settled that the measure of compensation ought to be such as to approximate as closely as possible in monetary terms to the principle of restitution in integrum - a remedy which is itself for practical reasons usually impossible of achievement. It is in such cases that the concept of 'full compensation' finds its clearest modern application .... The Hull standard [prompt, adequate and effective compensation] though built on relatively little express arbitral practice, long enjoyed widespread support in legal writings. However, as long ago as 1955, in the eighth edition of Oppenheim's International Law , Sir Hersch Lauterpacht suggested that

336- Loc. cit., p. 379.

337- Lauterpacht H., Oppenheim International Law, op. cit., p. 352; Dolzer, New Foundations of the Law of Expropriation of Alien Property, 75 A.J.I.L., 1981, pp. 553, 557.

338- G. A. Res. 1803(XVII) of 1962 of the U.N.

339- *INA Corp. v. Islamic Republic of Iran,* 8 Iran-U.S.C.T.R., op. cit., p. 378.

> traditional rules of compensation must be subject to modification .... in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference on a large scale with private property. In such cases, neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution to the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation."[340]

He was right to say that, discounting often will be greater in a situation where the investor has enjoyed the profits of his capital outlay over a large period of time, but less, or none, in the case of a recent investor, such as *INA*.[341] Then, he concluded that:

> "an application of current principles of international law as encapsulated in the 'appropriate compensation' formula, would in a case of lawful large-scale nationalization in a state undergoing a process of radical economic restructuring normally require the 'fair market value' standard to be discounted in taking account of all circumstances. However, such discount may, of course, never be such as to bring the compensation below a point which would lead to 'unjust enrichment' of the expropriating state."[342]

As in the AIG and ALICO cases, the Tribunal argued that, for purposes of determining the just amount of compensation, the company's value must be measured as a going concern amounting to $111, 470,000 (U.S.), which included such elements as future business prospects and good will. The claimants also contended that the valuation of their own interest in company must disregard any action of the Government of Iran prior to nationalization which might have had the effect of artificially depressing the value of the company and any event which followed the nationalization which might have negatively affected the company's future business prospects. All of the measures ought to be accounted as the risk which the claimant would have undertaken. Such a liability has not been

340.- Loc. cit., 386.

341.- Loc. cit., p. 390.

342.- Loc. cit.

asserted even in theory by international scholars. For example, Oppenheim admits partial compensation when the act is as the result of fundamental changes in the political system and economic structure of a State or far-reaching social reform.[343]

The claimant's assertion should not be regarded as appropriate, for the reason that the future could never be known with certainty and any discounted cash flow necessarily would be based on assumptions. This becomes more clear when one considers that there is no more market for the expropriated properties, and that the expropriating government cannot freely bargain to accept or reject the others' assumptions about the future revenues and risks. In addition to these considerations, the Tribunal should have taken into account the actual return which the claimant had obtained on its investment up to the time of the expropriation. If the actual rate of return earned by the company up to the time of the expropriation had been high, perhaps an unjustifiably large amount, the actual compensation award could also be reduced accordingly.

The Tribunal awarded $10m as compensation, based on 'going concern value'. Going concern value includes the good will and future interest and is a substitute for *restitutio in integrum*. This principle is usually used when an expropriation is unlawful and confiscatory. Even in this situation, some believed that, for practical reasons, the achievement of such a result is impossible.[344]

Going concern value has been invoked by the parties to disputes and by the Tribunal, but the results of their respective valuations have been completely different. For example in *American International Group*, the method of analysis employed by the claimant's two experts was

343- Lauterpacht H., Oppenheim International Law , op. cit, p. 352.

344- Separate Opinion of Gunnar Lagergren of 15 August 1985, in XI Y.C.A., op. cit., p. 315.

undoubtedly consistent with modern techniques of valuation of insurance companies, but was not acceptable to the Tribunal.[345]

The reason given by the Tribunal was that between the autumn of 1978 and June 1979 some changes in general social and economic conditions of Iran had taken place. The Chamber did not mention the political reality which prevented the restoration of relations between the two countries and consequently changed the company's economic and financial position. This fact was mentioned as an economic consideration, that many Iranian nationals belonging to the wealthier part of the population left the country.[346] In fact, this was not the main reason for the declining of the share prices of the U.S. companies in Iran; the reason was the political climate which was created during and after the revolution, as a result of which nobody wanted or had the courage to buy shares belonging to U.S. nationals in Iran. This reality was stated in the concurring opinion of Aldrich to the award in *ITT Industries, Inc. v. Iran,* that:

> "That Iran might experience revolution was a risk assumed by investors in Iran, as in any country, ... and any reduction in value of investments as a result of revolution cannot be ignored by the Tribunal. Thus, the Islamic Revolution was not a wrong for which claimant was entitled to compensation under international law; and in computing compensation, the Tribunal's task was not to ascertain the real value at the amount of taking, ..."[347]

The Tribunal based its decision on market value and rejected both the AIG's proposed 'going concern value' and projected future profits of the company. The value was made as an 'approximation..... taking into account all the relevant circumstances in the case'.[348]

345- *American International Group v. Islamic Republic of Iran* (93-2-3), Iranian Assets Litigation Rep., op. cit., p. 749.

346- Loc.cit., p. 750.

347- *ITT Industries, Inc. v. Islamic Republic of Iran.* AWD 47-156-2 of May 26, 1983, summerised in 77 A.J.I.L., 1983, p. 893.

The reason given by the Tribunal for choosing going concern value was in the perspective of finance theory, that when a shareholder buys stock, normally he does not anticipate corporate liquidation which is based on book value. Rather, he is purchasing the right to a stream of dividends, so that, in the case of a going concern, the theoretical value of a share is the present value of all dividends per share. It added that the discounted present value of anticipated future earnings would be a reasonable estimate of current share value.[349] However, from the perspective of international law, the decision's soundness and significance are not clear. There is no analysis of the relevant legal issues in the opinion, and some of the observations of the Tribunal are virtually without any evidential foundation.[350] The Tribunal needed to use more substantial facts, such as the privileged position of the company, for the calculation of compensation.

Although the Tribunal stated that it was adopting the going concern value, it declined to choose between the standards of 'prompt, adequate and effective compensation' and 'partial' compensation. Some commentators[351] have asserted that the award is based upon an orthodox

348- *American International Group v. Islamic Republic of Iran* (93-2-3), Iranian Assets Litigation Reports, op. cit., pp. 750-51.

349- Loc. cit., p. 750.

350- The statement that many Iranian nationals belonging to the wealthier part of the population left Iran, and the reference to the effects of 'certain Iranian Taxes' on the company's future profitability was without foundation; see more in *American International Group v. Islamic Republic of Iran* (93-2-3), Iranian Assets Litigation Reports, op. cit., pp. 750, 757 (Mosk, concurring); Article 31 of the UNCITRAL rules determines that the abitrators "must" state the reasons upon which their award is based, and Article 33 of those rules the law applicable to the mirits of the case should be clearly distinguished from the law applicable to the arbitral proceedings.

351- Clagett B. M., The Expropriation Issue Before the Iran-U.S. Claim Tribunal....., 16 L.P.I.B., 1984, p. 820; 25 Harv.I.L.J., 1984, p. 491.

compensation standard, but the small size of the award, together with the reasoning, appears to support a standard of partial compensation. The award not only did not use the opportunity to clarify a confusing area of international law, but it increased the ambiguity and uncertainty on the valuation of the nationalized property in similar situations.

Therefore, it would be correct to say that international law in regard to compensation for expropriation of alien properties is not clear.[352] The literature and the cases have mostly been dominated by the competing principles of "prompt, adequate and effective" and "partial" compensation, and in some cases, such as *Liamco*, it was declared that "clearly there is no conclusive evidence of the existence of community in principles" of domestic and international law.[353] The international community has practiced different rules and different amounts of compensations have been paid for the nationalized properties. *American International Group* is one of the cases which indicates those principles. By avoiding the competing principles of 'prompt', 'full', and 'partial' compensation and focusing on the issue of valuation, the Tribunal, in the *American International Group Case*, achieved a fair compromise between the interests of the company and Iran. This compromise was achieved by adopting the going concern standard, apparently to satisfy the American parties, and also taking into account the conditions existed in Iran to create an equitable and economically-sound result.

In applying the law, including the Treaty of Amity and customary

352- Restatement of Foreign Relations Law of the United States (Revised) XVIII Tenth Draft, No. 4, 1983). Cf. *Banco National,* 658 F. 2d, pp. 887-91; states that it "is difficult ..... to state in black or even Gray letter what is the international law now as regards compensation for expropriated alien propertics."; *Liamco case*, 20 I.L.M., 1981, pp. 75-6.

353- *Liamco case*, 20 I.L.M., op. cit., p. 76.

international law on liability and compensation, each Chamber has adopted quite different approaches or frameworks.

Chamber One, in its August 1987 decision in *Starrett Housing,*[354] adopted an essentially economic methodology in applying Article IV of the Treaty of Amity, and permitted application of the discounted cash flow method of valuation. It construed the Treaty as requiring payment of fair market value-in this case the market value of going concern. The Tribunal determined going concern value through an economic analysis, and adopted a discounted cash flow valuation which had been developed by a Tribunal-appointed expert. The main feature of this award is that lost profits were included as compensation to the claimant.[355] This award was rendered while Starrett had assigned the Agreement to an Iranian subsidiary, Shah Goli Apartment Corporation, and the property in this case had not been taken directly by the Iranian Government. In fact, as a result of the Revolution, the non-Iranian managers and workforce had left Iran and the construction came to a halt. To prevent the project from total destruction, the Iranian Government had taken charge of the abandoned projects in order to complete them.[356] In its interlocutory award of December 19, 1983, the tribunal found that the Government of Iran, by appointing a temporary manager for Shah Goli Company, had indirectly expropriated the company. According to the Tribunal, the expropriation comprised not only the physical assets of the company, but also the right to manage and complete the project.[357] The Tribunal

354- *Starrett Housing Corporation et. al. v. The Government of the Islamic Republic of Iran,* Award No. 314-24-1, 14 August, 1987, in 16 Iran-U.S.C.T.R., p. 112, para. 18.

355- See Concurring Opinion of Judge Holtzmann, in 16 Iran-U.S.C.T.R., p. 241.

356- *Starrett Housing Corporation et. al. v. The Government of the Islamic Republic of Iran et. al.* Award No. ITL 32-24-1, December 19, 1983, in 4 Iran-U.S.C.T.R., 1983, p. 122-147.

deferred the award on the issue of compensation until after a Tribunal-appointed expert examined the issue and gave his opinion as to the value of property in question.[358] The Tribunal deciding on the standard of compensation in 1987, based its finding entirely on the provisions of the Article IV-2 of the treaty of Amity and declared that Starrett was entitled to the full value of its property expropriated by Iran.[359]

In *Sola Tiles Case,* Chamber One likewise assessed market value, but on the basis of a less detailed factual record and with a correspondingly less sophisticated economic analysis.[360] The reason was probably that this case involved simple individual expropriation of a business. Full compensation in this case was generally understood to mean the full value of the property taken, which could include, in appropriate circumstances, an element for profitability. The awards mentioned totally frustrated the purposes of expropriations, which had been undertaken in the interest of the public, and implied a confiscatory aspect to those takings, although, the Tribunal accepted that they were lawful expropriations. Such an award means that the benefit of the takings for a developing country like Iran is to pay in advance and buy future risks of the expropriated businesses. This is an approach to the issue of expropriation for loss suffered by the expropriated parties which takes no account of the public interest as a further legitimate consideration. Such an approach, which is based on the principle of "unjust enrichment" was challenged in the oft-mentioned case of

357- Loc. cit., p. 155.

358- Loc. cit., p. 157.

359- *Starrett Housing Corporation et. al. v. The Government of the Islamic Republic of Iran et. al.,* 16 Iran-U.S.C.T.R., 1987, p. 195.

360- *Sola Tiles Inc. v. The Islamic Republic of Iran,*14 Iran-U.S.C.T.R., 1987 I, p. 223.

Aminoil,[361] and also in some awards of the Iran-U.S. Claim Tribunal.[362]

Chamber Two's decisions indicate that the Treaty of Amity was less applied to expropriation matters. In *Phelps Dodge*[363] and *Payne cases*,[364] the Tribunal decided that the expropriated entities were not going concerns.

Chamber Three's decisions are also somewhat different. In *Amoco Iran Oil Co.*.,[365] the Tribunal decided that the claimant's interest in a joint venture chemical enterprise had been lawfully expropriated and that the Treaty established the standard of compensation. The majority then construed the Treaty standard in the light of the principles of public international law applied in the Permanent Court of International Justice's celebrated *Chorzow Factory* Judgement.[366] Despite applying the *Chorzow Factory* principles, the Tribunal considered the expropriation lawful. Contrary to Chamber One in *Starrett Housing*, in this case, Chamber Three concluded that the Treaty and general principles of international law did not permit application of the discounted cash flow method of valuation in order to determine damages for a lawful expropriation. The Tribunal considered the issue of the public interest as a crucial balancing principle in the determination of appropriate compensation.[367] It was stated that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to

361- *Kuwait v. Aminoil*, 66 I.L.M., 1982, para. 144.

362- *Amoco International Finance Corp. v. Iran*, and *AIFC v. Iran*, op. cit.

363- *Phelps Dodge case*, 10 Iran-U.S.C.T.R., 1986 I, p. 121.

364- *Payne cases*,12 Iran-U.S.C.T.R., 1986 III, p. 3.

365- *Amoco Iran Oil Co.*,15 Iran-U.S.C.T.R., 1987 II, p. 189.

366- *Chorzow Factory case*, P.C.I.J., 1928, Ser. A, No. 17,(Judgement of Sept. 13).

367- *Amoco Iran Oil Co. case*, 15 Iran-U.S.C.T.R., pp. 258-65.

the compensation to be paid by the expropriating State differ according to the legal characterization of the taking. By this statement, the Tribunal meant *restitutio in integrum* for unlawful expropriation, and the full "value of undertaking at the moment of dispossession, *i.e,* 'the just price of what was expropriated', for lawful expropriation.[368] However, some awards have accepted lost profits as an element of full value, or have found lost profits to be a component of compensation only where the taking was unlawful.[369] In the *Aminoil case,* emphasis was placed upon the importance of a "balanced indemnification" and of an award based on a "reasonable rate of return", as contrasted with one based upon "speculative profits." The balance made by the Tribunal was in regard to " an enquiry into all the circumstances relevant to the particular concrete case".[370] Whatever the actual method used to calculate compensation, the 'balance' and concrete approach allowed nothing for the loss of profit during the remaining thirty years of the Aminoil concession. The other difference was the rejection of the "discounted cash flow" method of valuation which was based on the *Chorzow Factory* case. Contrary to this case, in *Starrett Housing,* Chamber One made no distinction on the basis of lawfulness of the expropriation, and its substantial award of the "full value" of the expropriated enterprise included compensation for lost profits. Chamber One's adoption of the "discounted cash flow" method makes the contradictions between the decisions of the Chambers more complicated.

In some other cases, such as *Sedco, Inc. v. Iran,* these

368- See the summerised text in 82 A.J.I.L., 1988, p. 360.

369- *American International Group, Inc.,* 4 Iran-U.S.C.T.R., op. cit., pp. 109-10, and *Payne v. Iran,* Awars 245-335-2, August 8, 1986, 2 Iran-U.S.C.T.R., op. cit., (expropriation was declared lawful, but lost profits awarded).

370- *Aminoil case,* 66 I.L.M., op. cit.

contradictions existed even in the argument and the decision of the Tribunal, since the claimant argued that Iran should pay full compensation on the basis of the Treaty of Amity, while Iran rejected the standard of full compensation as a rule of international law.[371] The Tribunal first held that no matter whether the Treaty of Amity was still in force, Article V-II of the Treaty of Amity was applicable. Despite this conclusion, the Tribunal examined customary international law and the standard of compensation thereunder. The Tribunal referred to the post-war lump-sum agreements, investment treaties and the U.N. Resolutions on Permanent Sovereignty over Natural resources. The Tribunal believed that Resolution No. 1803 (XVII) of the United Nations has altered the law in this field.[372] Therefore, the Tribunal found that current international law required appropriate compensation for expropriation of foreign property. Meanwhile, the Tribunal in applying the law to the case in hand, made a distinction between measures of large-scale nationalization and an *ad hoc* expropriation, and held that in case of an expropriation of a single item of property, which is not within a general programme of expropriation, international law still required full compensation. Surprisingly, the Tribunal considered the Sedco expropriation as a "discrete expropriation" and entitled the claimant to receive full compensation, "whether viewed as an application of the Treaty of Amity or, independently, of customary international law, and regardless of

371- *Sedco Inc. v. National Iranian Oil Company and the Islamic Republic of Iran*, Award No. ITL 59-129-3, March 27, 1986, in 10 Iran-U.S.C.T.R., p. 259.

372- Loc. cit., p. 186; the Tribunal cited the following authorities as evidence; *Topco case v. Libya*, in 17 I.L.M., 1978, p. 1; *Aminoil case*, in 21 I.L.M., 1982, p. 973; *Chilean Copper case*, in 12 I.L.M., 1973, p. 251; *INA case*, 8 Iran-U.S.C.T.R., op. cit.; Brownlie I., Principles of Public International Law, 3rd ed. 1979; Dolzer R., Eigentum, Enteignung und Entschadigung, in Geltenden Volkerrecht, 1985, p. 53.

whether or not the expropriation was otherwise lawful."[373] The Tribunal adopted the same kind of approach in the *INA case*. Moreover, the decision of the Tribunal that full compensation was required for a "discrete expropriation" and that, in large scale nationalizations, less than full compensation had evolved to comprise the rule of international law, is in conflict with the *AIG* Award. Indeed, the same Chamber of the Tribunal in the *AIG* case did not observe this rule. As was stated earlier, in the *AIG* case, Iran had nationalized the entire insurance industry, and the expropriation of the *AIG* thus was only part of a large scale nationalization. Yet, it was held that:

> "it is a general principle of international law that even in case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken."[374]

In that case, the Tribunal awarded full compensation to the *AIG*, with lost profits included. It is difficult to explain the inconsistency of approach between these two cases. In particular, the statement made by the Tribunal to the effect that the expropriation of *Sedco* was the taking of a single item of property is not at all convincing,[375] since the political atmosphere in 1979 in Iran demanded a radical economic restructuring.

The illegality of individual takings was disputed in other cases, such as *Khemco case*. In the *Khemco case*, the claimants demanded full expropriation based on going concern value of the property to be calculated in a 'discounted cash flow' method.[376] The Tribunal rejected the demand on the basis that *restitution in integrum* only applied to

373- *Sedco Inc. v. National Iranian Oil Company and the Islamic Republic of Iran*, 10 Iran-U.S.C.T.R., op. cit., pp. 183, 187.

374- *American International Group, Inc.*, 4 Iran-U.S.C.T.R., op. cit., p. 105.

375- As it was mentioned earlier in this chapter, the Title to Sediran, Subsidery of Sedco, was transfered to the Government of Iran pursuant to the "Law for the Protection and Development of Iranian Industries."

376- *Khemco case*, op. cit., Paras. 210, 227.

unlawful expropriations. The Tribunal referring to the *Chorzow Factory case,* made a careful analysis of the distinction between a lawful and an unlawful expropriation, and discussed the effect of such distinction on the standard of compensation. The Tribunal held:

> "a clear distinction must be made between lawful and unlawful expropriation, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking. ..... an obligation of reparation of all damages sustained by the owner of expropriated property arises from an unlawful expropriation. ..... in case of a lawful expropriation ..... the compensation to be paid is limited to the value of the undertaking at the moment of the dispossession, i. e. the just price of what was expropriated..... Obviously the value of an enterprise does not vary according to the lawfulness or unlawfulness of the taking. This value cannot depend on the legal characterization of fact totally foreign to the economic constituents of the undertaking, namely the conduct of the expropriating State. .....The difference is that if the taking is lawful the value of undertaking at the time of dispossession is the measure and limit of the compensation, while if it is unlawful, this value is, or may be, only a part of the reparation to be paid. In any event, even in case of unlawful expropriation the damage actually sustained is the measure of reparation and there is no indication that punitive damages could be considered."[377]

However, in the *Sola Tiles Inc. case,* decided by Chamber One, the approach was different. The claimant demanded compensation on the basis of general principles of international law, referring particularly to the *Chorzow Factory case.*[378] No reference was made to the Treaty of Amity by the parties to the dispute, but the Tribunal decided that it could not ignore the Treaty even though it had not been argued by the parties. However, the Tribunal first examined the customary international law and found that the standard of "appropriate compensation" was the standard which had been used in recent years and, elaborating on the term "appropriate compensation", the Tribunal found that the standard was

377- *Khemco case,* op. cit., Paras. 192-193, 196-197.

378- *Sola Tiles Inc.* v. *The Government of the Islamic Republic of Iran,* Award No. 298-317-1, April 22, 1987, in 14 Iran-U.S.C.T.R., p. 234.

broad enough to embrace the different standards to be applied in each individual case. The Tribunal held:

> "That term [appropriate] necessarily contemplates that all relevant circumstances will be assessed in any given case. Both the term itself and the elasticity it implies have by now achieved a solid basis in arbitral practice and writings."[379]

Although, the impression is that the Tribunal applied full compensation in the context of the 'appropriate compensation', the standard of compensation was not explicitly declared. Therefore, the findings of the Tribunal in regard to the standard of compensation are confusing.

The Award of the Tribunal in *AIFC v. Iran*, once again displays a difference in approach. The Tribunal made a partial award and held that a nationalization cannot be equated to a normal business investment or to a transaction in a free market, not because the expropriated owner is not usually a willing seller, but because the expropriating State acts for a public purpose. Commercial motivations are rarely paramount in decisions to nationalize, and may even be lacking altogether. Political considerations and considerations of economic policy or general national interest are usually more decisive.

With regard to expropriations such as those in Iran after the revolution, the way must be opened for a more rational and economically equitable consideration of the broader issues and long-term and excessive gains and losses of both parties. This becomes particularly important when one bears in mind that the major purpose of the nationalizations were to remove what has been claimed to be the unreasonable monopolistic position of the U.S. companies which were held responsible for the major social and political problems in Iran.

379- Loc. cit., p. 235.

Political issues and a large number of economic considerations affecting both parties must be taken into account in order to establish an equitable balance between the legitimate interests of the parties. Such an approach would entail a deeper consideration of the economic aspects of the problem and a different framework for analysing not only the respective positions of the parties but also the methods of valuation of compensation.

The difficulty of this latter aspect of valuation becomes apparent when one bears in mind that these are more than one incontrovertible value of any asset, depending not only on the purpose and the procedure but also on the circumstances under which they are valued and also the points of view of buyer or seller, public or private entities, insurance appraiser, economist or accountant and judges. Moreover, the calculations of 'value' from any given point of view, although using the same methods, can diverge widely, depending on the assumptions on which they are based.[380] Therefore, it is not surprising that there have been different approaches to the valuation of nationalized properties by the Chambers of the Tribunal.

Therefore, it is reasonable to suggest that, in determining the appropriate compensation for the Iranian expropriations, the entire history and background of the investment project be examined as well as all other relevant economic, political and social circumstances. Under the post-revolutionary situation in Iran, there could be no market for U.S. companies. By having regard to all these considerations the Tribunal's Chambers could have taken both the private and public interests into account. As some of the Chambers' decisions indicated, the privileged position of the U.S. companies in Iran had created a market value which

380- Joffe G., and Stevens P., Nationalisation of Foreign-owned Property for a Public Purpose....., 55 M.L.R., 1992, p. 359.

was much greater than the value of the enterprise from a public or social-economic point of view and which thus unduly favoured the private owners.

In sum, Iran directly or indirectly expropriated American national's property in Iran, but some of the disputes were as a result of non-performance of the contracts by the U.S. nationals. While the Iran-U.S. Claims Agreement should have been given weight, the special circumstances existing between Iran and United States reduced its importance as a source of international norms. The Agreement provided different solutions to the disputes; procedures inside and outside the Tribunal were at the option of the parties, and some of them were agreed to be decided by the Iranian Courts.

The Tribunal have has many opportunities to apply different kind of rules which were not a common practice between States. Some of the disputes were decided according to the laws of contracts, some others were based on the Treaty of Amity and international law. However, the authorities and references used by the Tribunal were not uniform and consistent. There were quite a lot of differences between the approaches of the parties. Indeed, these were as various as the decisions of the Tribunal itself. The approach of the Tribunal was more consistent with regard to the determination of the rights of the U.S. nationals in relation to their properties and contracts and with regard to the compensation rules applicable to them. However, the Tribunal ignored the discriminatory character of some of the takings against U.S. nationals, and there was no serious challenge to the purposes of the takings.

Therefore, in contrast to Brower's[381] somewhat sanguine

381- Brower C. N., The Lessons of the Iran-U.S. Claims Tribunal: How May They be Applied in the Case of Iraq, Virg.J.I.L., vol. 32:421, p. 421.

description of the results of the Iran-U.S. Claims Tribunal as a "miracle", from the point of international law, they were, in fact, collectively a mess which has only brought more confusion to the international rules on the question of expropriation. It might have been a miracle for the U.S. claimants in a short time, but has never become satisfactory to the Iranian government. The rules applied by the Tribunal are unlikely to become the legal conscious of international society and be appreciated and accepted.

While the arbitrations are inter-State and could have particular value, the Tribunal's statements might be said to be as gratuitous and *obiter*. The decisions of the Tribunal may be criticised, particularly on the ground that the compensation rules applied by the Tribunal have not been reasoned enough, based as they are largely on a misinterpretation of international law and international authorities, in particular the I.C.J case. Consequently, their views on the rules and the nature of the settlement agreements cannot be regarded as having any special force by virtue of their having been expressed by this tribunal.

The uncertainty of the international law on expropriation is also obvious from a consideration of the rules which were applied in the Iran-United Stated disputes.

The Tribunal and the arbitrators attempted to avoid controversy by applying such standards as "appropriate" and "just" compensation in dealing with expropriation cases. Sometimes, they clearly interpreted these terms to mean "full" or "market value" compensation, but this has not been a rigid position applied in all cases. In some of the cases, the Tribunal's Chambers have tried to create a balance by having regard to the "merits" or circumstances relevant to those cases which had the effect of reducing the amount of the compensation payable dramatically. This

approach has not been limited to Iran-U.S. disputes. In cases, such as *Aminoil*, the Tribunal considered that the determination of the amount of an award of 'appropriate' compensation was better carried out by means of an "enquiry into all the circumstances relevant to the particular concrete case," as was emphasized in Article 2(c) of the Charter of the Economic Rights and Duties of States.[382] The Tribunal clearly failed to have regard to all the elements involved in the Iranian expropriations and which had created a new set of circumstances.

In some cases the Tribunal became more conservative, by applying the international minimum standard rules, than the leading capitalist countries of the world like the United States. According to the 1987 formulation of the American Restatement of the Law, in the absence of a special circumstances, what is required by international law is "just compensation where the property of an alien has been taken by the State.[383] The Tribunal in some cases did not even recognize the Iranian revolution as a special circumstance, and did not consider what effect if any that event ought to have on the compensation amounts payable to the claimants. The Tribunal applied the rules which were not even accepted by the U.S. Federal Court of Appeal in *Banco National de Cuba v. Chase Manhattan Bank* in which the Court rejected "the going concern value".[384]

One of the other defects of the Tribunal was its uncertainty whether to use the Treaty of Amity between Iran and the United States. Some cases were decided on the basis of customary international law, although it

382- *Aminoil Case*, 21 I.L.M., 1982, p. 976.

383- *Restatement of the Law: The Foreign Relations Law of the United States*, 1987, Section 712(1), pp. 196-209.

384- *Banco National de Cuba v. Chase Manharran Bank*, 658 Federal Reporter .2d 875 (2d Cir. 1981).

had also been held that the Treaty standard and the customary standard were similar, In others, the treaty was regarded as distinct from customary international law. In some other cases, the treaty was rejected as the applicable law by the Tribunal.

The contradictions which existed in the Iran-U.S. Claims Tribunal's decisions are important, because they have been awarded by a single Tribunal and relate to the expropriation measures taken by one country; and sometimes this contradiction could be seen in the statements and approach of even one of the Chambers of the Tribunal.[385] For example, that *restitutio in integrum* is not a remedy for a lawful expropriation was evidently accepted by the Tribunal, in so far as it did not even contemplate or discuss the remedy even where it was offered by the respondent, Iran.[386]

As far as this work is concerned, the contention is that in post-revolution Iranian expropriations, there are many elements which ought to have been taken into account by the Tribunal, which nevertheless were ignored by the Tribunal.

The decisions of the Tribunal are mostly short, unreasoned, and without a careful analysis of the law and the facts. They were mostly based on the Treaty of Amity, and contribute little to the law of expropriation.

Iran never denied the duty to pay compensation for the expropriations, and the law of Iran is very clear in this regard, providing that in the case of illegal takings even damage should be paid. However,

385- *Sola Tiles Inc. Case* is of those cases which contains self-contradiction.

386- Khan R., The Iran-United States Claim Tribunal: Controversies, Cases and Contribution, Dordrecht, 1990, p. 248; the *Starrett Housing Corp.*, 16 Iran-U.S.C.T.R., 1987, p. 112.

under Iranian law, the property and the contractual rights obtained must be legitimate, based on the law in a real competitive way and without the aim to dominate politically or exploit the society economically. Moreover, the parties to the contracts and agreements must adhere to certain conditions to create a legal entity which would be recognized by Iranian laws. There are four conditions which require to be satisfied. In respect to the U.S. nationals' property, three of the four conditions were lacking. As was explained in the previous chapter on oil nationalizations, in some of them such as the oil contracts, they even lack the fourth condition.

One of the most important conditions is the legal capacity of the parties to the contracts. The Shah, like the rulers in many of the developing countries, was not an elected person and was ruling the country autocratically. His power was gained, at least since 1953, through the CIA *coup d'etat*. As the revolution indicated, he was not the representative of the people of Iran and his authority was not derived from the will of people to enter into agreements with other countries on behalf of the nation. Moreover, the contracts with the U.S. nationals were privileged as a reward to the support of their government to the Shah's regime. Therefore, private contracts with American nationals and the Treaty of Amity should be considered in this regard.

The behaviour of the United States in Iran was contrary to the aims of the United Nations to establish conditions, based on the equal rights of nations large and small to self-determination, under which justice and respect for the obligations arising from treaties and other sources of international law could be maintained. Therefore, in the interest of the principles of international law, the rights to self-determination, human rights, the Tribunal should have renounced such a treaty and the

contracts. In doing so, it might have discouraged other States from ignoring the rights of other nations to self-determination, and in consequence, dictators might loose the courage and opportunity to deprive their peoples of democracy and freedom.

Therefore, Iranian Government has been ready to pay full compensation for the taking of any property in so far as the property had been originally gained legitimately. Is the taking of the U.S. property, if not a total, then a partial vindication of the privileges granted to U.S. nationals by the Shah's regime. The less controversial settlement of the takings of the property of nationals of the other countries might be seen to provide evidence for this conclusion.

There are a great many defects in the work and the decisions of the Tribunal, and they have been the subject of criticism internationally.[387] Indeed, some commentators have called the Tribunal's treatment of the issues presented to it as so laconic, uninformative and unexplained that it forces one to consider the limits on the role of law in the Tribunal's decisions.[388]

Consequently, there is little of conclusive value that can be gleaned from the Tribunal's decisions to support a particular standard, and the decisions of the Tribunal on compensation in large scale nationalization cases are nothing more than a mockery of the principles of international law on political and economic self-determination.

387- Amerasinghe is one of them. See in Isues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice, op. cit., pp. 22-65.

388- Gray C. D., Judicial Remedies in International Law, Oxford, 1987, p. 183; Stein T. L., Jurisprudence and jurists' Prudence: The Iranian Forum Clause Decisions of the Iran-U.S.C.T., 78 A.J.I.L., 1984, p. 2; see also Piran H., Nationalisation of Foreign Property in International Law and Iran-U.S. Claims Tribunal, op. cit., chapter 7.

CONCLUSION

Expropriation existed long in history and will continue to do so as long as property and property laws exist. Expropriation occurs whenever there is a conviction in a society that a certain class of property should not be owned by private ownership. This conviction could emerge, as it has, in all kinds of societies.

The common feature in this branch of international law, namely the responsibility of States for injuries to property of aliens, is, and always has been, that, in most cases, there are no common grounds on which every body agrees and expropriations in developing countries have given rise to more controversy than in the other States. There is no historical evidence that there has been any rule on expropriation universally acceptable to all States, and differences of opinion are still the rule in this area of international law. The oldest restrictions upon the power of taking property emerged on the basis of "justa causa". These restrictions, which were developed during the Middle Ages, included the concepts of public utility and payment of compensation, and found expression in the domestic context within charters, decrees and constitutions. The rules varied as between different States and did not follow any constant course even within the one State.

Up until the Second World War, few expropriations actually took place and those few tended to be of an individual nature. The changes in the world economic order, particularly in the period immediately after 1945, resulted in the emergence of a new form of taking, according to

which most of the developing States asserted the right to exercise their political and economic independence. That was a clear departure from the traditional rules which were asserted by developed States and differences between developed and developing States on the issue clearly emerged.

Before the United Nations General Assembly Resolutions during the 1960s and 1970s, the history of expropriation indicates that no time at which the question of the State's responsibility towards aliens for the expropriation of their property is settled. In the Hague Codification Conference of 1930, the difference among the participants regarding the two standards of "national treatment" and "international minimum standard" was the main reason for the failure of that conference. The two main theories, the international minimum standard and the national treatment standard, thus reflect two completely different points of view based on different economic and political systems. Both have been developed with regard to the particular legal circumstances prevailing in certain States and, accordingly, neither of them can be implemented universally so as to provide a safeguard for the interests of all of the members of the international community and their nationals. Indeed, neither theory would alone be sufficient to bring justice and prosperity to the international community; nor, moreover, has either been incorporated into international law so as to have direct effect within the domestic sphere. The lack of a uniform approach is further demonstrated by the fact that, in some legal systems, the inviolable character of private property is affirmed, while in others the concept of private property is considered an undesirable and ought not to be countenanced.

Overriding each theory in favour of the other would not solve the problem which exist in the international society. The international

minimum standard rules developed among the Western countries and have been practiced to some extent by those States. However, they could not be acceptable to developing States which comprise the majority of members of the international community, and are usually politically deprived, economically backward and have had no role in the creation and development of those rules. Therefore, the view expressed to the effect that the issue of the State's international obligation towards aliens was fully settled before World War II, cannot be correct and it is submitted that it was during the 1960s and 1970s that a concordance of opinions emerged among the international community of nations regarding the subject.

For the reasons presented in this thesis, the theory of acquired rights also cannot provide a reliable legal basis for the determination of the duties of States, particularly developing States, in their dealings with the property of aliens.

One theory common to all States, however, is the theory of unjust enrichment. Despite the slight differences which might exist over this concept in the municipal laws of States, it is arguable that the equitable character of the principle is capable of providing a proper legal foundation upon which the duty of States towards aliens' property might be based and of preventing aliens from exploiting the resources of the host State. Human rights theory provides the most acceptable rules of international law in this regard and might be useful in resolving controversies over the rules of expropriation. To establish a creative, equitable and effective balance between the demand for socio-economic reforms and private interests, States have to reach an agreement on the basis of these principles and consider the rights and duties of both foreign investors and the host States in that regard. Otherwise, States would have

different interpretations of these principles which would cause controversies between States. Thus, developed States might so interpret the right to ownership, for example, as implying payment of full compensation for the expropriation of the property of their nationals, while developing States might interpret it so as to prevent aliens from any further exploitation of their natural resources. The difference in approach is not mainly caused by defects of the rules, but by the kind of relations which exist between States. Therefore, to protect the rights of aliens and host States equally, particularly in developing countries, the behaviours of the aliens and their governments in those countries should also be taken into account.

The controversy which exists over the international principles and rules of expropriation between different groups of States has been manifested in the resolutions of the General Assembly of the United Nations on sovereignty over natural resources. Despite all efforts of the United Nations to create a balance between the interests of different groups of States, States remain divided over the principles and rules which ought to govern their rights and duties towards aliens within this sphere. The success apparently achieved in those resolutions was that the concept of the permanent and inalienable sovereignty of States over their their natural resources became a universally accepted principle of international law. But, other principles raised in those Resolutions, such as the issue of compensation were rendered largely nugatory by the interpretations placed upon them by the States of the terms inserted in those resolutions. To achieve unanimity in the United Nations, these rules would require to be founded on the very basic principles of international law such as human rights, equity, justice, self-determination and so on,

acceptable to all States. By application of those principles, the Resolutions of the General Assembly of the United Nations on sovereignty over natural resources would become more practical at a universal level. Accordingly, the legal consequences of those rules would vary considerably in different groups of States without doing any injustice to either interested party. That is the only possible way to establish the rules contained in the United Nations' Resolutions as universal rules.

As has been indicated, the confusion and disagreement increases in respect of expropriation of contractual rights and the sanctity of contracts. There is no doubt that contracts and treaties play a major role in international economic relations between States. In fact, they constitute the backbone of those relations and make the international flow of goods and services possible. In the absence of any truly international law of contract, State contracts are usually guaranteed explicitly or implicitly through international treaties between States to treat the alien investors according to certain standards. Developed States' guarantees, if any, are part of their ordinary practice in their societies. But, such guarantees by developing countries are usually for different reasons and controversy has arisen over contracts between those States and aliens. Developed States, for the reasons mentioned, do not usually find it necessary to amend their contracts with aliens. However, where amendments to contractual terms have been required, it has not been a problem for them to do that and those States have had always full control over those contracts. But, the legal character of such contracts in developing States is quite different from those in developed States and there are various reasons which force developing States to end their contracts with some of aliens.

Moreover, there is, as yet, no clear-cut principle by means of which it may be determined whether a measure taken by a State in fact

constitutes a lawful expropriation or whether it ought more probably to be considered an illegal breach of contract. It has been more problematic where States ended the privileged terms of contracts with aliens. In such cases, aliens were reluctant to relinquish privileges which they had hitherto taken for granted. Investor countries have sometimes prevented developing States from dealing with the takings as a rightful exercise of sovereignty but, instead, they have usually resorted to characterizing the taking as breach of contract. The different legal consequences of lawful expropriation from illegal breach of contract makes it necessary to make a clear distinction between the two concepts. Thus, for example, with regard to the expropriation of the contractual rights of individuals, treating a mere breach of contract as an international wrong would have been both confusing and unnecessary, particularly when breaching the contract in force between a State and aliens has become the practice even of some developed States, as the act of a responsible government towards the nation. Therefore, any plea of breach of contract in this regard would represent a deviation from the rules of the sovereign right of expropriation.

As was indicated earlier, judicial decisions have not only failed to solve this problem, but have increased the confusion over what is a rightful exercise of expropriation rights and what is an illegal breach of a contract.

In order finally to resolve this controversy, some factors would require to be taken into account. For instance, it is clear that 'establishment treaties' have not always been respected by developing countries, and they have been problematic where imposed on the weak or dependent States to safeguard the interests of alien investors.

However, the treaties concluded between States have not followed a

single pattern, and some of them have been violated by the host States. There is no serious defect in the treaties between developed States and consequently they have almost without exception remained intact. It is likely that the traditional rules of expropriation could be followed even without the existence of such treaties between those countries. Most of the establishment treaties have been concluded between developed and developing States, the very conclusion of which indicates that the rules on expropriation of foreign property have not yet been established universally.

Apart from bilateral establishment treaties, there is no other rule of State contract in international society, and the contracts governed by those treaties have been left to the test of the strength of the parties to those contracts. While clever and powerful investors choose countries for investment carefully in order to reduce their investment risks and secure their future interests, developing countries are unable to act quite so prudently. Therefore, to gain privileged contracts, the investors invariably choose so-called 'friendly countries' which are almost invariably dependent countries under the direct influence of the investors' countries. Iran has concluded such contracts since the beginning of this century. It was for this reason that the Government of the Islamic Republic of Iran ended the privileged contracts with aliens, particularly those concluded with United States nationals. It was argued that contracts concluded between aliens or their governments and dependent countries lacked the requisite element of free will and consent and, consequently, could not be considered as legitimate. It would seem to follow from this that the very capacity of such governments to enter international obligations is questionable.

Meanwhile, treaties between States, whatever their content, do not provide evidence for the conclusion that aliens have become in any way the subject of public international law, and any analogy between international treaties and State contracts which might be drawn in this respect would be irrelevant.

Moreover, although the international practice of States is often thought to be based upon the sovereign equality of States in accordance with the U.N. Charter, the reality is that developing countries do not enjoy such equality. While doubtless aware of this, international judges, nevertheless, for reasons better known to themselves, ignore this reality. Developing countries are not ready to accept that such a practice might become a custom in international relations and try to strike back at any suitable time.

Therefore, it might be concluded that the sanctity of contracts as a preventive element for nationalization of the property of aliens is becoming increasingly less important and any attempt to internationalize their sanctity, applicable to all States, seems without any legal foundation. To end this confusion and ambiguity over State contracts, it is necessary to reach agreement upon definite principles and rules of expropriation of State contracts by means of a multilateral treaty.

Therefore, under international law, one could not assert that all States should respect aliens' property in accordance with certain standards. The principles asserted by developed States are not without legal foundation, but they are applicable only to the same group of countries which comprise the sponsors of those principles. If those States expropriate aliens' property and contractual rights in a discriminatory fashion, not for public purposes and in the absence of compensation, contrary to the principles of their liberal economy, they could be held

liable for those measures. Controversy has frequently arisen from attempts by the sponsors of the principles of the international minimum standard to extend those principles to developing States, because under colonial type relations between developed and developing countries, aliens enjoyed maximum privileges in developing States. To bring an end to what they saw as a discriminatory position of aliens, developing States dispossessed those aliens. In such a discriminatory situation, any non-discriminatory measures taken by developing States would themselves constitute illegitimate discrimination against the non-privileged ones. Therefore, it has not been appropriate for developing States to act according to the international minimum standard rules of non-discrimination. Essentially, the dispute over this principle was raised when a regime had changed in a country somewhat violently and the discriminatory measures against aliens have been taken intentionally.

It might be argued therefore, that an expropriation measure ought not to be condemned, particularly in developing States, on the grounds of its discriminatory nature. The practice of developing States in this regard should not be considered as an exception, but as the rule which characteristically applies to this group of countries. For, it would be based on those same cardinal principles as is the rule of non-discrimination in developed States.

Judicial decisions regarding the issue of the illegality of discrimination as against aliens are far from clear and consistent. What is certain, however, is that 'equal States' must be treated equally and that the different treatment of 'unequal States' is admissible. The concept of non-discrimination has been used internationally to prevent any injustice to aliens. However, its application in developing States is arguably contrary to its purpose. It has been for this reason that many States have ignored

the principle when they have expropriated aliens' property. What has been regarded as illegal under international law is racial discrimination and any discrimination which violates human rights expressed through international conventions.

The principle of public utility has been less controversial. However, the serious blow to the principle is that the sole judge of the measures is the expropriating State itself. While international law is indifferent in application of the principle of public utility, there is no international authority to question the legitimacy of an expropriation on this basis.

The approaches of the various States to the issue of payment of compensation are very controversial, being not frequently diametrically opposed to one another. The reason is that each group of States has mostly tried to apply the rules derived from certain conditions which are appropriate for certain groups of States to all expropriation cases equally. The traditional approach to the question of compensation initially developed in the free economic system of the West. All legal systems have accepted that, in principle, the enrichment of one party at the expense of another party is broadly unacceptable. This principle is one of the appropriate means of assessing the issue of compensation provided that the rule is applied to both expropriating and expropriated parties and not against one party in favour of the other interested party. There are few cases, if any, in which the behaviour of aliens in developing States have been considered and the responsibility of the expropriating States decided accordingly.

Therefore, the differences of opinion and diversity of international awards, together with the variety of different agreements on the issue of

compensation are indicative of the impracticability of the existing rules on expropriation applicable to all States. Therefore, it is inevitable to classify expropriation cases according to different groups of States. Such a classification, would not only require to be based upon the measures taken by expropriating States but would also require to take account of the behaviour of the investors and their governments within developing States. Accordingly, expropriation cases might be classified into three broad categories;

1 - Cases in which the parties are in an equal bargaining and negotiation position, or where the expropriating State has the upper hand in taking the measures. Expropriation in developed States falls within this category of cases. It is expected from developed States, and it has been mostly the practice of those States, to compensate fully aliens for the taking of their property. The practice of those States has been demanded by their own economic system, and they are expected to do so, because any contrary action would result in gross injustice to the expropriated individuals. It is not justifiable for those States to do otherwise while they are in full control of their economy and have a number of options for foreign investments, and foreign investments, if any, enter those States under their full authority.

2 - Expropriation cases which have usually arisen when States obtained their independence from colonial powers. Expropriation in these countries was considered as revindication of their natural resources and national wealth. These countries usually resisted any condition to be fulfilled for taking of property of colonial States and their nationals. Therefore, it is difficult to impose any condition as legal obligation on this group of cases of expropriation.

3 - Developing States are apparently independent but they often do not

have the superiority in expropriating aliens' property. The obligations of developing States should be reduced accordingly as changes in relations increasingly favour the aliens. Developing States generally find themselves acting under either direct or indirect duress in concluding contracts or admitting foreign investments into their country. Further, their economic needs are a direct pressure upon them, and the inefficient and dependent governments of those States are a further burden upon those nations. This has been, in the main, the reason which has so frequently obliged developing States to accept the conditions imposed by foreign investors to submit to economic domination by the more developed States. Payment of compensation to alien investors by developing countries should be considered in the light of these realities. Therefore, when these countries develop politically and economically they are not prepared to continue their previous economic relations with aliens. When they find an opportunity, they expropriated alien property, the latter being seen by them as an obstacle to their development; and they resist the demand for payment of compensation in respect of that the taking of which they consider as merely revindication of their inalienable rights. In reality, of course, alien investors usually take account of such risks, and often manage to gain very high revenue to redeem their investments within a relatively short space of time. Moreover, an investor will often demand compensation for such investments on the basis of their value as a going concern prior to expropriation. But, it is obvious that compensating such investments causes injustice to developing countries.

In fact, application of different rules for expropriation in developing States should be considered as an indemnity for the lack of sovereignty which developing States ought to have been accorded. The

extent of the problem posed by failure to accord proper sovereignty becomes apparent from an examination of the Resolutions of the General Assembly of the United Nations on Sovereignty of States over Natural Resources. The very approval of those resolutions indicates that, up to 1952, the sovereignty of States over natural resources, as a component of the right to self-determination was not accorded to all States. That is clear evidence that application of the traditional rules in developing countries has been without any legal foundation.

The contradictory positions of developed and developing States in the resolutions of the United Nations' General Assembly on Sovereignty of States over Natural Resources respectively were compromised by insertion of terms such as "appropriate" for payment of compensation which in fact did not solve any problem. For, what has been appropriate for developing States has been inappropriate for developed countries, and vice versa and might have had vital consequences for both groups of States. Therefore, the responsibility of each group of States needs to be formulated so as to satisfy the interests of all parties involved in expropriation of aliens' property.

States have tried somehow to safeguard their interests through settlement agreements. But those agreements have not followed any one pattern, for, in the conclusion of those agreements many different elements have been taken into account. Each party to the agreement, by accepting some obligations, usually obtain some rights. However, the agreements between developed States indicate that they have applied the rules nearly to international minimum standards. They are distinctly different from those agreements concluded between developed and developing States. In such agreements, the parties usually do not mention

the factors which have been taken into account and the difficulty of agreeing upon the elements involved in those agreements and identifying the exact responsibility of States towards expropriated aliens remains. Although many of the agreements between developing and developed States were not concluded as a result of some strongly held conviction on the part of the expropriating States, nevertheless a comparison between the claims of alien investors and the terms they agreed on with developing States are enough to conclude that, similar to GATT agreements, some privileges have been granted to developing States. Thus, it is necessary to classify the rules with regard to expropriations of aliens' property in accordance with the conditions of each group of States.

The same conclusion could also be reached from the case study of expropriation of aliens' property. The investments from developed States, particularly those from dominating States, have been treated differently by developing States. They have refused to comply with the traditional rules, and their rebellion against international minimum standards has been, for the most part, fully justified. While expropriations in developed States are usually undertaken with a view to the benefit of the public, in developing States, they are undertaken with the additional motives of preventing any more economic exploitation and gaining increased political independence.

That was the case with regard to the Iranian expropriations when Iran expropriated the *AIOC* and aliens' property in the post-1979 period. The expropriation of the oil industry in 1952 was a part of the struggle to gain control over the industry and to reduce the influence of the company and its government on the country. Despite the fact that Iran had clearly indicated her willingness to compensate the company, a coup d' etat was managed with the help of the CIA, in order to regain the privileged

position of the company within Iran. The post-Revolution expropriations of property, particularly United States nationals' property, was then a response to that coup d' etat, which ended in the domination of the United States over Iran, and put U.S. nationals in a privileged position in the country.

The judicial authorities issued contradictory judgements over the oil nationalization in Iran. Their approaches and the conclusions provide probably the clearest evidence in support of our argument that there is not as yet any universal rule on expropriation of aliens' property. They also indicate that the rules asserted in Western countries are not applicable to countries such as Iran. The nationalization measures were not challenged by international authorities or the neutral courts in Tokyo and Rome. Later events indicated that the dispute between Iran and the *AIOC* was not over the amount of compensation to be paid for legal or illegal taking of the property of the *AIOC*, but that the company was not satisfied with less than restoring its previous position disregard to the Iranian sovereign rights to nationalize the company. Generally, as a result of the quasi-colonial relations which existed between Iran and Britain on the one hand and Iran and the United States on the other hand, their nationals were rewarded for their support for the Shah by privileged contracts. The admission of other investors and the conclusion of the Treaty of Amity between Iran and the United States were a part of that reward for U.S. support. The privileged position of those aliens had created a distinctive condition which was not common in developed States. Iran nationalized the *AIOC*, but the result was not much different. For, the measures were enforced again by a coup d' etat regime which did not manifest the right to the self-determination of the people. As a consequence, after the 1979 revolution, Iran, in fact, renationalized the oil industry and

implicitly rejected the legitimacy of the contractual rights of U.S. nationals.

A diversity of rules on expropriation of alien property can be seen in the agreements between Iran and the United States and in the decisions of the Iran-U.S. Claims Tribunal. The Tribunal was given the option to apply many various kinds of rules which were not common practice of States. Some of the disputes were decided by the Tribunal on the basis of the law of contracts, some others were decided upon the basis of the treaty of Amity and international law, and the authorities and references used by the Tribunal were not uniform and consistent. The Tribunal was uncertain whether to use or omit the Treaty of Amity between the two countries. In some cases it was held that the Treaty standard and the customary standard are similar. In others, the Treaty was distinguished from customary international law, and in some other cases it was rejected by the Tribunal as representing the applicable law.

The Tribunal largely ignored the clearly discriminatory character of some of the expropriation of property belonging to U.S. nationals, and never seriously questioned the appropriateness of the purposes for which expropriations had been undertaken. As a result, the Iran-U.S. Claims Tribunal has really only been productive of greatly increased confusion with regard to the international rules on the question of expropriation.

There are numerous defects in both the procedures and decisions of the Tribunal, and they have, of course, been criticised internationally.[1] In particular, the reasoning adopted by the Tribunal in their application of the compensation rules appears, at times, highly questionable proceeding occasionally upon a clear misrepresentation of international authorities

[1] - Amerasinghe is one of them. See ..... International and Comparative Law Quarterly, vol. 41, part 1, Jan. 1992, pp. 22-65.

such as the decisions of the I.C.J. The Tribunal attempted to avoid controversy by applying such a standard as "appropriate" or "just" compensation payable for the expropriated property and in so doing, admittedly, avoided the adoption of a rigid position in all cases. Indeed, in some of the cases, the Tribunal clearly sought to create a balance between the interests of the parties by taking account of the "merits" or particular circumstances relative to each case, which had the effect of reducing dramatically the amount of the compensation payable. The Tribunal clearly failed to take account of all the elements which were relevant to the Iranian expropriations. They, for example, failed to take into account the privileges which had been enjoyed by the United States' nationals in Iran, in order to protect the rights and interests of a developing country like Iran and thereby to challenge the attitudes of developed States towards developing ones. The Tribunal was even reluctant to recognize the 1979 revolution in Iran as a special circumstance. In some cases, the Tribunal, applying the international minimum standard rules, demonstrated an attitude more markedly conservative than the leading capitalist States like the United States. As a consequence, the decisions of the Tribunal became self-contradictory and irreconcilable. The importance of the contradictions in the decisions of the Tribunal is that they were awarded by a single tribunal and relate to the expropriation measures taken by one State and, at times, contradictions in awards could be seen in the statements and approaches of even one of the chambers of the Tribunal. Moreover, the decisions of the Tribunal are usually short, unreasoned and lacking in any detailed analysis of the law or indeed, the facts. Therefore, it is not always helpful to try to provide support for the application of a particular standard by

reference to the decisions of the Tribunal.

Iran, a party to the Tribunal, has not been happy with the outputs of the Tribunal and is unlikely to participate in any repeat of such an experience again. The reason for the adoption of this attitude is that Iran considers the taking of the U.S. nationals' property, if not a total, then a partial vindication of the privileges granted to U.S. nationals by the Shah's regime and nothing more than that. The less controversial settlement of disputes over the taking of property between the nationals of other countries and Iran are further evidence of such a conclusion.

Therefore, resort to the traditional rules of expropriation was irrelevant and improper, and without taking account of some important factors it is difficult to establish the responsibility of Iran towards American investors. It is, perhaps,unfortunate that the Iran-U.S. Claims Tribunal has paid little attention to the arguably irresponsible measures of the United States government on supporting an undemocratic regime in Iran while in many cases the Tribunal declared the Treaty of Amity binding on Iran. All these elements together has created a hostile relationship between the two countries which, according to the United Nations Charter, should have been avoided.

In fact, the work of the Tribunal has not in the main proved helpful in developing international law, having instead increased the confusion already existing with regard to the rules appropriate to govern this area of international law. The Tribunal, despite possessing a unique opportunity, was not successful in producing a corpus of precedent worthy of its being followed in other disputes. The Tribunal's decisions on the State's responsibility for injuries to aliens fell short of being the kind of scholarly decisions which many observers would hoped to. Arguably, its only positive contribution to international law has been the

fact that it has highlighted the need for different formulations of expropriation rules in developed and developing States. However, it should be praised that the Tribunal is fairly a symbol of the peaceful settlement of disputes between two nations with different legal structure and antagonistic political systems.

It might, therefore, be argued that the rules governing expropriation, at least in so far as they relate to the nationals of countries with a bargaining power equal to that of the expropriating country, regardless of the degree of economic development of those countries, could be, to some extent, those of the international minimum standard. In such cases, there is no reason to expropriate the property of aliens without public need, but to deprive them from their property. Any discrimination towards such owners would be productive of a very unjust and unacceptable situation which can neither be seen as necessary nor desirable from the point of view of either domestic legal systems or international society.

Similar rules would be applicable in respect of the question of compensation. The practice and arguments indicate that there is less contest on the payment of compensation when the parties begin from an equal bargaining position and have less political and economic influence on each other. The protests are mostly against those expropriations which do not have such characteristics, such as those undertaken in Iran and other developing countries, where the property expropriated belonged to aliens from more powerful countries which had political and economical influence within the expropriating country.

Therefore, to deal with the question of expropriation and its most important aspect, that is, compensation, it is not impossible to propose a specific and definite standard which would apply to all instances.

However, the proposed rules are required to comprise different contents to enable a judge, for example, to render an equitable judgement in a specific case. To do so, in a certain case some elements should be taken into account. The payments on agreed terms which are a result of the compromise of the parties somehow reflect the influence of those elements. They are remarkably helpful where investors are looking for compensation as a remedy for damage and demand for future profits, and countries like Iran attempt to prevent any more exploitation of their resources.

Therefore, in order to create a comprehensive rule for expropriation of aliens' property acceptable to all States, the following formula is suggested to establish the responsibility of States on a just and equitable basis and one presumably satisfactory to the parties affected by the expropriation.

Thus, the responsibility of States for expropriation of aliens property might be based upon the application of that most incontrovertible of principles, namely, that nobody should suffer loss as a result of the fault of another, to both the expropriated parties and to the expropriating States. Therefore, it is submitted, in assessing the responsibility of developing States towards aliens account should be taken of the following elements:

1 - The legality of the contracts between aliens and the host State and related treaties, and the presence of the aliens' property in the light of the conditions as those which were mentioned in the Iranian expropriations. To become certain of the legality of investment contracts and treaties between States and aliens on the one hand, and between States on the other hand, some criteria ought to be introduced in order to enable

consideration of the existing contracts and hence provide guidance for both States and aliens with regard to their future investments.

2 - The degree of bargaining power of the host country with the investors and their government/s. This is to be considered with regard to all economic, political and other aspects of the issue.

3 - The risk which the business might involve and which the investors usually take into account when investing in another country which include, *inter alia*, the political risk.

4 - The political influence of the investors and their government/s on the regime of the host State, which has created encouraging conditions for a group of investors to invest in those States which enables those investors to gain a lot of profit. From this point of view, not only must the responsibility of the host States be considered, but also the behaviour of the investors. This aspect of the issue was of the greatest importance in the assessment of the Iranian expropriations.

5 - The right to development and the balance of payments situation of the expropriating country. This is not a legitimate reason for non-payment of compensation, but it could be taken into account in respect of the other elements. For example, the degree to which the presence of aliens' investments have used the hard currency of that country. This, of course, would affect the manner of payment of compensation by the country, and might oblige that country not to expropriate a section of the economy which would make it impossible to pay compensation in hard currencies. The host State might be obliged to expropriate only a small portion of its economy and consequently, the expropriations become discriminatory, and compensation be paid with delay.

6 - The legal ability of the host State, as well as the level of market and technical information of that country. These are the advantages of

developed States while developing States usually lack such abilities.

7 - The amount of profit (excess profit), and losses of the investment which is important to the developing countries. This could be partially or totally a result of the above mentioned abilities.

8 - The privileged position of the investors and the effects of their presence on the rights of the people for economic and political self-determination. This is one of the more important considerations and ought not to be ignored. Giving weight to this consideration would discourage the practice whereby both aliens and their governments use their political influence to gain privileged contracts, and they would avoid supporting undemocratic regimes for this purpose. It would help to spread democracy throughout the world and strengthen international peace and security.

By taking into account the above mentioned elements and principles, it would not be difficult to indicate the responsibility of States towards aliens' property. It would at least facilitate the search for rules on the basis of which it might be judged whether an expropriating State had taken an illegal measure or not. Conversely, taking such elements into consideration might also allow a judge in a particular case to decide that discriminatory measures directed against individual businesses are in fact, lawful. He might decide that any payment of compensation to the investor would result in his unjust enrichment, thus effectively barring claims for compensation whether in full or in part. In this way treaties with undemocratic regimes might equally be declared null and void. On the other hand, the same judge might decide, given a particular case which lacked any of the above elements, that the expropriating State had a responsibility to compensate fully the aliens for their expropriated property or investments. This does not mean to discriminate between the

developed and developing countries, but it is to strike a balance between the interest of the parties to prevent any unjust enrichment of one party at the expense of the other. The contradictions apparent in the judgements of the judicial bodies including those of the Iran-U.S. Claims Tribunal can not be explained except upon the basis that some of the Chambers, have taken into account some of the above mentioned elements, while others have not.

It follows that it is necessary to differentiate lawful measures of expropriation from illegal breaches of contract and confiscatory acts. The different consequences of each should be precisely determined in order to prevent any more confusion in dealing with such measures. To do so, it is necessary for international organizations to sponsor such rules in order to protect the interests of all States. Any agreement however limited in extent, which might achieved in this regard would represent a great success for the international community. Otherwise, the question of expropriation, as a right of States to organize their economies, would be misused and the gains of developing States in expropriating aliens' investments would be limited to the risks of those businesses. The rules of expropriation created on the basis of these suggested elements would enable people to exercise their rights to economic self-determination recognized by international law. Thus, dictators might find it more difficult to deprive their nations of the right to self-determination, with the consequence that the bloody cycle of revolutions and *coups d'etat* might at last, come to an end. The result might be a more stable and peaceful international society, something which would benefit every body, including the investors who require stability and low risks to encourage them to invest.

However, all this will only be possible when the international society manages to come to some sort of agreement, as they did to a certain extent on "the law of treaty" and to a lesser degree on the "sale of goods", which would regulate the rules on the rights and responsibilities of all States with regard to aliens and their property. There seems to be no reason why they could not reach an agreement similar to the GATT one or even a more radical agreement which might satisfy all groups of the countries. Without such an agreement or convention, however, the confusion surrounding the rules of expropriation will continue so that those rules expressed by arbitrators, courts and lawyers will be seen as little more than reflections of particular systems of thought and State interests and thus having no binding status as universal rules of international law.

****
****
****
*****
***
*

BIBLIOGRAPHY

- **Ago R.,** Third Report to the International Law Commission on State Responsibility, U.N. Doc. ACC. 4/246 & Add 1-3, 1971, reprinted in I. L. C. Y., 1977, p. 199.
- **Akehurst M.,** A Modern Introduction to International Law, London, 5th ed., 1984.
- **Akinsania A. A.,** International Protection of Direct Foreign Investments in the Third World, 36 I. C. L. Q., 1987, p. 58.
- **Akinsania A. A.,** The Expropriation of Multinational Property in the Third World, Praeger, 1980.
- **Al-Sowayegh Abdulaziz,** the Oil Embargo, Arab Petro Politics, Londo, 1984.
- **Alfonso Garcia Robles,** The Charter of Economic Rights and Duties of States, in 75 P. A. S. I. L., 1975, p. 227.
- **Amerasinghe C. F.,** Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice, 41 I. C. L. Q., Jan. 1992, p. 22.
- **Amerasinghe C. F.,** State Responsibility for Injuries to Aliens, Oxford, 1967.
- **Amerasinghe C. F.,** The Quantum of Compensation for Nationalised Property, in Lillich R. B., (Ed.), The Valuation of Nationalised Property in International Law, Vol., III, The University of Virginia, 1975, p. 91.
- **American Convention on Human Rights,** 9 I. L. M., 1970, p. 99.
- **African Charter on Human Rights,** 21 I. L. M., 1982, p. 58.
- **Amin S. H.,** Commercial Law of Iran, Tehran, 1986.
- **Amin S. H.,** Iran-U.S. Claims Settlement, 32 I. C. L. Q., 1983, p. 750.
- **Amin S. H.,** Remedies for Breach of Contract in Islamic and Iranian Law, Glasgow, 1984.
- **Amin S. H.,** The Settlement of Iran-U. S. Disputes, J. B. L., 1982, p. 248.
- **Anderson C. P.,** Basis of the Law Against Confiscating Foreign-owned Property, 21 A. J. I. L., 1927, p. 525.
- **Asante S. K. B.,** International Law and Foreign Investment: a reapraisal, 37 I. C. L. Q., 1988, p. 588.
- **Asante S. K. B.,** Stability of Contractual Relations in the Transnational Investment Process, 28 I. C. L. Q., 1979, p. 401.
- **Asian African Legal Cosultative Committee Reports,** 3rd sess., 1960,; 4th sess., 1961.
- **Baade H. W.,** Indonesian Nationalisation Measures Before Foreign Courts, a reply, 54 A. J. I. L., 1960, p. 801.
- **Baez A. C.,** Should Investment in the Third World be Internationally Protected? What Role for the United Nations, P. A. S. I. L., 1985, p. 378.
- **Bainbridge S.,** Nationalisations standard of Compensation, 24:4 Virg. J. I. L., 1984, p. 998.
- **Baxter R. R.,** International Law in "Her infinite Variety", in 29 I. C. L. Q., 1980, p. 549.
- **Baxter R. R.,** Recent codification of the Law of State Responsibility for Injuries to Aliens, New York, 1974.
- **Bellet P.,** Forward to Symposium on the Iran-U. S. Claims Tribunal, 16 Law and Policy in International Business, 1984, p. 667.
- **Bergin T. F.,** The Compensation Rule: An Imaginary Debate, in Lillich R. B., (Ed.), The Valuation of Nationalised Property in International Law, Vol., II, The University of Virginia, 1973, p. 3.

- **Bishop W.,** International Law Cases and Materials, 3rd ed., boston, 1971.
- **Bockstiegel K.,** Arbitration and State Enterprises, 1984.
- **Borchard E. M.,** Responsibility of States at the Hague Codification Conference, 24 A. J. I. L., 1930, p. 517.
- **Borchard E. M.,** The Diplomatic Protection of citizens Abroad or the Law of International Claims, New York, 1927.
- **Bove K. A.,** Arbitration Issues in State Responsibility, P. A. S. I. L., 1990, p. 51.
- **Bowett D. W.,** State Contracts with Aliens, 59 B. Y. I. L., 1988, p. 49.
- **Brierly J. L.,** The Law of Nations, 6th ed., clarendon, 1963.
- **Briggs H. W.,** The Law of Nations, Cases, Documents, and Notes, Sec. Ed., New York, 1952.
- **Bring O. E.,** The Impact of Developing States on International Customary Law, 24 Scandinavian Studies in Law, 1980, p. 99.
- **Brower and Olson,** Learning from the Iranian Experience: Doing Business in High-risk Countries, 1980.
- **Brower C. N.,** and **Tepe J. B.,** The Character of Economic Rights and Duties of States: a reflection or rejection of international law? 9 International Lawyer, 1975, p. 295.
- **Brower C. N.,** Current Developments in the Law of Expropriation and Compensation: A Preliminary survey of awards of the Iran-U. S. Claims Tribunal, 21 International Lawyer, 1987, p. 639.
- **Brower C. N.,** The Lessons of the Iran-U. S. Claims Tribunal: How May They Be Applied in the Case of Iraq?, 32 Virg. J. I. L., 1991-92, p. 421.
- **Brown R.,** The Relationship Between the State and the Multinational Corporation in the Exploitation of Resources, 33 I. C. L. Q., 1984, p. 218.
- **Brownlie I.,** Basic Documents in International Law, 3rd edition, Oxford, 1985.
- **Brownlie I.,** Principles of Public International Law, 4th ed. Oxford, 1990.
- **Brownlie I.,** System of the Law of Nations, State Responsibility, part I, Oxford, 1983.
- **Bullington J. P.,** Problems of International Law in the Mexican Constitution of 1917, 21 A. J. I. L., 1927, p. 685.
- **Burton F. N.,** and **Inoue H.,** Expropriations of Foreign-Owned Firms in Developing Countries, 18 L. W. T. L., 1984, p. 396.
- **Burzynski A.,** The Concept of a Joint Venture and the Legal Context for Joint Ventures in CMEA Countries, 5 Florida International Law Journal 1990, Spr., p. 189.
- **Calisse C.,** A History of Italian Law, london, 1969.
- **Cameron P. D.,** Property Rights ans Sovereign Rights. The Case of North Sea Oil, London, 1983.
- **Cariston K. S.,** Concession Agreements and Nationalisation, 52 A. J. I. L., 1958, p. 258.
- **Caron D. D.,** The Nature of the Iran-U.S. Claims Tribunal and the Evolving Structure of International Disputes, 84 A. J. I. L., 1990, p. 104.
- **Castaneda J.,** The Underdeveloped Nations and the Development of International Law., 15 International Organisation, No. 1, 1961, p. 38.
- **Cattan H.,** The Evolution of Oil Concessions in the Middle East and North Africa, New York, 1967.
- **Cerna C.,** The Charter of Economic Rights and Duties of States, P. A. S. I. L., 1974-75, p. 225.
- **Chatterjee S. K.,** The Convention Establishing the Multinational Investment Guaantee Agency, 36 I. C. L. Q.,1987, p. 76.
- **Cheng B.,** The Anglo-Iranian Dispute, 5 World Affairs, 1951, p. 387.

- **Cheng Chia-Jui,** Clive M. Schmittoff's Select Easys on International Trade Law, London, 1988.
- **Chinkin C.,** The Foreign Affairs Powers of the US President and the Iranian Hostages Agreement, 32 I. C. L. Q., 1983, p. 600.
- **Chowdhury S. R.,** Permanent Sovereignty Over Natural Resources, in Hossein K and Chowdhury S. R., (eds.), Permanent Sovereignty Over Natural Resources in International Law, London, 1984, p. 1.
- **Christenson G. A.,** The Doctrine of Attributibility in State Responsibility, in Lillich R. B., (ed.), International Law of State Responsibility for Injuries to Aliens, University Press of Virginia, 1983, p. 321.
- **Christenson G. A.,** The United States-Rumanian Claims Settlement Agreement of March 30, 1960, 55 A. J. I. L., 1961, p. 617.
- **Christie G. C.,** What Constitutes a Taking of Property under International Law, 38 B. Y. I. L., 1962, p. 307.
- **Clagett B. M. & Poneman D. B.,** The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Law, 22 International Lawyer, 1988, p. 35.
- **Clagett B. M.,** Just Compensation in International Law, in Lillich R. B., (ed.), Valuation of Nationalized Property in International Law, vol. 4, University Press of Virginia, 1987, p. 32.
- **Clagett B. M.,** Protection of Foreign Investment Under the Revised Restatement, 25 Virg. J. I. L., 1986.
- **Clagett B. M.,** The Expropriation Issue Before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?, 16 Law & Policy in International Business, 1984, No. 3, p. 813.
- **Cliford Frederick,** History of Private Legilation, 1885, vol. 1.
- **Constitutions of the World,** New York, 1980.
- **Cripps Y.,** A New Frontier for International Law, 29 I. C. L. Q., 1980, p. 1.
- **Crook J. R.,** Applicable Law in International Arbitration: The Iran-U. S. Claims Tribunal Exprience, 83 A. J. I. L., 1989, p. 278.
- **D' Orazio,** Constitutional Law, Exicutive Power Presidential Claims Settlement Power, 27 New York Law School Law Review, 1982, pp. 985-999.
- **Daintith and Gault,** pacta sunt servanda and the Licensing and Taxation of North Sea Oil Production, 8 Camberian Law Review, 1977, p. 28.
- **Daintith T. C.,** and **Willoughby G. D. M.,** A manual of United Kingdom Oil and Gas Law, London, 1977.
- **Dawson F. G. & Hea I. L.,** International Law, National Tribunals and the Rights of Aliens, New York, 1971.
- **Dawson F. G., Weston B. H.,** Prompt, Adequate and Effective: A Universal Standard of Compensation?, 30 Forham Law Review, 1961-2, p. 728.
- **De Arechaga E. J.,** Aplication of the Rules of State Responsibility to the Nationalisation of Foreign-owned Propery, in Legal Aspects of the New International Economic Order, ed. Kamal Hossain, Oxford, 1980, p. 221.
- **De Arechaga E. J.,** Application of the Rules of State Responsibility to the Nationalisation of Foreign-owned Property, in Hossain K.(ed.), Legal Aspects of the New International Economic Order, London, 1980, p. 220.
- **De Arechaga E. J.,** International Law in the Past Third of Century, 1978-I.

- **De Arechaga E. J.,** State Responsibility for the Nationalisation of Foreign Owned Property, 11 N. Y. U. J. I. L. & Pol. 1978, p. 179.
- **De Lupis I. D.,** Finance and Protection of Investments in Developing Countries, 2nd ed., G. Britain, 1987.
- **Delaume G. K.,** Transnational Contracts, Applicable Law and Settlement of Disputes, New York, 1975.
- **Delaume G. R.,** Economic Development and Sovereign Immunity, 79 A. J. I. L., 1985, p. 319.
- **Denning L. J.,** The Need for a New Equity, in Keeton G. W. & Schwarzenberger G., 5 Current Legal Problems, London, 1952, p. 1.
- **Denza E., Brooks S.,** Investment Protection Treaties: United Kingdom Exprience, 36 I. C. L. Q., 1987, p. 908.
- **Dicke D. C.,** Foreign Investment in the Present and a New International Economic Order, vol. 2, Switzerland, 1987.
- **Diosdi Gyorgy,** Ownership in Ancient and Preclassic Roman Law, Budapest, 1970.
- **Dixon M., McCorquodale R.,** Cases and Materials on international Law, London, 1991.
- **Dolzer R.,** New Foundations of the Law of Expropriation of Alien Property, 75 A. J. I. L., 1981, p. 553.
- **Doman N. R.,** Postwar Nationalisation of Foreign Property in Europe, 8 Columbia Law Review, 1948, p. 1125.
- **Doman, N. R.,** Compensation for Nationalised property in Eastern Europe, 3 I. L. Q., 1950, p. 323.
- **Domke M.,** Foreign Nationalizations, Some Aspects of Contemporary Law, 55 A. J. I. L., 1961, p. 585.
- **Domke M.,** Indonesian Nationalisation Measures Before Foreign Courts, 54 A. J. I. L., 1960, p. 305.
- **Dowson F. G.** and **Burns H. W.,** Prompt, Adequate and Effective: A Universal Standard of Copensation, 30 Forham Law Review, 1962, p. 727.
- **Eagleton C.,** Responsibility of States in International Law, New York, 1928.
- **Eagleton C.,** Self-determination in the United Nations, 47 A. J. I. L., 1953, p. 88.
- **Edith Penrose, George Joffe, and Paul Stevens,** Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, in 55 M. L. R., 1992, p. 353.
- **Edwards jr. R. W.,** Extraterritorial Application of the U.S. Iranian Assets Control Regulations, 75 A. J. I. L., 1981, p. 870.
- **Elian G.,** The Principle of Sovereignty over Natural Resources, Netherland 1979.
- **Erskine J.,** An Institute of the Law of Scotland, 1973, Book II.
- **European Convention of Human Rights** of November 1950, in 213 U. N. T. S., p. 221.
- **Fachiri A. P.,** Expropriation and International Law, 6 B. Y. I. L., 1925, p. 159.
- **Farahani A. G.,** International, Law, Nationalisation, Teheran, 1988.
- **Fatouros A. A.,** Government Guarantees to Foreign Investors, Columbia University Press, New York, 1962.
- **Fatouros A. A.,** International Law and the Internationalized Contract, 74 A. J. I. L., 1980, p. 134.
- **Fawcett J. E. S. & Parry A.,** Law and International Resource Conflicts, Oxford, 1981.
- **Fawcett J. E. S.,** Some Foreign Effects of Nationalisation of Property, 27 B. Y. I. L., 1950, p. 355.

- **Fawcett J. E. S.,** The Legal Character of International Agreements, 30 B. Y. I. L., 1953, p. 381.
- **Feeley M. S.,** Dual Nationality, 26 Harvard International Law Journal, 1985, p. 208.
- **FitzGerald R. C.,** The Law and Ethics of the Compulsory Acquisition of Land, in Keeton G. W. & Schwarzenberger G., Current Legal Problems, vol. 5, London, 1952, p. 55.
- **Flint D.,** Foreign Investment and New International Economic Order, in Hossain K. and Chowdhry S. R. (eds.), Permanent Sovereignty over Natural Resources in International Law, London, 1984, p. 158.
- **Foighel I.,** Nationalization, A Study in the Protection of Alien Property in International Law, London, 1957.
- **Ford A. W.,** The Anglo-Iranian Oil Dispute, University of Califonia Press, 1954.
- **Francioni F.,** Compensation for Nationalization of Foreign Property: the Borderland Between Law and Equity, 24 I. C. L. Q., 1975, p. 255.
- **Freeman A. V.,** Recent Aspects of the Calvo clause and Challenge to International Law, 40 A. J. I. L., 1946, p. 121.
- **Freeman A. V.,** The International Responsibility of States for Denial of Justice, London, 1938.
- **Friedman W.,** The Use of 'General Principles' in the Development of International Law, 57 A. J. I. L., 1963, p. 279.
- **Friedman S.,** Expropriation in International Law, London, 1953.
- **Friedmann w.,** The Changing Structure of International Law, London, 1964.
- **Furnish D. B.,** Days of Revindication and National Dignity: Petroleum Expropriations in Peru and Bolivia, in Lillich R. B., (ed.), The Valuation of Nationalized Property in International Law, Vol. II, University press of Virginia, 1973, p. 55.
- **Furnish D.,** Trade Problems of the Developing Nations, P. A. S. I. L., 1982, p. 206.
- **Gainer G.,** Nationalisation: The Dichotomy Between Western and Third World Perspective in International Law, 26 Howard Law Journal, 1983, p. 1547.
- **Gantz D. A.,** Dispute Settlement, P. A. S. I. L., 1979, p. 245.
- **Garcia Amador F. V.,** Fourth Report to the International Law Commission on the Subject of the 'Responsibility of States for Injuries Caused in Its Territory to the Persons or Property of Aliens' (1959), U.N. Document No. A/CN. 4/119, Reprinted in Y. I. L. C., vol. II, 1959, p. 1.
- **Garcia Amador F. V.,** The Emerging International Law of Development, London, 1990.
- **Garcia Amador F. V.,** The Proposed New International Economic Order: A New Approach to the Law Governing Nationalisation and Compensation, 12 Lawyer of the Americas, 1980, p. 1.
- **Garcia-Amador F. V.,** "The Proposed New International Economic Order: A New Approach to the Law Governing Nationalisation and Compensation" 16 Lawer of the Americas, 1984, p. 5.
- **Gaston P. G.,** Iran-United States Litigation, P. A. S. I. L., 1983, p. 3.
- **Gebrehana T.,** Arbitration: An Element of International Law, 1984.
- **Geiger R.,** 'The Unilateral Change of Economic Development Agreements', 23 I. C. L. Q., 1974, p. 73.
- **Geiser H. J. A.,** A New International Economic Order: Its Impact on the Evolution of International Law, Geneva, 1978.
- **Gill D. G.,** Legal Principles and Practices Relating to Private Foreign Investment, P. A. S. I. L., 1983, p. 292.
- **Girvan N.,** Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint, in Lillich (ed.), The Valuation of Nationalised Property in International Law, vol. III, 1975, p. 149.

- **Goldman R. K.** and **Paxman J. M.,** Real Property Valuations in Argentina, Chile, and Mexico, in Lillich R. B., (Ed.), The Valuation of Nationalised Property in International Law, Vol., II, The University of Virginia, 1973, p. 129.
- **Goldstajn A.,** Reflections on the Structure of the Modern Law of International Trade, in P. Sarcevic, International Contracts and Conflicts of Laws, London, 1990, p. 14.
- **Goode R. M.,** Commercial Law, (Harmonsworth), 1982.
- **Gordon E.,** The Independence and Impartiality of International Judges, P. A. J. I. L., 1988, p. 508.
- **Gough J. W.,** Fundamental Law in English Constitutional History, 1955.
- **Gray C. D.,** Judicial Remedies in International Law, Oxford 1987.
- **Green L. C.,** International Law through the Cases, New York, 1978.
- **Green L. C.,** The Raw Materials of International Law, 29 I. C. L. Q., April 1980, p. 186.
- **Grieke,** Natural Law and the Theory of Society 1500-1800, 1934.
- **Gross L.** and **Sohn L. B.,** Reflections on Order, Freedom, Justice, Power: The Challenges for International Law, P. A. S. I. L., 1980-1, p. 186.
- **Gutteridge J. A. C.,** Expropriation and Nationalisation in Hungary, Bulgaria and Roumania, 1 I. C. L. Q., 1952, p. 14.
- **Hackworth G. H.,** Digest of International Law, vol. 3, Washington D. C., 1942.
- **Hackworth G. H.,** Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners, 24 A. J. I. L. 1930, p. 500.
- **Hanessian G.,** General Principles of Law in the Iran-U. S. Claims Tribunal, 27 Col. J. T. L., 1989, p. 309.
- **Harris D. J.,** Cases and Materials on International Law, second edition, 1979.
- **Hawtrey R. G.,** Economic Aspects of Sovereignty, London, 1930.
- **Heichelheim F. M.,** An Ancient Economic History, vol. 1, 1958.
- **Henry Jr. S. P., Bainbridge S.,** Nationalisation- Standard of Compensation, 24 Virg. J. I. L., 1984, p. 993.
- **Hermann A. H.,** Conflicts of National Laws with International Business Activity: Issues of Extraterritoriality, London 1982.
- **Herz J. H.,** Expropriation of foreign property, 35 A. J. I. L., 1941, suppt, p. 243.
- **Higgins R.,** The Taking of Property by the State: Recent Developments in International Law, Recucil Descours, 1982-II, p. 261.
- **Hohenveldern I. S.,** Communist Theories on Confiscation and Expropriation: critical comments, 7 A. J. C. L., 1958, p. 541.
- **Holtzmann H. M.,** Disputes Concerning the Termination of Joint Ventures: Lessons from Awards of the Iran-US Claims Tribunal, International Arbitration vol. 9, No. 1, 1993, p. 103.
- **Holtzmann H. M.,** Some Lessons of the Iran-U. S. Claims Tribunal, in Landwehr M. L. (ed.), Private Investors Abroad, Problems and Solutions in International Business, 1987, ch. 16, p. 1.
- **Horn N.,** Uniformity and Diversity in the Law of International Commercial Contracts, in N. Horn and C. M. Schmitthoff, (eds.), The Transnational Law of International Commercial Transactions, Deventer, 1982, p. 15.
- **Hornsey G.,** Foreign Investment and International Law, 3 I. L. Q., 1950, p. 552.
- **Hossain K.,** Legal Aspect of the New International Economic Order, London, 1980.
- **Hossain K. & Chowdhry S. R.,** Permanent Sovereignty Over Natural Resources in International Law, London, 1984.

- **Hossain K.,** Law and Policy in Petroleum Development, London, 1979.
- **Huang T. T. F.,** Some International and Legal Aspects of the Suez Canal Question, 51 A. J. I. L., 1957, p. 277.
- **Huston,** International Tribunals, Past and Future, Washington, 1944.
- **Hyde C. C.,** Confiscatory Expropriation, 32 A. J. I. L., 1938, p. 759.
- **Hyde C.,** International Law, Boston, 1947, vol. 1.
- **Hyde J. N.,** Permanent Sovereignty over natural wealth and Resources, 50 A. J. I. L., No. 4, 1956, p. 854.
- **Hyde C. C.,** Compensation for Expropriation, 33 A. J. I. L., 1939, P. 108.
- **I.C.J.** Pleadings 1952.
- **Ingrm G. M.,** Expropriation of U. S. Property in South America, Second ed. U. S., 1975.
- **International Chamber of Commerce,** Bilateral Treaties for International Private Investment, ICC Publications, Paris, 1977.
- **Janis M. W.,** The Challenge of Universality, P. A. S. I. L., 1989, p. 547.
- **Jenks C. W.,** State Succession in Respect of Law-Making Treaties, 29 B. Y. I. L., 1952, p. 105.
- **Jennings R. Y.,** State Contracts in International Law, 37 B. Y. I. L., 1961, p. 156.
- **Jessup P. C.,** Modern Law of Nations, 2nd ed., New York, 1956.
- **Jessup P. C.,** The Price of International Justice, new York, 1971.
- **Jessup P.C.,** Non-Univesal International Law, 12 Col. J. I. L., 1973, p. 415.
- **Joffe G.,** and **Stevens P.,** Nationalisation of Foreign-owned Property for a Public Purpose, 55 M. L. R., 1992, p. 359.
- **Jones D. L.,** The Iran-U. S. Tribunal: Private Rights and States Responsibility, 24 Virg. J. I. L. 4, 1984, p. 259.
- **Jordan H.,** The Last Year of the Carter Presidency; Saunders H., American Hostages in Iran, 1985.
- **Kaeckenbeek G.,** The Protection of Vested Rights in International Law, 17 B. Y. I. L., 1936, p. 1.
- **Katzarov K.,** The Validity of the Act of Nationalisation in International Law, 22 M. L. R., 1959, p. 639.
- **Katzarov K.,** Theory of Nationalisation, the Hague, 1964.
- **O' Keefe P. J.,** The United Nations and Permanent Sovereignty Over Natural Resources, 8 J. W. T. L., 1974, p. 239.
- **Keeton G.W.** and **Schwarzenberger G.,** Foreign Investments and International Law, London, 1969.
- **Khalilian S. K.,** Controversial Theory of Frustration Before the Iran-U. S. Claims Tribunal, 7 Journal of International Arbitration, 1990, p. 5.
- **Khan R.,** The Iran-United States Claims Tribunal: Controversies, Cases and Contribution, Dordrecht, 1990.
- **Khorshid Salman,** Justice and the New International Economic Order, in Hossain K.(ed.), Legal Aspects of the New International Economic Order, London, 1980, p. 108.
- **Kosheri A. S. El, & Riad T. F.,** Law Governing a New Generation of Petroleum Agreements, ICSID Review of Foreign Investment Law Journal, vol. 1, 1986.
- **Koven V. R.,** Expropriation and the Jurisprudence of OPIC, 22 Harv. I. L. J., 1981, p. 269.
- **Kronfol Z. A.,** Protection of Foreign Investment, Netherland, 1972.
- **Kuhn A. K.,** Foreing Funds Control and Foreing Owned Property, 35 A. J. I. L., 1941 Suppt., p. 651.

- **Kunz J. L.,** the Mexican Expropriations, New York, 1976.
- **Kunzer K.,** Recent Development, Developing A Model Bilateral Investment Treaty, 15 Law and Policy in International Business, 1983, p. 273.
- **Lacey J.,** The Demand for Economic Justice, P. A. S. I. L., 1981-2, p. 120.
- **Lake W. T. & Dana J. T.,** Judicial Review of Awards of the Iran-U. S. Claims Tribunal: Are the Tribunal's Awards Dutch?, 16 Law and Policy in International Business, 1984, p. 755.
- **Lall S.** and **Streeten P.,** Foreign investment, Transnationals and Developing Countries, London 1977.
- **Lange D., Born G.,** The Extraterritorial application of National Laws, the Netherlands, 1987.
- **Lapping B.,** End of Empire, London, 1985.
- **Lauterpacht E.,** The Iran-U. S. Claims Tribunal: An Assessment, in Landwehr M. L.(ed.), Private Investors Abroad, Problems and Solutions in International Business, 1982, p. 213.
- **Lauterpacht H.,** Oppenheim's International Law, 8th ed., London, 1955.
- **Leddy J. M.,** Contemporary Practice of the United States Relating to Contemporary Law, 61 A. J. I. L., 1967, p. 101.
- **Leich M. N.,** The Iran-U.S. Claims Tribunal, 77 A. J. I. L., 1983, p. 913.
- **Leigh G. I. F.,** Nationality and Diplomatic Protection, 20 I. C. L. Q., 1971. p. 453.
- **Lenczowski G.,** Russia and the West in Iran; A Study in Big-Power Rivalry 1918-1948, Ithaca, 1949.
- **Lew J. D.,** Applicable Law in Interantional Commercial Arbitration, 1978.
- **Lieblich W. C.,** Determination by International Tribunals of the Economic Value of Expropriated Enterprises, 7 Journal of International Arbitration, 1990, p. 37.
- **Lillich R. B.,** and **Weston B. H.,** International Claims: Their Settlement by Lump-Sum Agreements, Vol.s I, II, U. S., 1975.
- **Lillich R. B.,** and **Weston B. H.,** Lump-Sum Agreements: Their Continuing Contribution to the Law of International Claims, 82 A. J. I. L., 1988, p. 69.
- **Lillich R. B.,** International Law of State Responsibility for Injuries to Aliens, University Press of Virginia, 1983.
- **Lillich R. B.,** International Claims: Postwar British Practice, Syracuse University Press, 1967.
- **Lillich R. B.,** International Law and the Chilean Nationalizations: The Valuation of the Copper Companies, in The Valuation of Nationalized Property in International Law, vol. II, The University of Virginia, 1973, p. 120.
- **Lillich R. B.,** Lump-sum Agreements: standards therein and impact thereof, in Dike D.(ed.), Foreign Investment in the Present and a New International Economic Order, Switzerland, 1987, p. 239.
- **Lillich R. B.,** States Responsibility, Self-help, and International Law, P. A. S. I. L., 1979, p. 244.
- **Lillich R. B.,** The Current Status of the Law of State Responsibility of Injuries to Aliens, in Interantional Law, 1939.
- **Lillich R. B.,** The Iran-United States Claims Tribunal 1981-1983, University of Virginia, 1984.
- **Lillich R. B.,** The Valuation of Nationalised Property in International Law: Toward a Consensus or More "Rich Chaos"? in Lillich R. B., (Ed.), The Valuation of Nationalised Property in International Law, Vol., III, The University of Virginia, 1975, p. 183.
- **Lissitzyn O. J.,** International Law in a Divided World, No. 542, International Conciliation, 1963.
- **Lissitzyn O. J.,** International Law, Today and tomorrow, New York, 1965.
- **Lissitzyn O. J.,** The Meaning of the Term Denial of Justice in International Law, 30 A. J. I. L.,

1936, p. 632.
- **Lok Sabha Secretariat,** Suez Canal Nationalisation and After, New Delhi, 1956.
- **Lok Sabha secretariat,** Suez Canal Nationalisation and After, New Delhi, 1956.
- **Longhurst,** Advanture in Oil, London, 1959.
- **Love A. V.,** Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act. 1980, A. J. I. L. 1981, p. 257.
- **MacCarthy T. E.,** Transnational Corporations and Human Rights, in UN Law Fundamental Rights, Two Topics in International Law, (Cassese A., ed.), The Netherlands, 1979, p. 175.
- **Mackey H.,** Expropriation (Persian), vol. I, Tehran, 1982.
- **Mackey H.,** The Years of National Movement (Persian), Vol. 5, Tehran, 1990.
- **Mackey, H.,** Expropriation, (Persian), Vol. I, Tehran, 1982.
- **Macleod J. K., Hudson A. H.,** Elements of Mercantile Law, London, 1978.
- **Maddison A.,** Economic Progress and Policy in Developing Countries, London, 1970.
- **Magrow D., Bove K.,** Recent Developments in State Responsibility, P. A. S. I. L., 1989, p. 224.
- **Maitland J.,** Political Theories of the Middle Ages, Cambridge, 1900.
- **Makarczyk J.,** Principles of the New International Economic Order, Boston, 1988.
- **Malloy M. P.,** Extraterritoriality: Conflict and Overlap in National and International Regulation, 81 P. A. S. I. L., 1980, p. 30.
- **Mann F. A.,** British Treaties for the Promotion and Protection of Investments, 52 B. Y. I. L., 1981, p. 241.
- **Mann F. A.,** International Corporations and National Law, 42 B. Y. I. L., 1967, p. 145.
- **Mann F. A.,** Outlines of a History of Expropriation, 75 L. Q. R., 1959, p. 188.
- **Mann F. A.,** State Contracts and State Responsibility, 54 A. J. I. L., 1960, p. 572.
- **Mann F. A.,** Studies in International Law, Oxford, 1973.
- **Mann F. A.,** The Legal Aspects of Money; With Special Reference to Comparative and public International Law, 4th ed., Oxford, 1982.
- **Mann F. A.,** The Proper Law of Contracts Concluded by International Persons, B. Y. I. L., 1959, p.
- **McCarthy M. M.,** State Responsibility for Violation of Human Rights, P. A. S. I. L., 1989, p. 372.
- **McClelenand,** International Arbitration, 17 Virg. J. I. L., 1977, p. 729.
- **McCosker J. S.,** Book Values in Nationalisation Settlements, in Lillich R. B., (Ed.), The Valuation of Nationalised Property in International Law, Vol., II, The University of Virginia, 1973, p. 36.
- **McDougal M.,** Human Rights and World Public Order, Yale University Press, New Haven, 1980.
- **McKinnon R.,** Money in International Exchange, New York, 1979.
- **McNair A. D.,** The General Principles of Law Recognised by Civilized Nations, 33 B. Y. I. L. 1957, p. 1.
- **McNair and Watts,** The Legal Effects of War, Cambridge 1966.
- **Meier G. M. and Gerald M.,** The International Economics of Development; Theory and Policy, New York, 1968.
- **Mendelson M.,** The United Kingdom Nationalisation Cases and the European Convention on Human Rights, 57 B. Y. I. L., 1986, p. 33.
- **Mendelson M. H.,** What Price Compensation? Compensation for Expropriation: The Case Law, 79 A. J. I. L., 1985, p. 414.
- **Messenger J. L.,** Recent Trends in Branch Expropriation Cases, Suffolk Transnational Law Journal, vol. 8:1, 1984, p. 45.

- **Mikesell K. F.,** Public International Lending for Development, New York, 1966.
- **Miller A. S.,** Protection of Private Foreign Investment by Multinational Conventions, 53 A. J. I. L., 1959, p. 371.
- **Mintz N. N.,** An Economic Analysis of Aspects of International Expropriation of Property, in Lillich R. B., (Ed.), The Valuation of Nationalised Property in International Law, Vol., II, The University of Virginia, 1973, p. 18.
- **Mintz N. N.,** Economic Observations on Lump-sum Agreements, 43 Indian Law Journal, 1968, p. 885.
- **Mitchell J. D. B.,** The Contracts of Public Authorities, 1954.
- **Moore J. A.,** A Digest of International Law, Washington, 1906, vol. VI.
- **Movahed, M. A.,** Our Oil and Its Legal Problems (Persian), Tehran Jan. 1980.
- **Muchlinski P. T.,** Law and the Analysis of the International Oil Industry, in Judith Rees and Peter Odell (eds.), The International Oil Industry: An Interdisciplinary Perspective, london, 1987, p. 142.
- **Muller M. H.,** Compensation for Nationalisation, A North-South Dialogue, Col. J. I. L., 1980-1, p. 35.
- **Murphy C. F.,** Limitations upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalisation, in Lillich R. B., (Ed.), The Valuation of Nationalised Property in International Law, Vol., III, The University of Virginia, 1975, p. 49.
- **Murphy C. F.,** State Responsibility for Injuries to Aliens, 41 N. Y. U. L. Rev., 1966, p. 125.
- **Mustill M. J. and Boyd C.,** The Law and Practice of Commercial Arbitration in England, 2nd ed., London, 1989.
- **Nawaz M. K.,** Nationalisation of Foreign Oil Companies, Libyan Decree of 1 Sept., 1973, 14 Indian Journal of International Law, 1974, p. 74.
- **Nelson R. W.,** Avoidance and Settlement of International Investment Disputes, in P. A. J. I. L., 1984, p. 38.
- **NG'ONG'OLA C.,** The Post-Colonial Era in Relation to Land Expropriation Laws in Botsowana, malawi, Zambia and Zimbabwe, 41 I. C. L. Q., 1992, p. 117.
- **Norton J. J. & Collins M. H.,** Reflection of the Iranian Hostages Settlement, 67 American Bar Association Journal, 1981, p. 146.
- **Norton P. M.,** A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation, 85 A. J. I. L., 1991, p. 474.
- **Nussbaum A.,** Money in the Law, National and International, (rev. ed. 1950).
- **Nussbaum A.,** Money in the Law, National and International, Oxford, 1950.
- **Nwogugu E.I.,** The Legal Problems of Foreign Investment in Developing Countries, Manchester University Press, 1965.
- **O'Connell D.,** International Law, London, 1970.
- **OECD,** National Treatment for Foreign-Controlled Enterprises, Paris, 1993.
- **OPEC Official Resolutions and Press Release,** 1960-1983, 2nd ed., Oxford, 1984, p. 61.
- **Oppermann T., Petersmann E. U.,** Reforming the International Economic Order, Berlin, 1987.
- **Owen R. B.,** The Final Negotiation and Release in Algiers, in Kreisberg, American Hostages in Iran, 1985.
- **Owen R. B.,** The U.S.-Iranian Hostage Settlement, 75 P. A. S. I. L., 1981, p. 236.
- **Paasivirta E.,** Internationalization and Stabilization of Contracts Versus State Sovereignty, 60 B. Y. I. L.,1989, p. 315.

- **Peaslea A. J.,** Constitution of Nations, third edition, Netherland, 1968.
- **Pechota V.,** The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes, 76 A. J. I. L., 1982, p. 639.
- **Pellonpaa M. & Fitzmaurice M.,** Taking of Property in the Practice of the Iran-U.S. Claims Tribunal, 19 Neth. Y. I. L., 1988, p. 53.
- **Penrose E., Joffe G., Stevens P.,** Nationalisation of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, M. L. R., Vol. 55,1992, p. 351.
- **Peters P., Schrijver N. J. & De Waart P. J. I. M.,** Permanent Sovereignty, Foreign Investment and State Practice, in Hosain K. & Chowdhry S. R.(eds.), Permanent Sovereignty Over Natural Resources in International Law, London, 1984, p. 90.
- **Peter C. M.,** Settlement of Investment Disputes, Journal of International Arbitration, vol. 5, No. 1, March 1988, (off-prints), p. 67
- **Piran H.,** Nationalization of Foreign Property in International Law and Iran-U. S. Claims Tribunal, Liverpool, 1992.
- **Plant G.,** Wolrd Court Jurisdiction and U.S. Foreign Policy in Latin America, P. A. S. I. L., 1985, p. 321.
- **Quran.**
- **Rado A. R.,** Czechoslovak Nationalisation Decrees: Some International Aspects, 41 A. J. I. L., Suppt. 1947, p. 795.
- **Ramazani R. K.,** Iran's Revolution: Patterns, Problems and Prospects, International Affairs, 1980.
- **Rees J. & Odell P.,** The International Oil Industry: An Interdisciplinary Perspective, London, 1987.
- **Restatement of the Law,** Second, Foreign Relations Law of the United States, The American Law Institute, Washington D. C., 1965.
- **Restatement of the Law,** Third, Foreign Relations Law of the United States, vol. 2, The American Law Institute, Washington D. C., 1986.
- **Revolution, Treaties and State Succession,** 76 Yale Law Journal, 1967, p. 1669.
- **Ristau B.,** The U.S./Iranian Hostage Settlement, P. A. S. I. L., 1981, p. 236.
- **Robinson D. R.,** Expropriation in the Restatement (revised), 78 A. J. I. L., 1984, p. 176.
- **Robinson R. D.,** International Business Policy, New York, 1964.
- **Rode Z. R.,** The International Claims Commission of the United States, 47 A. J. I. L., 1953, p. 615.
- **Rodriguez R. A.,** Holding Foreign Government Corporations Liable for the Wrongs of the Government: A Clash Among Competing Policies, 39 University of Miami Law Review, 1985, p. 341.
- **Rogers W. D.,** Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas, 72 A. J. I. L., 1978, p. 1.
- **Rohani F.,** History of the Iranian Oil Nationalisation (Persian), Tehran, 1964.
- **Roy G.,** Is the Law of Responsibility of States for Injuries to Aliens Part of Universal International Law? 55 A. J. I. L., 1961, p. 863.
- **Rozenthal A.,** The Charter of Economic Rights and Duties of States and the New International Economic Order, 16 Virg. J. I. L., 1976, p. 309.
- **Rugman A., M., Lecraw D. J., Booth L. D.,** International Business, London, 1988.

- **Safaei S. H.,** Force Majeure, Law Journal of the International Legal Bureau, No. 3, p. 134.
- **Safai S. H.,** Unjust Enrichment, 2 B. I. L. S. L. J., (Persian), Spring 1985, p. 7.
- **Safai S. H.,** Restrictions on the Property Rights of Foreigners under International Law, 11 Legal Journal of B. I. L. S. (Persian), 1989-90.
- **Sarcevic P.,** Essays on International Commercial Arbitration, Britain 1989.
- **Scammell E. H.,** Nationalisation in Legal Perspective, in Keeton G. W. & Schwarzenberger G., 5 Current Legal Problems, London, 1952, p. 30.
- **Schachter O.,** Compensation for Expropriation, 78 A. J. I. L., 1984, p. 121.
- **Schachter O.,** Compensation Case- Leading and Misleading, 79 A. J. I. L., 1985, p. 420.
- **Schachter O.,** Sharing the World's Resources, Columbia University Press, 1977.
- **Schmitthoff C. M.,** Commercial Law in a Changing Economic Climate, 2nd ed., London, 1981.
- **Schmitthoff C. M., Simmons K. R.,** International Economic and Trade Law, Leyden, 1979.
- **Schulz F.,** Principle of Roman Law, 1879, Oxford, 1936.
- **Schwarzenberger and Brown,** A Manual of International Law, London, 1976.
- **Schwarzenberger G.,** Foreign Investment and International Law, London, 1969.
- **Schwarzenberger G.,** International Law, vol. I, 3rd ed., london, 1957.
- **Schwarzenberger G.,** The Protection of British Property Abroad, 1952, 5 Current Legal Problems, London, 1952, p. 295.
- **Schwebel S. M. & Wetter J. G.,** Arbitration and the exhaustion of Local Remedies, 60 A. J. I. L., 1966, p. 484.
- **Schwebel S. M.,** The Story of the U. N. Declaration on Permanent Sovereignty Over Natural Resources, 49 A. B. A. J., 1963, p. 463.
- **Schwesig W. A.,** Researching International Law, P. A. S. I. L., 1989, p. 107.
- **Shanks R. B.,** Insuring Investment and Loans Against Currency Inconvertibility, Expropriation, and Political Violence, 9 Hastings International and Comparative Law Review, 1986, p. 417.
- **Shaw M. N.,** International Law, 2nd. ed., Camberidge, 1986.
- **Shea D. R.,** The Calvo Clause, A Problem of Inter-American and International Law and Diplomacy, 1955.
- **Shuster W. M.,** The Strangling of Persia; A Record of European Diplomacy and Oriental Intrigue, London, 1913.
- **Sick G.,** American Hostages in Iran, 1985.
- **Siegel K. M.,** The International Law of Compensation for Expropriation and International Dept: A Dangerous Uncertainty, 8 Hastings International and Comparative Law Review, 1985, p. 223.
- **Sigmund P. E.,** Multinationals in Latin America, The Politics of Nationalization, Madison, 1980.
- **Smith H.,** Frustration of Contract, A Comparative Attempt at Consolidation, 58 Columbia Law Review, 1958, p. 287.
- **Smith D. N.** and **Wells L. T.,** Conflicts Avoidance in Concession Agreements, 18 Harv. I. L. J., 1976, p. 59.
- **Smith H. A.,** The Crisis of the Law of Nations, London, 1947.
- **Smith R. P.,** Real Property Valuation for Foreign-Wealth Deprivations, in Lillich R. B., The Valuation of Nationalised Property in International Law, The University Press of Virginia, 1971, p. 133.
- **Sohn L. B.,** and **Baxter R. R.,** Responsibility of States for Injuries to the Economic Interests of Aliens, 55 A. J. I. L., 1961, p. 545.

- **Sorensen M.,** Manual of Public International Law., London, 1968.
- **Sornarajah M.,** Compensation for Expropriation: The Emergence of New Standards, 13 J. W. T. L., 1979, p. 108.
- **Staker C.,** Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations, 58 B. Y. I. L., 1987, p. 151.
- **Starr, C. G,** A History of the Ancient World, 2nd ed. London, 1974.
- **Stein T. L.,** Jurisprudence and Jurist's Prudence: the Iranian forum clauses decisions of the Iran-U. S. Claims Tribunal, 78 A. J. I. L., 1984, p. 1.
- **Steiner H. J., & Vagts D.F.,** Transnational Legal Problems, 1976.
- **Stevens C.,** EEC and the Third World: A Survay, London, 1981.
- **Stewart D. P.,** The Iran-U. S. Claim Tribunal: A Review of Development 1983-84, 16 Law and Policy in International Business, 1984, p. 677.
- **Strauss M.,** Causation as an element of State Responsibility, 16 Law and Policy in International Business, 1984, p. 893.
- **Suy E.,** Settling U. S. Claims Against Iran Through Arbitration, 29 A. J. C. L., 1981, p. 523.
- **Symposium on Iran,** The Settlement with Iran, 13 Lawyers of Americas, 1981, p. 1.
- **Teson F. R.,** Interdependence, Concent, and the Basis of International Obligation, P. A. S. I. L., 1989, p. 558.
- **Teson F. R.,** State Contracts and Oil Expropriations: the Aminoil-Kuwait Arbitration, 24 Virg. J. I. L., 1984, p. 323.
- **Tewart D. P.,** The Iran-U. S. Claims Tribunal...., 16 Law and Policy in International Business, 1984, p. 685.
- **Todaro M. P.,** ECO. Development in the Third World, $th ed., London, 1989.
- **Toriguian S.,** Legal Aspects of Oil Concessions in the Middle East, Beirut, 1972.
- **Toscano D. B.,** Forbearance Agreements: Invalid Contracts for the Surrender of Sovereignty, 92 Columbia Law Review, 1992, p. 426.
- **Treitel G.,** An Outline of the Law of Contract, 1989.
- **Tunkin G. I.,** Theory of International Law, London, 1974.
- **Vafai G. H.,** Commercial Laws of Middle East, Oceana Publications, 1982.
- **Vagt D. F.,** Coercion and Foreign Investment Rearangements, 72 A. J. I. L., 1978, p. 17.
- **Verbit G. P.,** State Succession in the New Nations, 60 P. A. S. I. L., 1966, p. 119.
- **Verwey W. D.,** and **Schrijver N. J.,** The Taking of Foreign Property Under International Law: a New Legal Perspective 15 Neth. Y. I. L., 1984, p. 3.
- **Verzijl J. H. W.,** Western European Influence on the Foundation of International Law, International Relations, No. 4, October 1955.
- **Verzijl J. H. W.,** International Law in Historical Perspective, vol. 1, Leyden, 1968.
- **Verzijl J. H. W.,** International Law in Historical Perspective, vol. VI, Leyden, 1973.
- **Vicuna O.,** The International Regulation of Valuation Standards and Processes: A Reexamination of Third World Perspectives, in Lillich R. B.(ed.), The Valuation of Nationalised Property in International Law, vol. III, the University of Viginia, 1975, p. 131.
- **Visser F.,** The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests, 21 Comparative International Law Journal of South Africa, 1988, p. 76.
- **Von Mehren R. B.,** and **Kourides P. N.,** International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalisation Cases, 75 A. J. I. L., 1981, p. 476.
- **Von Mehren R. B.,** The Iran-U. S. Arbitratl Tribunal, 31 A. J. C. L., 1983, p. 713.

- **Voss J.,** The Protection and Promotion of Foreign of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies, 31 I. C. L. Q., 1982, p. 686.
- **UNCITRAL,** The United Nations Commission on International Trade law, New York, 1986.
- **Waelde T. W.,** Lifting the Veil from Transnational Mineral Contracts: A Review of Recent Literature, Natural Resources Forum, 84, 1977, p. 277.
- **Waight G. W.,** Libyan Nationalization of British Petroleum Assets, 6 International Lawyer, 1972, p. 541.
- **Walden J. L.,** The International Petroleum Cartel in Iran-Private Power and the Public Interest, 21 Journal of Public Law, 1962, p. 64.
- **Waldock H.,** Human Rights in Contemporary International Law and the Significance of the European Convention, in The European Convention on Human Rights, British Institute of International and Comparative Law, series No. 5, 1965, p. 1.
- **Walker H.,** Treaties for the Encouragement and Protection of Foreign Investment, Present U. S. practice, 5 A. J. C. L., 1956, p. 229.
- **Waller S. W.,** Adjudication of Foreign Expropriation in U.S. Courts, P. A. S. I. L., 1983, p. 335.
- **Warbrick C.,** Investment Promotion and Protection Agreements, 36 I. C. L. Q., 1987, p. 928.
- **Weigel D. R. & Weston B. H.,** Valuation upon the deprivation of Foreign eEnterprise: A Policy-Oriented approach to the Problem of Compensation under International Law, in Lillich R. B., The Valuation of Nationalized Property in International Law, vol. 1, University Press of Virginia, 1971, p. 3.
- **Wesley R. C.,** A Compensation Framework for Expropriated Property in the Developing Countries, in Lillich R. B., The Valuation of Nationalized Property in International Law, vol. III, University Press of Virginia, 1975, p. 3.
- **Westberg J. A.,** Compensation in Cases of Expropriation and Nationalisation: Awards of the Iran-U.S. Claims Tribunal, ICSID Review Foreign Investment Law Journal, 1990, p. 256.
- **Weston B. H.,** Constructive Taking Under International Law: a modest foray into the problem of creeping expropriation, 16 Virg. J. I. L., 1975-76, p. 103.
- **Weston B. H.,** International Claims: Postwar French Practice, Syracuse University Press, 1971.
- **Weston B. H.,** The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Property, 75 A. J. I. L., 1981, p. 437.
- **Wheaton H.,** Classics of International Law, Elements of International Law, London, 1936.
- **White G.,** Nationalisation of Foreign Property, London, 1961.
- **Whiteman M. M.,** Damages in International Law, vol. 3, Washington D. C., 1948.
- **Whiteman M. M.,** Digest of International Law, vol. 8, Washington D. C., 1967.
- **Whiteman M.,** Damages in International Law, vol. 3, Washington D. C., 1948.
- **Williams J. F.,** International Law and the Property of Aliens, 9 B. Y. I. L., 1928, p. 1.
- **Wilson N. S.,** Freedom of Contract and Adhesion Contracts, 14 I. C. L. Q., Jan. 1965, p. 172.
- **wolff M.,** Private International Law, Sec. Ed., Oxford 1950.
- **Woolsey L. H.,** The Expropriation of Oil Properties by Mexico, 32 A. J. I. L., 1938, Suppt., p. 519.
- **Wortley B. A.,** Expropriation in Public International Law, Cambridge, 1959.
- **Young E., Robinson J. R.,** Disturbance Compensation: Flexibility and the Principle of Eqivalence, The Juridical Review, 1984, p. 133.
- **Yumingdon Raymond,** Aspects of Protection of Foreign Investment under International Law,

Cambridge, Jan. 1974.

- **Zink D. W.,** The Political Risks for Multinational Enterprise in Developing Countries, With a Case Study of Peru, London, 1973.
- **Zoller E.,** Peacetime Unilateral Remedies: An Analysis of Countermeasures, New York, 1984.
- **Zorn S. A.,** New Developments in Third World Mining Agreements, Natural Resources Forum, 50, 1977, p. 239.

APPENDIX I

TEXTS OF THE LAWS NATIONALIZING THE OIL INDUSTRY IN IRAN, 1951

The Single article Law of March 20, 1951

For the Happiness and Prosperity of the Iranian Nation and for the purpose of securing world peace, it is hereby resolved that the oil industry throughout all parts of the country, without exception, be nationalized; that is to say, all operations of exploration, extraction and exploitation shall be carried out by the Government.

passed by the Majlis on March 15, 1951, and by the Senate on march 20, 1951. Signed and promulgated by the Shah May 1, 1951.

Source of text: Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., Appendix IV, p. 268.

Law regulating Nationalization of the oil Industry

1) For the purpose of regulating the execution of the Law of 20th March which nationalizes the Oil industry throughout the country, a Mixed Board shall be formed.This Board shall be consist of five members of the senate and five deputies of the Majlis to be elected by each of these two bodies, the minister of Finance in office or his deputy, and one other person to be selected by the Government.

2) Under the supervision of the Mixed board the Government is charged to remove forthwith the former Anglo-Iranian Oil Company from control of the Oil industry of the country; should the Company make its claim for compensation an excuse to forestall prompt delivery, the Government may deposit up to 25% of the current income, less cost of production, in the Bank Melli or any bank acceptable to both parties to secure the claim.

3) Under supervision of the Mixed Board the Government is charged to investigate the lawful and rightful claims of the Government as well as those of the Company, to report its views therein to the two House of Parliament and upon ratification to give effect thereto.

4) From Esfand 20th 1329 [March 20, 1951] when the Bill for the nationalization of the oil industry received the ratification of the Senate, the Iranian nation being lawfully and unquestionably entitled to the entire earning derived from Oil and Oil Products, the Government, under the supervision of the Mixed Board, is charged to investigate and check the accounts of the Company; similarly, the Mixed Board must meticulously supervise the exploitation of the Oil resources from the date this Law went into effect until the appointment of a board of management.

5) As soon as possible, the Mixed Board shall prepare the Charter of the national Oil Company including therein provision for the appointment of a Board of management and a Board of Technical experts; such Charter shall be submitted to the House for their ratification.

6) For the purpose of gradually replacing foreign technicians, the Mixed Board is charged to draw up regulations for the annual selection through competitive examinations of students to be sent abroad for education, training and experience in the various branches of the Oil industry; these regulations after being ratified by the two House shall be put into effect by the ministry of Education. The cost of education of these students shall be paid out of the oil earnings.

7) Purchasers of the products of the oil fields from which the former Anglo-Iranian Oil Company has been removed can hereafter purchase annually at the current world market prices the same quantities purchased by them during the period commencing from the beginning of 1948 up to 29th Esfand 1329 [March 20, 1951] ; for any additional quantities they shall also enjoy priority, other conditions being equal.

8) All proposals of the Mixed Board shall be delivered to the Majlis and if approved by the Oil Commission the latter shall submit a report thereon to the Majlis for ratification.

9) The Mixed Board must complete its work within three months of the ratification of the Law and submit a report of its action to the Majlis in accordance with Article 8. Should the Board need a longer period of time it may ask for an extension giving adequate reasons therefore.

Passed by the majlis on April 30, 1951 and by the Senate on May 1, 1951. Signed and promulgated by the Shah on May 2, 1951.

Source of text: Ford A. W., The Anglo-Iranian Oil Dispute, op. cit., Appendix IV, p. 269.

APPENDIX II

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

The government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the Unites States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 Unites States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherence received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A) Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to insure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in paragraphs 4-9.

B) It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in the United States courts involving claims of the United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgements obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Point I: Non-intervention in Iranian Affairs

1- The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

Point II and III: Return of Iranian Assets and Settlement of U.S. claims

2- Iran and the United States (hereinafter "the parties" will immediately select a mutually agreeable central bank (hereinafter "the Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "The Algerian Central Bank") as depository of the escrow and security funds hereinafter prescribed and will promptly enter into depository arrangements with the Central Bank in accordance with the terms of this declaration. All funds placed in escrow with the Central Bank pursuant to this declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Democratic Popular Republic of Algeria.

3- The depository managements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this declaration.

If such notice is given by the united States and the foregoing certification is made by the government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this declaration shall be of no further force and effect.

ASSETS IN THE FEDERAL RESERVE BANK

4- Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by paragraph 3 above.

ASSETS IN FOREIGN BRANCHES OF U.S. BANKS

5- Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the Unites States will bring about the transfer to the central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with paragraph 3 of this Declaration.

ASSETS IN U.S. BRANCHES OF U.S. BANKS

6- Commencing with the adherence by Iran and the United States to this declaration and the claims settlement agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that agreement and paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the united States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by paragraph 3.

7- As funds are received by the Central Bank pursuant to paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account has reached the level of $1 billion. After the $1 billion balance has been achieved, the algerian Central Bank shall direct all funds received pursuant to paragraph 6 to be transferred to Iran. All funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of $500 million in the account. The account shall be so maintained until the President of Arbitral Tribunal established pursuant to the claims settlement agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement, at which point any amount remaining in the security account shall be transferred to Iran.

OTHER ASSETS IN THE U.S. AND ABROAD

8- Commencing with the adherence of Iran and the United States to this declaration and the attached claims settlement agreement and the conclusion of arrangements for the establishment of the security account, which arrangements will be concluded within 30

days from the date of this Declaration, the united States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart fro those assets referred to in paragraph 5 and 6 above, to be held by the Central Bank in escrow will until their transfer or return is required by paragraph 3 above.

9- Commencing with the adherence by Iran and the United States to this declaration and the attached claims settlement agreement and the making by the Government of Algeria of the certification described in paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United states and abroad and which are not within the scope of the preceding paragraphs.

NULLIFICATION OF SANCTIONS AND CLAIMS

10- Upon the making by the Government of Algeria of the certification described in paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11- Upon the making by the Government of Algeria of the certification described in paragraph 3 above, the United states will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claims of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of 52 United states nationals of November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Teheran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claims asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

Point IV: Return of the Assets of the Family of the former Shah

12- Upon the making by the Government of Algeria of the certification described in paragraph 3 above, the United States all freeze, and prohibit any transfer of, property and assets of the United States within the control of the estate of the former Shah or of any close relative of the former Shah served a defendant in U.S. litigation brought by Iran to recover Shah property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13- Upon the making by the Government of Algeria of the certification described in

paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14- Upon the making by the Government of Algeria of the certification described in paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in paragraph 12 above, the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgements relating to such assets should be enforced by such courts in accordance with United States law.

15- as to any judgement of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgement to the extent that the property or assets exist within the United States.

16- If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfil such obligation, it shall make an appropriate award in favour of Iran which may be enforced by Iran in the courts of any nation in accordance with its law.

SETTLEMENT OF DISPUTES

17- If any other dispute arises between the parties as to the interpretation or performance of any provision of this declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this declaration or the claims settlement agreement, may be enforced by the prevailing party in the courts of any Initiated on January 19, 1981

by_____

Warren M. Christopher
Deputy Secretary of State
of the Government of the United states

By virtue of the powers vested in him by his Government
as deposited with the Government of Algeria

UNDERTAKINGS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN WITH RESPECT OF THE DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

1- At such time as the Algerian Central bank notifies the Governments of Algeria, Iran, and the United States that it has been notified by the Central bank that the Central bank has received for deposit in dollar, gold bullion, and securities account in the name of the Algerian Central Bank, as escrow agent, cash and other funds, 1,632,917.779 ounces of gold (valued by the parties for this purpose at $0.9397 billion), and securities (at face value) in the aggregate amount of $7.955 billion, Iran shall immediately bring about the safe departure of the 52 U.S. nationals detained in Iran. Upon the making by the Government of Algeria of the certification described in paragraph 3 of the Declaration, the Algerian Central Bank will issue the instructions required by the following paragraph.

2- Iran having affirmed its intention to pay all its debts and those of its controlled institutions, the Algerian Central Bank acting pursuant to paragraph 1 above will issue the following instructions to the central Bank:

(A) To transfer $3.667 billion to the Federal Reserve Bank of New York to pay unpaid principle of and interest through December 31, 1980 on (1) all loans and credits made by a syndicate of banking institutions, of which a U.S. banking institution is a member, to the Government of Iran, its agencies, instrumentalities or controlled entities, and (2) all loans and credits made by such a syndicate which are guaranteed by the Government of Iran or any of its agencies, instrumentalities or controlled entities.

(B) To retain $1.418 billion in the escrow account for the purpose of paying the unpaid principle of the interest owing, if any, on the loans and credits referred to in paragraph (A) after application of the $3.667 billion and on all other indebtedness held by United States banking institutions of, or guaranteed by, the government of Iran, its agencies, instrumentalities or controlled entities not previously paid and for the purpose of paying disputed amounts of deposits, assets, and interests, if any, owing on Iranian deposits in U.S. banking institutions. Bank Markazi and the appropriate United States banking institutions shall promptly meet in an effort to agree upon the amounts owing.

In the event of such agreement, the Bank Markazi and the appropriate banking institution shall certify the amount owing to the Central Bank of Algeria which shall instruct the Bank of England to credit such amount to the account to the account, as appropriate, of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. In the event that within 30 days any U.S. banking institution and the Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 additional days after such reference, by the Iran-Unites States Claims Tribunal. The presiding officer

of such panel or tribunal shall certify to the Central Bank of Algeria the amount, if any, determined by it to be owed, whereupon the Central Bank of Algeria shall instruct the Bank of England to credit such amount to the account of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. After all disputes are resolved either by agreement or by arbitration award and appropriate payment has been made, the balance of the funds referred to in this paragraph (B) shall be paid to Bank Markazi.

(C) To transfer immediately to, or upon the order of, the Bank Markazi all assets in the escrow account in excess of the amount referred to in paragraph (A) and (B). Initialled on January 19, 1981

by_____

Warren M. Christopher
Deputy Secretary of State
of the Government of the United States

By virtue of the powers vested in him by his Government
as deposited with the Government of Algeria

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN

The Government of the Democratic and popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

ARTICLE I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third-party arbitration in accordance with the terms of this agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

ARTICLE II

1- An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is

hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, counteracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent iranian courts in response to the Majlis position.

2- The tribunal shall also have jurisdiction over official claims of the united States and Iran against each other arising out of the contractual arrangements between them for the purchase and sale of goods and services.

3- The Tribunal shall jurisdiction, as specified in paragraph 16-17 of declaration of the government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any precision of that declaration.

ARTICLE III

1- The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third president of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the president shall determine. Each such panel shall be composed by the president and shall consist of one member appointed by each of by the three methods set forth above.

2- Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extend modified by the parties or by the Tribunal to ensure that this agreement can be carried out. The UNCITRAL rules for appointing members of three-member Tribunals shall apply mutatis mutandis to the appointment of the Tribunal.

3- Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal either by claimants themselves, or, in the case of claims of less than $250'000, by the Government of such national.

4- No claim may be filed with the Tribunal more than one year after the entry into force of this agreement or six months after the date the president is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by paragraphs 16

and 17 of the Declaration of the Government of Algeria of January 19, 1981.

ARTICLE IV

1- All decisions and awards of the Tribunal shall be final and binding.

2- The president of the Tribunal shall certify, as prescribed in paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this agreement have been satisfied.

3- Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

ARTICLE VI

1- The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2- Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3- The expense of the Tribunal shall be born equally by the two governments.

4- Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

ARTICLE VII

For the purposes of this agreement:

1- A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2- "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and

provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filling of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3- "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4- The "United States" means the Government of the United States, any political subdivision of the United States, any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

ARTICLE VIII

This agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the agreement.

Initialled on January 19, 1981

by_____

Warren M. Christopher

Deputy Secretary of State

of the Government of the United States

By virtue of the powers vested in him by his Government

as deposited with the Government of Algeria

Source of text: 20 International Legal Materials, 1981, pp. 224-233.

INDEX