THE IMPACT OF DEVELOPING STATES ON INTERNATIONAL CUSTOMARY LAW CONCERNING PROTECTION OF FOREIGN PROPERTY

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General international law is basically a product of customary norms established since the time of the Treaty of Westphalia. With this time perspective it is easy to see that the development since the second world war has been of a revolutionary character compared with the earlier international and political setting which produced much of the customary law valid today.

It is not only technological developments that have characterized the last few decades. The world has also witnessed a series of changes in the international system which, it may safely be assumed, have affected or are affecting the law of nations. Of manifest importance are the structural changes in the international community, i.e. the coming into being of new international legal subjects—states and international organizations—as well as the effects of these structural changes on the socioeconomic and ideological levels. It is clear that when new states bring forward new ideas and new values in the various international fora of today and through other more direct forms of state practice, the effect on the traditional international legal system may well be substantial. At its creation in 1945, the United Nations had 51 member states. Today, following the decolonization process, the membership has increased by over a hundred to 153.

The changing structure of the international society has brought with it a division between "North" and "South", a conflict of interests between the so-called "have" and "have not" nations. Röling, in his book *International Law in an Expanded World,* has compared the Afro-Asian bloc to a trade union, where members finding themselves in the same social position join forces to improve their status.[1]

I. THE NON-OCCIDENTAL TREND IN INTERNATIONAL LAW

The new states early found that international law, traditionally looked upon as binding on any newcomers in the international community, was

This study presents the main theme of the author's doctoral dissertation, *Det folkrättsliga investeringsskyddet,* Stockholm 1979.

[1] Röling, *International Law in an Expanded World,* Amsterdam 1960, p. 69.

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essentially Western law. Verzijl wrote in 1955 that "there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of European beliefs, and in both of these aspects it is mainly of Western European origin".[2] According to an American observer (Lissitzyn) much of international law has developed "in response to the requirements of the Western business civilisation".[3]

Since the early 1960s the developing states have been advocating a more "Third-World-adapted" international law.[4] Afro-Asian commentators have declared that developing states are not prepared to accept those parts of traditional international law which exclusively reflect European values and stem from colonial relationships. International law should reflect attitudes of the international community as a whole, including the new states, and should incorporate elements from the legal systems and cultures of the Third World. It has been stressed that the new majority in the world, constituted by the non-industrialized states, has new needs and new demands; and international law, if it is to be effective, must readjust itself to the needs of the changing international society. Whereas in the 1960s these arguments were mostly put forward *de lege ferenda* (i.e. to change the law), in the 1970s they tended to underpin conclusions as to *lex lata* (existing law, as it was seen).

It is sometimes said that much of the opposition to traditional legal concepts can be explained by differences between Western and non-Western civilizations and cultural traditions. This is a gross overstatement. Studies concerning the world's different legal systems rather indicate that these systems harmonize with one another.[5] The Latin American states, which have opposed many classical legal concepts since the first decades of the 19th century, have done so despite the fact that they share a European cultural and legal heritage.

[2] Verzijl, "Western European Influence on the Foundation of International Law", *International Relations*, no. 4, October 1955, p. 137.

[3] Lissitzyn, "International Law in a Divided World", no. 542 *International Conciliation* 1963, p. 58.

[4] See, generally, Castañeda, "The Underdeveloped Nations and the Development of International Law", 15 *International Organization* 1961, p. 38; Abi-Saab, "The Newly Independent States and the Rules of International Law: An Outline", 8 *Howard Law Journal* 1962, p. 95; Fatouros, "International Law and the Third World", 50 *Virginia Law Review* 1964, p. 783; Mushkat, "The African Approach to Some Basic Problems of Modern International Law", 7 *Indian Journal of International Law* 1967, p. 335; Sinha, *New Nations and the Law of Nations*, Leyden 1967; Udokang, "The Role of the New States in International Law", 15 *Archiv des Völkerrechts* 1971, p. 145; Anand, "Attitude of the Asian-African States toward certain Problems of International Law", 15 *International and Comparative Law Quarterly* 1966, p. 55; and *idem*, *New States and International Law*, Delhi 1972.

[5] See H. A. Freeman in 8 *Indian Yearbook of International Affairs* 1959, pp. 197–8.

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The opposition to traditional international law must then be seen as a typical attitude of developing countries—an attitude fostered by economic and technological underdevelopment. It is submitted that a low degree of economic development will produce certain attitudes toward international law, attitudes which may well be changed if and when the state in question attains a higher level of economic development.

Consequently, the position of the developing countries is not the product of cultural traditions, nor is it a product of any specific political ideology. The fact that there is agreement between most states of Latin America, Africa and Asia on many issues of international law today, even though these states often differ in their political orientation, goes to show that the link between them is one of common interests, not of common ideologies.[6] It is another matter that national interests often tend to disguise themselves in the cloak of philosophies or moral values.

It is important to remember that the developing nations today by no means reject international law as such. On the contrary, they invoke its norms in disputes with other states. They take a very active part in the legislative work at international conferences, including the work in the International Law Commission. The Asian-African Legal Consultative Committee has endorsed traditional international law on a number of points. The developing states object only to those traditional rules which, they consider, hamper their economic development and impair their political independence. Since basically they are lacking in political and economic power, they feel a need for a strong international legal order. Thus the Third World has no interest in tearing down the international legal system, only in revising it.

The practice of the less developed states amounts to a *non-occidental trend* in international law, in the sense that these non-Western states are striving for a legal order which is not based on traditional Western legal thinking but on principles which would also take into account the interests of the "have not" nations.

This non-occidental trend in state practice has manifested itself in a number of legal controversies.

For example, the developing states have advanced a more or less strict consensus theory as the basis of obligation in international law. In its most rigid form, this theory does not accept that a new state is born into an international society of legal obligations, unless the state in question explicitly accepts these obligations. In its less rigid form, the theory stresses that, if any international legal rules are to be universally binding, they must

[6] See, for this line of argumentation in the present context, Wolfgang Friedmann, *The Changing Structure of International Law*, London 1964, pp. 313–22.

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express the consensus of the great majority of states making up the present international society. This notion of consent as the basis of international law is attractive to developing states, since it makes possible the exercise of unrestricted sovereignty as a defence against pressure by stronger states.

The best-known example of the non-occidental trend is the opposition to the traditional law of the sea.

Another example is the emergence of the concept of economic self-determination. In numerous resolutions in the United Nations General Assembly, the so-called "Group of 77" has been at pains to emphasize the "sovereign equality" of states and each state's "supremacy over its domestic jurisdiction". These are principles which in theory would give states complete liberty of political and economic action in the national interest, without the risk of foreign or supranational interference.

This brings us to the area on which this paper will now focus, namely the law on the protection of aliens and alien property. The institution of diplomatic protection of citizens abroad was developed during the last half of the 19th and the beginning of the present century. This was a period characterized by large-scale migrations of nationals and capital from the industrialized states to the countries of the underdeveloped world. It has been said that the law of responsibility of states for injuries to aliens was developed "not merely without reference to small states but against them" and that this part of international law was "based almost entirely on the unequal relations between Great Powers and small states".[7] Traditional international law in this field has undeniably been concerned only with the question of how to protect foreigners and their capital. The non-occidental trend indicates a new law, which would take into account not only the interests of capital-exporting countries but also the rights and needs of host states.

II. TRADITIONAL VIEWS ON THE LEGAL PROTECTION OF FOREIGN PROPERTY

Under this heading the traditional Western views on the legal protection of foreign property, as expressed in legal writing and in state practice, will be briefly presented. There is no doubt that many of these traditional attitudes coincide with the *lex lata* (the valid law) before 1945, and some of

[7] Padilla Nervo, *Yearbook of the International Law Commission* 1957, vol. I, p. 155. Similar statements were made in the same context by R. B. Pal, *ibid.*, pp. 157–8, Martine-Daftary, *ibid.*, p. 160, El-Erian, *ibid.*, p. 161, and el Khouri, *ibid.*, p. 169.

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them probably express the *lex lata* of today; but no attempt will be made at this stage to ascertain the legal standing of the different principles involved. An assessment of existing law must wait until the practice of the developing countries has been examined.

The International Minimum Standard

It is often stated that the legal treatment afforded to aliens must not lie below a certain minimum standard of civilization.[8] A state should not be allowed to take shelter behind its own legislation in order to escape accusations from abroad about its treatment of foreigners, if that treatment falls below the "civilized nation" standard. Even if under national law a state's citizens may be deprived of their property without compensation, confiscation of the property of aliens is in contravention of the minimum standard and is a violation of international law.

Although the international minimum standard has received wide support in legal writing[9] and in judicial practice,[10] the exact content of the

[8] This theory was first formulated in 1910 by the former US Secretary of State, Elihu Root, in 4 *Proceedings of the American Society of International Law*, p. 20, but an international standard *de facto* played a role in state practice before that time. See Moore, *A Digest of International Law*, Washington 1906, vol. VI, pp. 252, 312, 321, 700, 725 and 770; a statement by Secretary Bayard from 1887, cited in Dunn, *The Diplomatic Protection of Americans in Mexico*, New York 1933, pp. 263–4; a French statement from 1900 in Kiss, *Répertoire français de droit international public*, vol. IV, Paris 1962, p. 362. For a more recent example, see the British statement at the 1948 General Assembly, cited in Whiteman, *Digest of International Law*, vol. 8, Washington 1967, p. 699.

[9] See Roth, *The Minimum Standard of International Law Applied to Aliens*, Leyden 1949, pp. 81–3; Briggs, *The Law of Nations*, 1952, pp. 618–20; Re, "The Nationalization of Foreign-Owned Property", 36 *Minnesota Law Review* 1952, p. 338; Guggenheim, *Traité de droit international public*, vol. I, Geneva 1953, p. 334; S. Friedman, *Expropriation in International Law*, London 1953, pp. 137–9; Brandon, 43 *Transactions of the Grotius Society* 1957, p. 48, and Wortley, *Expropriation in Public International Law*, Cambridge 1959, pp. 33, 103 and 128; White, *Nationalisation of Foreign Property*, London 1961, pp. 38 and 240; Domke, "Foreign Nationalizations", 55 *American Journal of International Law* (hereinafter abbreviated *AJIL*) 1961, p. 586; Veith & Böchstiegel, *Der Schutz von ausländischem Vermögen in Völkerrecht*, Baden-Baden 1962, p. 171; Seidl-Hohenveldern, *Investitionen in Entwicklungsländern und das Völkerrecht*, Cologne 1963, pp. 23–5; Stevenson, 57 *AJIL* 1963, p. 99; Waldock as editor of the 6th edition of Brierly's *The Law of Nations*, pp. 278–80; Tucker, as editor of the 2nd edition of Kelsen's *Principles of International Law*, New York 1967, p. 367; Schwarzenberger, *Foreign Investments and International Law*, London 1969, p. 4; O'Connell, *International Law*, London 1970, vol. II, pp. 694 and 780–81; Kronfol, *Protection of Foreign Investment*, Leyden 1972, p. 18, and Verzijl, *International Law in Historical Perspective*, vol. V, Leyden 1972, p. 437. For a fuller account, covering also references for the period before 1945, see the author's book *Det folkrättsliga investeringsskyddet*, Stockholm 1979, p. 63.

[10] See the following cases adjudicated by the United States—Mexican Claims Commission of 1923: *The Hopkins Case, Annual Digest of Public International Law Cases* (hereinafter abbreviated *AD*) 1925–1926, Case no. 167; *The Neer Case*, AD 1925–1926, Case no. 154; *The Faulkner Case, ibid.*, Case no. 219; *The Roberts Case, ibid.*, Case no. 166; *The García and Garza Case, Opinions of Commissioners*, Washington 1927, pp. 165–6, and *The Chattin Case, ibid.*, pp. 435–6. See also Judge Huber's statement in *Spanish Zone of Morocco Claims (UK* v. *Spain)* 1925, UN Reports of International Arbitral Awards, vol. II, p. 644; *L'Affaire Chevreau* (*France* v. *UK*), *ibid.*, vol. II, p. 1123; *The Denham Claim* (*USA* v. *Panama*), Report of B. L. Hunt, Washington 1934, p. 245, and *The De Sabla Claim* (*USA* v. *Panama*), 28 *AJIL* 1934, p. 602.

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standard in respect of protection of property has never been fully established. In the *Neer Case* in 1926 the claims commission referred to "an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[11] Eagleton admitted in his thesis on state responsibility in 1928 that the vagueness of the standard opened the way to abuse of weaker states; the remedy, however, was not limitation of the right of diplomatic intervention, "but 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".[12]

Acquired Rights

The idea of respect for acquired or vested rights (*droits acquis*) has its origin in private law where it has been used as a basis for the solution of conflicts of laws in respect of time. The concept of *droits acquis* was aimed at protecting rights which were duly acquired under an earlier legal system.[13] It was thus an expression of the principle of non-retroactivity in national legislation. It has been said that the "origin of the principle of acquired rights is found in legal individualism" and that the principle has been used as a "defense against state interferences with the interests and rights of individuals and as a plea in favour of social *status quo*".[14]

From the field of intertemporal conflicts of laws and the field of public law for the protection of individual rights against interference by the state, the concept has reached public international law.[15] There it has been pleaded in the context of diplomatic protection of citizens abroad and has at times been regarded as part of the international minimum standard of civilization. In the *Portuguese Religious Properties Case* in 1914 the British Government stated: "Respect of property, respect of acquired rights, those are the legal principles of all civilized countries."[16]

In modern state practice similar positions have been taken by the Swiss Government before the International Court of Justice in the *Interhandel Case* (1959)[17] and by the Netherlands in the United Nations Commission

[11] General Claims Commission United States-Mexico, *Opinions of Commissioners*, p. 71.

[12] Eagleton, *Responsibility of States in International Law*, New York 1928, p. 86.

[13] Kaeckenbeeck, "The Protection of Vested Rights in International Law", 17 *British Yearbook of International Law* 1936, pp. 2–4.

[14] Lalive, "The Doctrine of Acquired Rights" in *Rights and Duties of Private Investors Abroad*, International and Comparative Law Center, The South-Western Legal Foundation, Dallas 1965, p. 151.

[15] See, generally, Sik, "The Concept of Acquired Rights in International Law: A Survey", 24 *Netherlands International Law Review* 1977, Special Issue 1/2, pp. 120–26.

[16] Cited by Fachiri in 6 *British Yearbook of International Law* 1925, p. 168.

[17] ICJ *Pleadings* 1959, pp. 39, 121–2 and 131–3.

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on Permanent Sovereignty over Natural Resources in 1961.[18] Respect for acquired rights was also referred to by the Permanent Court of International Justice in three cases[19] and by various arbitration tribunals during the twenties and thirties.[20] As to modern judicial practice, the Saudi Arabia-Aramco arbitration 1958[21] and the Sapphire International Petroleum Case 1963[22] should be mentioned.

The doctrine of acquired rights has produced two different conclusions as regards respect for foreign property. According to the first, more extreme theory—which today is only of historical interest—respect for vested rights means that it is prohibited to expropriate foreign property acquired through lawful investments. An expropriating state will under these circumstances have to face claims for restitution of the expropriated property.[23] The second, more modern and realistic theory as to the doctrine of acquired rights does not imply an absolute respect of the interests of foreign investors. According to O'Connell, "the doctrine merely indemnifies the titleholders from complete and arbitrary destruction of their interests".[24] In this version the doctrine of acquired rights will serve as a basis for claims for "adequate" or "full" compensation when the taking of the property is already a fact.[25]

[18] With regard to a Chilean draft resolution, the Netherlands representative stated that, as a general rule, old investments should not be jeopardized by new laws and should be protected in accordance with the generally recognized principle of respect for legally acquired rights. See Gess in 13 *International and Comparative Law Quarterly* 1964, pp. 442–3.

[19] *The German Settlers Case,* PCIJ, Advisory Opinion 1923, Series B, no. 6, pp. 35–6; *The German Interests in Polish Upper Silesia Case,* PCIJ 1926, Series A, no. 7, pp. 22 and 42; *The Oscar Chinn Case,* PCIJ 1934, Series A/B, no. 63, pp. 81 and 88 (where the Court confirmed the principle but did not find it applicable in the case before it).

[20] *The Burt Case, AD* 1923–1924, p. 79; *The David Goldenberg Case, AD* 1927–1928, p. 545; *The Hungarian Optants Case, AD* 1927–1928, pp. 89–90; *Eva Thalheimer* v. *Yugoslavia, ibid.,* p. 90; *Sopron-Köszeg Railways Case, AD* 1929–1930, p. 58; *Affaire des Forets du Rhodope* 1933, 3 *UN Reports of International Arbitral Awards,* pp. 1417–19; *Zeltweg-Wolfsberg and Unterdrauburg Woellan Railway Case, AD* 1933–1934, pp. 486–7.

[21] 27 *International Law Reports,* p. 168.

[22] 35 *International Law Reports,* pp. 136–8.

[23] The so-called "Kellogg doctrine", asserted by the United States against Mexico in 1926. See Lippmann, "Vested rights and Nationalism in Latin America", 5 *Foreign Affairs* 1927, pp. 359–60.

[24] *State Succession in Municipal Law and International Law,* Cambridge 1967, vol. I, p. 266.

[25] In modern legal literature the principle of acquired rights has gained support from Domke, "Foreign Nationalizations", 55 *AJIL* 1961, pp. 585, 596 f.; Fouilloux, *La nationalisation et le droit international public,* Paris 1962, p. 52; Verdross, *Völkerrecht,* 5th ed., Vienna 1964, pp. 365 f.; Nwogugu, *The Legal Problems of Foreign Investments in Developing Countries,* Manchester 1965, pp. 177 f.; Lalive, *op. cit.,* at pp. 149, 165 and 183; De Visscher, *Théories et réalités en droit international public,* Paris 1970, pp. 213 f., and Kronfol, *Protection of Foreign Investment,* Leyden 1972, pp. 19–20.

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The Distinction between Lawful and Unlawful Nationalizations

The principle of sovereignty in international law is constituted by the right of all states freely to determine their own economic, social and industrial policy. In a general sense it has never been disputed that this implies the sovereign right of any government to expropriate or nationalize (whatever the terminology[26]) foreign property in furtherance of a public purpose.[27] The United Nations General Assembly has on a number of occasions pronounced that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty".[28] But, as Schwarzenberger has put it, "a sovereign state may *exercise* its sovereignty only subject to compliance with all other rules of international law".[29] An act of expropriation or nationalization is a lawful exercise of territorial competence—but, according to a majority of Western governments and jurists, its legality is subject to certain conditions. First, it is seldom disputed that if a nationalization is to be lawful it must have a public purpose and must not involve discrimination against aliens. Secondly, it is often said that the right to nationalize is coupled with and conditioned by an obligation to pay adequate compensation.[30] Some Western jurists, however, are of the opinion that a nationalization, as an act of a sovereign state, can never be considered illegal—unless the expropriation implies a violation of a treaty obligation. To them the duty to pay compensation is an independent obligation, which follows upon the *fait accompli* of nationalization

[26] The terminology is by no means settled. The terms "expropriation" and "nationalization" are often used interchangeably. It is not uncommon that any deprivation by state organs of a right of property (or transfer of the power of control) is described as expropriation. If the taking is regarded as unlawful, for instance because of absence of compensation, it is sometimes described as "confiscation". Expropriation as part of a general programme of social and economic reform is generally referred to as nationalization. The author does not find it necessary to specify a certain terminology at this stage. It will, however, be useful to do so after the survey of state practice has shown what kind of takings the international society generally is concerned with (see pp. 151–2).

[27] E.g. a note by US Secretary of State Cordell Hull to the Mexican Government on July 21, 1938 (32 *AJIL* 1938, supplement, pp. 181–2) and the French-British-US statement at the Suez Canal Conference, London, August 2–24, 1956, Command paper 9853, p. 3.

[28] Citation from GA Resolution 626 (VII), GA Official Records, 7th session, suppl. no. 20 (A/2361).

[29] Schwarzenberger, *Foreign Investments and International Law*, London 1969, p. 8.

[30] See, for instance, the following examples from state practice: The British note to Mexico on April 8, 1938, *Documents on International Affairs* 1938, vol. I, London 1942, pp. 460–61; the Netherlands' note to Mexico on October 27, 1938, *ibid.*, p. 472; the US memorandum to Mexico on April 3, 1940, 2 *Department of State Bulletin* 1940, p. 380; the British plea to the International Court of Justice on October 10, 1951, in the Anglo-Iranian Oil Case, ICJ *Pleadings*, pp. 116–17; a US statement concerning the note to Ceylon on July 5, 1963, 49 *Department of State Bulletin* 1963, p. 245; and the British note to Indonesia on July 20, 1965, *British Practice in International Law* 1964, pp. 199–200. See also art. 3 of the OECD Draft Convention on the Protection of Foreign Property, published in Paris 1967.

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measures.[31] According to this view, a nationalization can never be illegal *per se* due to an absence or inadequacy of compensation.

The practical relevance of the distinction between lawful and unlawful nationalizations is twofold. First, from the viewpoint of private international law, an expropriation which is deemed unlawful may in foreign courts be considered as a nullity without any legal effects. The forum will tend not to recognize titles which are based on the unlawful taking. Secondly, from the viewpoint of public international law, a finding that an expropriation is unlawful will have a bearing upon the compensation issue. Compensation claims for lawful expropriations will never exceed the value of the expropriated property, whereas in the case of unlawful takings, restitution in kind could be claimed, or "payment of a sum corresponding to the value which a restitution in kind would bear".[32] In the latter case the payment would include lost prospective profits (*lucrum cessans*).

Public Purpose and Non-discrimination

The right to nationalize foreign property is generally held to be qualified by the requirement that the property must be taken for a public purpose. In the *Walter Fletcher Smith Case* the arbitrator ruled that a deprivation of foreign property was contrary to international law, since the expropriation was intended to benefit a private company.[33] In state practice this principle was asserted against Mexico in 1938[34] and against Cuba in 1960.[35] The problem is that there are no objective limits to the measures a government may consider necessary for the general welfare of the state. The principle of territorial sovereignty makes it natural for the nationalizing government to be the sole judge of the situation in its own country. Although the absence of a public purpose will normally be difficult to prove, there may still be cases in state practice or judicial practice—as the *Walter Fletcher*

[31] E.g. Fischer Williams in 9 *British Yearbook of International Law* 1928, p. 28; Cavaglieri in 38 *Revue générale de droit international public* 1931, p. 296; Doman in 48 *Columbia Law Review* 1948, pp. 1127 and 1158 f.; Rubin, *Private Foreign Investment,* Baltimore 1956, p. 10; Delson in 57 *Columbia Law Review* 1957, pp. 763–4; Foighel, *Nationalisering af fremmed ejendom,* Copenhagen 1961, p. 139; and de Visscher, *Théories et réalités en droit international public,* Paris 1970, p. 216.

[32] Citation from the *Chorzow Factory Case,* PCIJ 1928, Series A, no. 17, p. 47. The Court also said: "The essential principle contained in the actual notion of an illegal act ... is that reparation must as far as possible wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if the act had not been committed." *Ibid.*

[33] 2 *UN Reports of International Arbitral Awards,* p. 917 (*AD* 1929–1930, Case no. 163).

[34] See the British note of April 8, 1938, Command Paper 5758/38, p. 11, and the US notes of July 21, 1938, and April 3, 1940, Hackworth, *Digest of International Law,* vol. III, pp. 657 and 662.

[35] US note of July 16, 1960, Whiteman, *Digest of International Law,* vol. 8, pp. 1042–3.

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Smith Case shows—in which the complete absence of a public purpose can be established.

The right to nationalize foreign property is also often qualified in so far as the measures must not discriminate against aliens or any particular group of aliens. Gillian White in her study of 1961, after an evaluation of post-war state practice, came to three conclusions regarding the scope of the non-discrimination rule: (1) general measures which in fact single out property of a certain nationality for unfavourable treatment are unlawful, unless such treatment can be justified by reference to treaty provisions; (2) a nationalization which is expressly aimed at, or in practice affects, a foreign undertaking in a field where there are no national interests is not to be considered as discrimination; (3) measures which are exclusively aimed at foreign interests, in a field where there also exist national undertakings, are unlawful.[36]

The principle of non-discrimination has also served as a means of assistance in the interpretation of the concept of "public purpose". Thus it has been said that an overt discrimination of foreign property precludes a *bona fide* public purpose.[37]

Prompt, Adequate and Effective Compensation

In cases of nationalization it is more often than not said that the property taken must be compensated for in a "prompt, adequate and effective" manner. This classic compensation formula began to evolve during the nineteenth century, and gradually became accepted in legal writing and state practice during the twentieth.[38]

The requirement of *prompt* compensation constitutes an expectation of immediate payment, more or less on the day of the effective expropriation. Investment treaties concluded by European states with various capital-importing countries use the formula "without delay" or "without undue delay".[39] In extensive expropriations, however, immediate payment be-

[36] White, *Nationalisation of Foreign Property*, London 1961, p. 144.

[37] Cf. Kunz in 17 *New York University Law Quarterly Review* 1940, p. 381.

[38] The formula was first formulated in state practice by Secretary of State Cordell Hull in a note to Mexico on August 22, 1938. See Hackworth, *Digest of International Law*, vol. III, p. 658. The formula was affirmed by the State Department in a statement concerning nationalizations on Ceylon, on July 23, 1963, 2 *International Legal Materials* 1963, p. 961, and in British notes to Ceylon in 1963 and Indonesia in 1965, *British Practice in International Law*, 1963: II, p. 122, and 1964: II, p. 199.

[39] E.g. the following treaties: UK-Egypt 1975, 14 *International Legal Materials* (hereinafter abbreviated *ILM*) 1975, p. 1472; UK-Singapore 1975, 15 *ILM* 1976, p. 593; UK-Indonesia 1976, *Investment Laws of the World*, vol. III, 1:4 I–3.3; France-Indonesia 1973, *loc. cit.*, vol. III, 1:4 H–3.4; Netherlands-Tunisia 1963, 4 *ILM* 1965, p. 159; Belgium/Luxembourg-Tunisia 1964, 5 *ILM* 1966, p. 1132; Switzerland-Sudan 1974, *Investment Laws of the World*, vol. II, 46:4 D–3.4.

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comes less practicable, if not impossible. In consequence deferred payment in instalments, with interest as a substitute for "prompt" payment, is widely accepted in practice. The increased number of protracted compensation negotiations resulting in "lump sum" agreements with deferred payments does not seem to have weakened the claim for prompt compensation in diplomatic practice.

The requirement *adequate* signifies that the compensation must correspond fully to the market value of the nationalized property. The same meaning is often given to the expressions "full", "fair" or "just" compensation. Some bilateral investment treaties have specified that the market value should refer to the time "immediately before the expropriation itself or before there was an official Government announcement that expropriation would be effected in the future, whichever is earlier".[40] It is generally agreed that compensation, in order to be adequate, must include interest from the day of the effective taking until the date of payment.

Claims for lost profits (*lucrum cessans*) should only follow upon unlawful nationalizations, but since there are divergences of opinion as to what constitutes a lawful expropriation, such claims—although they do not occur often—can be found in various situations.[41]

Attempts have often been made to draw a distinction between cases of general expropriations which affect a whole society (nationalizations) and cases of *ad hoc* expropriations which affect only individual property. While some authors limit the requirements of "prompt" and "adequate" compensation to the latter category, the typical traditional view seems to be to apply the "prompt and adequate" formula to both types of takings,[42] sometimes expressly disregarding the distinction involved.[43]

The remaining element in the classical formula is the requirement that compensation shall be *effective*, that is to say, it should be of real economic value to the foreign investor. This is often taken to mean that payments

[40] Cited from the treaty between the United Kingdom and Egypt of 1975, art. 5, 14 *ILM* 1975, p. 1472. See also the treaty between the UK and Singapore of 1975, art. 5, 15 *ILM* 1976, p. 593, and the treaty between the UK and Indonesia of April 27, 1976, *Investment Laws of the World*, vol. III, Section 1: 4 I–3.3.

[41] E.g. the UK Memorial of October 10, 1951, in the *Anglo-Iranian Oil Co. Case*, ICJ, *Pleadings*, etc., 1952, pp. 117–18. See also the initial claims of the Suez Canal Company after the Egyptian nationalization of 1956, Report in 14 *Villanova Law Review* 1969, p. 236.

[42] E.g. Wortley, *Expropriation in Public International Law*, Cambridge 1959, pp. 34–5; Eli Lauterpacht in *International and Comparative Law Quarterly*, Supplementary Publication no. 3 (1962), p. 19; Starke, *An Introduction to International Law*, London 1967, p. 258; Schwarzenberger, *Foreign Investments and International Law*, London 1969, pp. 4 and 6; and Verzijl, *International Law in Historical Perspective*, vol. V, Leyden 1972, p. 472.

[43] Adriaanse, *Confiscation in Private International Law*, The Hague 1956, pp. 165–6; Kissam & Leach, "Sovereign Expropriation of Property and Abrogation of Concession Contracts", 28 *Fordham Law Review* 1959, p. 214; O'Connell, *International Law*, vol. II, London 1970, pp. 776 f.

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should be made in hard currency, or at least convertible currency, so that the creditor can make full use of the amount offered to him. The requirement of effectiveness is also met if the payment can be reinvested or otherwise fully used within the debtor state. If this is not the case, the compensation sum must be transferable from the country paying it. Payment in kind is also accepted as effective compensation. Thus, in the *Caselli Claim* 1933 the United States Panama Claims Commission did not find that expropriation implied an obligation to pay pecuniary compensation, but suggested that "reciprocal transfer of other property" might be sufficient.[44]

Payments in the form of bonds is a more controversial issue. The British Government found in 1948 in the case of Rumania that bonds apparently redeemable from expected profits of nationalized undertakings could not be considered to provide "prompt, adequate and effective compensation".[45]

The nationalizations in Eastern Europe after 1945 resulted in a number of diplomatic *en bloc* settlements ("lump sum agreements") adapted to practical and political realities in a way which did not make compensation either "adequate" (in the sense of market or "going concern" value) or "prompt".[46] In spite of this and other signs that the classic compensation formula is being eroded, the formula still enjoys wide support in legal writing.[47] Moreover, during the nineteen-sixties and -seventies capital-exporting states such as the USA, West Germany, the United Kingdom, France, the Netherlands, Sweden and Switzerland have managed to insert the traditional compensation formula (or variations thereof) in bilateral investment treaties with a number of capital-importing states.[48]

III. THE PRACTICE OF CAPITAL-IMPORTING STATES

This study is concerned with the protection of foreign property in *general* international law, i.e. international law established by custom. This means that any conclusions as regards existing law have to be based on an evaluation of modern state practice. Foreign property more often than not

[44] *AD* 1933–1934, Case no. 195, at p. 441.
[45] Note of September 7, 1948, to the Rumanian Ministry for Foreign Affairs. See Schwarzenberger, "The Protection of British Property Abroad", 5 *Current Legal Problems* 1952, p. 311.
[46] See White, *Nationalization of Foreign Property*, 1961, pp. 206 f., 235 f.
[47] See notes 42 and 43 above.
[48] See Table 2 below.

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means foreign investments, and protection of foreign investments is an issue which is part of the conflict of interests between the "have" and "have not" nations. In international customary law, the law-creating process must include, above all, the practice of those states whose interests are specifically affected.[49] When examining the law on protection of investments, it is thus natural to focus on the attitudes of capital-exporting and capital-importing states. In order to make such an examination manageable, however, it will be presumed (and it is submitted that the presumption should not be very controversial) that the attitudes of the capital-exporting states coincide, *more or less,* with the traditional views on protection of foreign property. What remains, then, is to study the practice of capital-importing states. For this purpose the concept of "state practice" will be given a wide meaning. In the law-creating and law-revising process all state acts (whether concrete measures or declarations *in abstracto*) are relevant which express some form of *opinio juris,* whether this refers to existing law or to what is conceived of as the desired and "necessary" law.[50]

The Calvo Doctrine

An examination of the practice of capital-importing states can suitably begin with Latin America, a part of the present Third World which has been represented in the international community since the early 19th century. The period before the first world war provides many examples of how the Latin American Republics attracted foreign investors who, owing to unstable political conditions, suffered injuries to their persons and property. In response to this situation, governments of capital-exporting states developed the institution of diplomatic protection. It became the practice of economically advanced states to intervene on behalf of their citizens and present international claims for the alleged injuries. These claims would be discharged as a result of diplomatic negotiations, economic or political pressure, or sometimes even through the use of armed force. Latin American statesmen and lawyers often asserted that redress for injuries was dependent more on political than on legal consid-

[49] International Court of Justice, *Reports* 1969, pp. 43, 44, 176, 227–30, in the *North Sea Continental Shelf Cases.*

[50] *Opinio juris* as a psychological element of custom cannot refer only to a practice which is already consistent with prevailing customary law, since that would not explain the emergence of new rules or the change of old ones. Thirlway has explained the emergence of new rules by substituting a concept of *opinio necessitatis* for the requirement of *opinio juris.* According to this theory, a state follows a certain practice, not because it is required to do so by existing law, but because a norm that conforms to the practice in question is regarded as a necessary part of international law. Thirlway, *International Customary Law and Codification,* Leyden 1972, pp. 55–6.

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erations and that the institution of diplomatic protection was constantly abused.[51] In response to the practice of diplomatic intervention, the Latin American Republics evoked the Calvo Doctrine.

It was in 1868 that the Argentine diplomat and lawyer Carlos Calvo published his *El Derecho Internacional teóretico y práctico de Europa y América* in two volumes. The fifth edition, published in French in Paris in 1896, comprised six volumes. It is not an easy task to cite any one passage in Calvo's treatise which gives his doctrine in a nutshell. Donald Shea, in his book *The Calvo Clause,* has pointed out that Calvo's tendency to avoid analysis makes it necessary for the reader to select and collocate a series of assertions made in the book. Only in this way is it possible to discern the principles underlying the Latin American attempt to restrict or eliminate diplomatic protection.[52]

Calvo based his doctrine on two cardinal principles. One was the principle of non-intervention, according to which sovereign states enjoy the right to freedom from any sort of foreign interference, whether it be by force or diplomacy. The other principle was that of "equality of treatment", according to which no state is obliged to accord more favourable treatment to foreigners than to its own citizens, and that consequently foreigners can only bring their claims before the local authorities.[53]

Since the Calvo Doctrine was in contravention to the international minimum standard of treatment of aliens—in fact it constituted a maximum standard of national treatment—it failed to gain recognition in Europe and in the United States. The Latin American states then tried to implement the doctrine by constitutional provisions, by municipal law, and by so-called Calvo clauses in concession agreements and other government contracts. Many examples could be cited from the first part of this century,[54] but here attention will have to be limited to the legislation and diplomacy of Mexico.

The Mexican Constitution of 1917 prescribes that "private property may only be expropriated for a public purpose and against compensation" (art. 27). The same article also stipulates that foreigners cannot acquire property unless they agree (1) to be treated as nationals in respect of property rights and (2) to renounce any protection of their home government in property matters. Art. 27, and thereby the Calvo Doctrine, was invoked

[51] E.g. Alvarez, who mentions the *Cerutti affaire* of 1885, in 3 *AJIL* 1909, p. 307.

[52] Shea, *The Calvo Clause,* Minneapolis 1955, p. 17.

[53] Calvo, *Le droit international théorique et pratique,* 5th ed., Paris 1896, vol. I, pp. 267, 351–2, and vol. III, pp. 138–40.

[54] See, for example, Freeman, *The International Responsibility of States for Denial of Justice,* London 1938, p. 457; Antokoletz, *Tratado de derecho internacional público,* 5th ed., Buenos Aires 1951, vol. II, p. 147, and Bring, *Det folkrättsliga investeringsskyddet,* pp. 92–3.

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against the United States in connection with the Mexican agrarian reforms of 1917–38 and the oil nationalizations of 1938–39. The Mexican foreign minister Hay stated in 1938 that although his country, in accordance with her own constitution, was under an obligation to indemnify American landowners, there did not exist in international law any principle "that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character". He denounced the US position as a demand for unequal treatment:

> ... by insisting on payment to American landholders, it [the US Government] demands, in reality, a special privileged treatment which no one is receiving in Mexico.[55]

The Inter-American Conferences

The dispute about the Calvo Doctrine was above all an inter-American affair, a conflict between the United States and the republics in the South. For the Latin American states it was natural to use their majority position in the Pan American conferences to assert their interests against the powerful neighbour in the North.

At the First Pan American Conference, held in Washington in 1889–90, fifteen Latin American states supported a resolution which recommended the participating states to work for equality of treatment between nationals and foreigners as a principle of American law.[56] A convention to this effect was adopted at the next conference in 1902, but one article could also be interpreted as implying a minimum standard. At the Seventh Inter-American Conference, held at Montevideo in 1933, there was adopted a resolution on state responsibility which included the following passage:

> [The Conference] reaffirms once more, as a principle of international law, the civil equality of the foreigner with the national as the maximum limit of protection to which he may aspire in the positive legislations of the state.[57]

The same conference also adopted the well-known Convention on Rights and Duties of States, where in art. 9 it was said that "foreigners may not claim rights other or more extensive than those of ... nationals".[58] To-

[55] Note to the US ambassador on August 3, 1938, Hackworth, *Digest of International Law*, Washington 1942, vol. III, pp. 657–8.

[56] Scott, *International Conferences of American States, 1889–1928*, New York 1931, p. 45.

[57] Resolution LXXIV, Seventh International Conference of American States, Final Act, p. 30. *International Conferences of American States*, First Supplement, 1933–1940, Washington 1940, pp. 91 f.

[58] Convention on Rights and Duties of States, December 26, 1933. *International Conferences of American States*, First Supplement, 1933–1940, p. 122.

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gether with a broad prohibition of intervention in art. 8, the result was, at least in Latin American opinion, a clear expression of the Calvo Doctrine.

The United States (which ratified the convention together with fifteen Latin American states) made a reservation to arts. 8 and 9 in which it stated that these articles could mean a deviation from "the law of nations as generally recognized and accepted".[59]

The Ninth International Conference of American States, which met at Bogotá in 1948, adopted a text for an economic agreement which was more satisfactory to US business interests than any previous Pan American document. Art. 25 of the "Economic Agreement of Bogotá" was given the following wording:

> The States shall take no discriminatory action against investments by virtue of which foreign enterprises or capital may be deprived of legally acquired property rights, for reasons or conditions different from those that the constitution or laws of each country provide, for the expropriation of national property. Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner.[60]

The inclusion of the traditional compensation formula in art. 25 resulted in reservations from eight Latin American states. The reservation of Ecuador was typical:

> Article 25 must be understood in the sense that the rule therein established must be subordinated to the constitutional provisions in force at the time of its application, and that it is exclusively within the jurisdiction of the courts of the country within which the expropriation takes place to determine, in accordance with the laws in force, everything relating to the circumstances under which such expropriation must be carried out, the sum to be paid, and the means of executing such payment.[61]

Owing to the Latin American opposition the "Economic Agreement of Bogotá" never received enough ratifications to enter into force.

The Andean Investment Code

The Andean Common Market, established in 1969, consists today of Bolivia, Colombia, Ecuador, Peru and (since 1973) Venezuela—and until November 1976 also included Chile. On December 31, 1970, the

[59] *Ibid.*, p. 68.

[60] Novena Conferencia Internacional Americana, *Actas y Documentos*, vol. VI, Bogotá 1953, pp. 146–7.

[61] Cited by Becker in 40 *Department of State Bulletin* 1959, pp. 789–90. The other states that made reservations were Mexico, Argentina, Uruguay, Guatemala, Cuba, Venezuela and Honduras.

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plenipotentiary commission of the Community adopted the Andean Foreign Investment Code or "Decision 24". The Code establishes uniform rules for foreign investments in the Andean region in economic sectors which have traditionally attracted foreign capital.[62] Art. 50 of the Code reaffirms the Latin American maximum standard: the member states of the Community are forbidden to accord foreign investors a more favourable treatment than that granted to national investors. Art. 51 stipulates that in no instrument relating to investments shall there be clauses that remove possible conflicts from the national jurisdiction of the host country. Thereby this provision underlines a common Latin American reluctance to accept international adjudication of foreign investor claims. Thus, art. 51 could, in the same way as art. 50, be seen as an expression of the equality standard: *national* investors cannot refer disputes to settlement outside the jurisdiction of their home state, and foreigners should not be in a privileged position.

Regional Positions in Africa and Asia

In Africa and Asia there do not, in contrast to Latin America, exist any legal traditions as to treatment of aliens, and consequently examples of African or Asian regional attitudes are less easy to find. The following instances should, however, be noted.

In 1969 the European Community and eighteen African francophone states concluded an association agreement at Yaoundé, Cameroon. Art. 89 of the agreement stipulates:

> The Associated States shall treat nationals and companies of Member States on an equal footing in respect of their investments and of capital movements resulting therefrom.[63]

This article above all lays down a rule of non-discrimination, but the provision is also an expression of the maximum standard of national treatment.

The question of compensation for nationalized property has been taken

[62] See, for example, Oliver, "The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment", 66 *AJIL* 1972, pp. 763 f. The text of the code is reprinted in 11 *ILM* 1972, pp. 126 f., and (a revised version) in 16 *ILM* 1977, pp. 138 f.

[63] Sohn, *Basic Documents of African Regional Organizations*, vol. IV, New York 1971, p. 1708. The African signatories to the Yaoundé agreement were Burundi, Cameroon, the Central African Republic, Chad, Congo-Brazzaville, Congo-Kinshasa (now Zaire), Dahomey, Gabon, Ivory Coast, Malagasy, Mali, Mauretania, Niger, Ruanda, Senegal, Somali, Togo and Upper Volta.

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up by the Asian-African Legal Consultative Committee (AALCC). At the fourth session of the Committee, which took place in Tokyo in 1961, a draft convention or resolution "on Principles concerning Admission and Treatment of Aliens" was adopted. Art. 12 of this text provides that a state has "the right to acquire, expropriate or nationalize the property of an alien" in return for compensation determined and paid "in accordance with local laws, regulations and orders".[64] The draft thereby laid down a maximum standard of treatment. Already in the report from the foregoing session the secretariat of the AALCC had written that "in the context of modern society the doctrine of the Minimum Standard of Treatment has become somewhat outmoded".[65]

As regards the notion of "acquired rights", the secretariat, in the commentary on the adopted declaration, rejected any absolute respect for such rights. Property rights were always subject to national legislation. On the other hand, the secretariat confirmed that expropriation measures should always be followed by compensation and be exercised without discrimination against aliens as such.[66]

The 1961 session of the AALCC was attended by delegations from Burma, Ceylon, India, Indonesia, Iraq, Japan, Morocco, Pakistan, Sudan and the United Arab Republic. Japan filed a reservation to art. 12 of the declaration on treatment of aliens. It should be noted that delegates to the AALCC are not regarded as official government representatives.

The compensation issue has also been touched upon by the Organization of Petroleum Exporting Countries (OPEC). Although OPEC is a producer organization, its official statements can be considered partly as expressions of regional or subregional attitudes. Of the thirteen member states, seven represent the Arab World: Algeria, Libya, Iraq, Kuwait, Saudi-Arabia, Qatar and the United Arab Emirates. The other Afro-Asian member states are Nigeria, Gabon, Iran and Indonesia. (Venezuela and Ecuador are the only non-Afro-Asian members.)

By 1972 it was an established OPEC policy to acquire majority shares in the foreign oil companies ("the Yamani participation programme"), and to pay compensation therefor roughly according to the book value of the acquired property. The Western oil companies (Exxon, Texaco, Mobil Oil, British Petroleum, Shell and others) initially wanted to have some compensation for lost profits and claimed that the value of the business as "a going concern" should be taken into account. In the end they had to accept the OPEC compromise formula of "updated net book value", which included

[64] *Asian-African Legal Consultative Committee*, Fourth Session, Tokyo 1961, p. 49.
[65] *Ibid.*, Report from the Third Session, Colombo 1960, p. 83.
[66] *Ibid.*, Report from the Fourth Session, pp. 131–2.

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additions for, *inter alia,* inflation. These revised book-value compensation provisions

> clearly constituted a significant departure from orthodox market value criteria. While the provisions afforded more than original physical plant value, they failed to provide for any discounted future value of the concessions or intangible asset values.[67]

In December 1974, it was reported that the consortium ARAMCO had agreed to sell its remaining interests to the Saudi government, and in March 1975 the government of Kuwait had concluded negotiations with BP and Gulf for a 100 per cent takeover. In the latter case it was immediately clear that the companies had had to accept the net book-value formula as a basis for compensation, but, on the other hand, they were granted favourable "buy back" prices for crude oil.[68] ARAMCO's prospects of compensation according to market-value standards did not look brighter. What had started as participation agreements developed into what could be termed creeping nationalizations.

Compensation for Nationalized Property 1953–76

Numerous nationalizations of foreign property have taken place in the Third World during the last few decades. The foreign companies affected, and sometimes also their home governments in the industrialized world, have regularly claimed compensation in accordance with traditional standards. Above all the claim for "adequate" compensation, in the sense of market value or going-concern value, has been put forward in the negotiations. Table 1 shows the outcome of such negotiations, or other ways in which the compensation issue has been solved. The table shows clearly that prompt compensation, or compensation in accordance with market-value standards, is not the rule in modern nationalization practice. In general, the quantum of compensation seems to have been more or less based on the book value of the property taken. Of more than 30 settlements it can be asserted that the compensation afforded met the traditional requirement of "adequacy" in only three cases: Zambia 1969, Peru 1976, and perhaps Brazil 1964. Although the author's conclusion is partly reached through comparisons between what was demanded as compensation and what was

[67] Cited from Wesley in Lillich (ed.), *The Valuation of Nationalized Property in International Law*, vol. III, Charlottesville 1975, p. 7.

[68] *Petroleum Economist*, January 1976, p. 6.

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Table 1. *Nationalizations and compensation settlements 1951–76*

Nationalization	Affected enterprises	Year of settlement	Implementation period of agreement	"Adequate" compensation	Other compensation
Iran 1951	Anglo-Iranian Oil Company	1954	£25 million during 10 years. 40 % share in future business	–	£290 million plus a 40 % share in new oil consortium (cf. claims for £350 million)
Bolivia 1952	Patiño, Aramayo and Hochschild mining enterprises	1953	15–20 years (5 % of annual proceeds)	–	$24.4 million (impartial valuation: $60.5 million)
Bolivia 1969	Gulf Oil Co.	1970	$78.6 million during 20 years. First instalment in 1973	–	$78.6 million without interest (impartial valuation: $101 million)
Bolivia 1971	Mina Matilde	1972	–	–	$13.4 million (cf. US claims for $25 million)
Egypt 1956	Suez Canal Company	1958	5 years		28.4 million French francs without interest (cf. *bourse* value of 66.5 million francs)
Egypt 1961	Various foreign companies	Bilateral compensation treaties 1964–76 with Switzerland France, Denmark, Italy, Greece, Netherlands, Sweden, Austria, UK and USA	8 years (treaty with Switzerland 1964) 3 years (treaty with UK 1971)		"Lump sum"—settlements, in the cases of France, Netherlands and Sweden only covering 50 % of the agreed value of the assets
Indonesia 1958	Dutch-owned enterprises	1966	After an initial cash payment, the remainder should be paid in annual instalments over 30 years, beginning in 1973	–	Lump sum of 600 million guilders (cf. claims for 5 000 million guilders)

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Nationalization	Affected enterprises	Year of settlement	Implementation period of agreement	"Adequate" compensation	Other compensation
Cuba 1959–60	Primarily US investments, but also other Western enterprises	1967 (as regards France and Switzerland)	5 years (treaty with France) 8 years (treaty with Switzerland)	–	Switzerland: lump sum of 18 million Swiss francs, which however could only be paid out of the proceeds from Swiss purchases of Cuban sugar. France: lump sum of 10.8 million francs
Ceylon 1961–63	Shell, ESSO and Caltex	1965	5 years	–	55 million rupees. The companies had initially claimed 100 million rupees as corresponding to "the going concern value"
Brazil 1962	ITT and AFP (American & Foreign Power Co.)	1963–1964	25 years (ITT) 45 years (AFP)	$7.3 million for ITT and $135 million for AFP. The payments had mainly to be reinvested in Brazil. Both settlements were regarded as satisfactory by the companies	
Burma 1963	Various foreign enterprises	1974 as regards the British-owned Burma Mines	20 years (Burma Mines Case)	–	$750 000 for Burma Mines against the claim for $2.37 million. Other companies have—so far—only been promised compensation
Morocco 1963	Belgian land-owners	1967	7 years		15 million Belgian francs, which according to a Belgian Parliamentary bill amounted to 20 % of the original claims
Tunisia 1964	*Inter alia* Italian land-owners	1967	After an initial cash payment, the remainder was to be paid in 11 annual instalments, beginning in 1972	–	Lump sum of 9 000 million lire, of which 3 000 million in cash, conditioned on Italian loans of 13 000 million lire. Compensation has been regarded as "partial" only
Iraq 1964	Various foreign-banks and insurance companies	1964–1965	Payments in bonds, redeemable after 15 years	–	Bonds corresponding to the book value of the nationalized assets

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Nationalization	Affected enterprises	Year of settlement	Implementation period of agreement	"Adequate" compensation	Other compensation
Iraq 1972	Iraq Petroleum Company, owned by a Western consortium	1973		–	Delivery of 15 million tons of crude oil. In 1973 estimated at a value of £120 million. The amount did not cover any prospection costs or intangible assets
Iraq 1975	Remaining foreign oil interests	1976–		–	Compensation according to "net book value"
Syria 1965	Various foreign companies		Bonds redeemable after 15 years	–	Compensation as a rule offered according to nominal value of shares
Zaire 1967	Union Minière	1969	Certain share in proceeds from future business	–	Value of share in proceeds estimated at 25 000 million Belgian francs (cf. claims for 40 000 million)
Tanzania 1967	Various foreign companies	1967–1969	3–10 years	–	Compensation in respect of the net value of the assets taken
Peru 1968	Standard Oil's subsidiary IPC			–	$27 million conditional on payment of indemnities. Peruvian authorities earlier estimated the value of the nationalized assets at $71 million
Peru 1969	W. R. Grace & Co.	1974		–	A total of $150 million covered compensation not only to W. R. Grace (over 20 million) and Cerro de Pasco (77 million) but also to other companies. Typical "lump sum"-settlement
Peru 1974	Cerro de Pasco	1974	US-Peruvian agreement in fact meant "prompt" compensation		See above.

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Nationalization	Affected enterprises	Year of settlement	Implementation period of agreement	"Adequate" compensation	Other compensation
Peru 1975	Marcona Mining Co.	1976	Certain share in proceeds from future business	$61 million, "Adequate" according to the US government	
Zambia 1969	Zambian Anglo American Corp. Roan Selection Trust	1969	8–12 years	Total of $400 million (book value $300 million)	
Algeria 1971	The French oil companies ERAP and CFP	1971	7 years		300 million dinars for CFP, which had to reinvest certain amounts annually in Algeria. Compensation to ERAP was set off by counter-claims
Chile 1971	Kennecott, Cerro de Pasco, Anaconda	1974	10 years (in the case of Braden-Kennecott)		The Allende government made deductions for "excess profits" from the book value of the nationalized property. The new government paid compensation according to the book value
Libya 1971	BP	1974	Within 1 year		In other Libyan oil nationalizations during 1973 "the net book value" was the basis for compensation and BP had to accept the same formula in 1974
Venezuela 1976	Standard Oil, Shell, Mobil Oil, Texaco	1976	5–10 years		$1 000 million (the amount based on income tax reports). Cf. claims for about $5 000 million, said to correspond to the value of the total assets

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actually paid, it holds true even if one takes into account that claims by investors in compensation negotiations tend to be exaggerated.[69]

The fact that compensation is almost never prompt reinforces the conclusion that the adequacy criterion does not find expression in nationalization practice, since the often long period between the date of nationalization and the date of final payment is seldom compensated for by means of market-adapted payments of interest.[70]

Bilateral Investment Treaties

Conclusion of bilateral agreements for protection of investments has been one method which capital-exporting states have used to prevent compensation problems in cases of foreign nationalizations. Treaties of this type have also been a useful tool for developing states, which need to give capital exporters legal and political assurances in order to attract badly needed foreign capital. This community of interests has no counterpart in situations where a political decision has been taken to nationalize existing foreign investments. In such a situation the decision-makers have shifted the priorities—*from* attracting foreign capital *to* exercising full sovereignty over a certain enterprise or economic branch.

These factors help to explain why attitudes of capital-importing states, as regards the compensation issue, differ substantially in general investment treaties as compared with concrete compensation treaties. Thus, a number of developing states have in bilateral investment or trade agreements welcomed foreign capital, giving the assurance that any taking of foreign property would be followed by compensation in accordance with traditional standards. This tendency in modern treaty practice is shown by Table 2.

It is significant that the Latin American republics have not even bilaterally accepted the traditional compensation formula. The only exceptions are Ecuador and Nicaragua, two states which in other contexts have reaffirmed the Latin American standard of national treatment.[71] According to

[69] For a detailed account of these cases, see the author's *Det folkrättsliga investeringsskyddet*, pp. 126 f.

[70] See, for example, the treaty between the Netherlands and Indonesia of 1966, where it was stipulated that 564 million guilders should be paid during 30 years against an interest of 1 per cent. Lillich & Weston (ed.), *International Claims: Their Settlement by Lump Sum Agreements*, Part II, Charlottesville 1975, pp. 330 f. Syria in 1965 offered ESSO and other oil companies compensation in bonds, redeemable after 15 years and with the low interest rate of 3 per cent. State Department Report of 1971 on Nationalizations, 11 *ILM* 1972, p. 114.

[71] For Ecuador see the statement at the Bogotá conference 1948, p. 134 above. For Nicaragua see art. 27 of the Constitution of 1974, Blaustein & Flanz, *Constitutions of the Countries of the World*, "Nicaragua", New York 1977. Although Colombia, Chile and Uruguay, too, have concluded investment treaties with the USA and/or West Germany which lay down a traditional standard, these treaties have never been ratified by the Latin American parties.

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Table 2. *Bilateral treaties which express the classic compensation formula ("prompt, adequate and effective") or variations thereof. Indications refer to year of signature*[a]

	USA	W. Germany	UK	France	Switzerland	Belgium	Netherlands	Sweden	Denmark
Cameroon		1962	1963		1963		1965		
Chad		1967			1967				
Ecuador		1965							
Egypt			1975	1975	1973		1976	1978	
Gabon		1969			1972				
Ghana		1967							
Guinea		1962			1962				
Indonesia		1968	1976	1973	1974	1970	1968		1968
Ivory Coast		1966			1962		1965	1965	1966
Kenya		1964					1970		
Liberia		1961			1963				
Madagaskar		1962			1964			1966	1965
Malaysia		1960		1975	1978		1971	1979	
Mauritius		1971		1973					
Morocco		1961		1975		1965	1971		
Nicaragua	1956								
Niger		1964			1962				
Pakistan	1959	1959							
Philippines		1964							
Senegal		1964			1962		1965	1967	
Siera Leone		1965							
Singapore			1975	1975	1978		1972		
South Korea	1956	1964	1976	1975	1971	1974	1974		
Sri Lanka		1963							
Sudan		1963			1974		1970		
Taiwan	1946								
Tanzania		1965			1965		1970		
Thailand	1966	1961					1972		
Togo	1966	1961			1964				
Tunisia		1963		1963	1961	1964	1963		
Upper Volta					1969				
Zaire		1969		1972	1972				

[a] Sources: *Inter alia, United Nations Treaty Series, International Legal Materials, Investment Laws of the World (ICSID), Bundesgesetzblatt* (Bonn) and *Tractatenblad van het Koninkrijk der Nederlanden.*

a common Latin American interpretation of the Calvo Doctrine, any kind of bilateral or multilateral standards that might open the door to diplomatic intervention or international adjudication would be in contravention to the principle of national sovereignty. Consequently, most Latin American states have avoided becoming parties to investment treaties (including the World Bank Convention for Settlement of Investment Disputes).[72]

[72] There are a few exceptions to the rule. See note 71 above and the treaties concluded between West Germany/Dominican Republic, Switzerland/Costa Rica and Switzerland/Ecuador. The provisions in these treaties can be interpreted as expressions of a national compensation standard in accordance with the Latin American *opinio juris*. See, for example, the German/Dominican treaty, *Bundesgesetzblatt* 1957: II, p. 1471, and the Swiss/Costa Rican treaty, cited in ICC Publication no. 303, *Bilateral Treaties for International Investment*, Paris

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Common to almost all investment treaties is the principle of non-discrimination against foreign property.[73] While this principle has been reaffirmed in other state practice, this is not—as regards capital-importing states—the case with the formula of "prompt and adequate compensation" as an international standard. Many of the Afro-Asian states listed in Table 2 have in other contexts asserted the principle of national treatment. This is true of Ghana, Guinea, Indonesia, Kenya, Madagascar, Malaysia, Mauritius, Pakistan, the Philippines, Sudan, Thailand and Upper Volta. In 1972, these states, as members of UNCTAD's Trade and Development Board (TDB), belonged to a majority which voted through a resolution caused by the nationalizations in Chile. In the resolution, later forwarded to the United Nations, it was said that "it is for each State to fix the amount of compensation".[74] In 1973 the inclusion of a similar provision in a UN resolution was supported by some of the other listed Afro-Asian states, namely Cameroon, Chad, Egypt, Gabon, Liberia, Morocco, Niger, Senegal, Sierra Leone, Tanzania, Togo, Tunisia and Zaire.[75]

It is clear that conclusion of bilateral agreements, as a form of state practice, does not necessarily imply expression of an *opinio juris* (a conviction as to what the law is). Bilateral treaties may well have the character of contracts, in which case they may constitute a willingness of one state to ensure another a certain standard of treatment which is on a higher level than is required by customary law. In order to get a clearer picture of the attitudes of capital-importing states, it should be helpful to take into consideration the actions of these states in the multilateral, globally normative, context of the United Nations resolutions.

The Developing States in the United Nations

The General Assembly has since 1952 adopted ten resolutions on sovereignty of states over natural resources,[76] and it is the so-called Group of 77 which has prompted this development. The interesting point about these resolutions is not the constantly reaffirmed right of states to nationalize foreign investments—which is not controversial—but the ob-

1977, p. 23. Provisions for adequate compensation "conformément au droit des gens" are not helpful in agreements with Latin American states whose conception of existing law differs from that of European states.

[73] See, for example, art. 2: 2 of the British treaties with Egypt and Singapore 1975, 14 *ILM* 1975, p. 1471, and 15 *ILM* 1976, p. 592.

[74] TDB Resolution 88 (XII), 11 *ILM* 1972, pp. 1474 f.

[75] GA Official Records, 28th Session, Plenary Meeting 2203, December 17, 1973.

[76] Res. 626 (VII) 1952, 1314 (XIII) 1958, 1515 (XV) 1960, 1803 (XVII) 1962, 2158 (XXI) 1966, 2386 (XXIII) 1968, 2692 (XXV) 1970, 3016 (XXVII) 1972 and Res. 3171 (XXVIII) 1973. Resolution 3281 (XXIX) 1974 has a wider scope.

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ligations that might be attached to this sovereign right. In the long series of resolutions, only the three most important ones will be considered here.

Resolution 1803 (XVII), adopted by an overwhelming majority in 1962, stipulated in operative paragraph 4:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid *appropriate compensation,* in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and *in accordance with international law.* In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. (Italics added.)

It has been pointed out that the resolution formulated a balanced compromise between capital-exporting and capital-importing states; that it endorsed neither the claim for "prompt and adequate" compensation nor the claim that compensation is entirely a matter of national discretion and not an obligation of international law.[77] However, in their statements a number of developing states indicated another interpretation. Madagascar opposed an American proposal to include the words "prompt" and "adequate" in the text, using the arguments that the financial situation of states could justify deferred payments and that the rule of exhaustion of local remedies in fact meant that compensation would be adequate.[78] Algeria preferred the text as it was, because it left "to the discretion of states to decide on ... the granting and amount of compensation".[79] Statements of this kind seemed to imply that international law only required appropriate compensation in accordance with national law, and that compensation duly paid after exhaustion of national remedies was always bound to be "appropriate".

Resolution 3171 (XXVIII), adopted in 1973, did not strike *any* kind of balance between the different interests involved. In the third operative paragraph of the resolution, the General Assembly stated:

> ... the application of the principle of nationalization carried out by states, as an expression of their sovereignty in order to safeguard their natural resources, implies that each state is entitled to determine the amount of *possible compensation* and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each state carrying out such measures. (Italics added.)

[77] Friedmann, *The Changing Structure of International Law,* New York & London 1964, p. 138.

[78] GA Official Records, 17th Session, 2nd Committee, 1962, p. 298.

[79] *Ibid.,* p. 387.

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This text, which was proposed by Algeria, Iraq and Syria, gained support in a separate vote from 86 states (developing countries, Eastern bloc countries and Iceland). Eleven states voted against and 28 abstained (among them 15 developing countries[80]). When the resolution as a whole was put to the vote it was adopted, 108 states voting for it, one against (the United Kingdom) and 16 abstaining. Only one developing country—Nicaragua—abstained.

In the committee Peru supported the Iraqi proposal with the remark that:

> There was in Latin American Law a widely accepted principle to the effect that when a problem arose between a foreign corporation and the host country, it was for the latter to settle the problem in accordance with its own legislation.[81]

The Argentine delegate pointed out that "Argentine legislation contained clear provisions with regard to expropriation, applying both to nationals and to aliens, and [that] his delegation could not accept any form of interference in the solution of such questions".[82]

In resolution 3281 (XXIX) 1974—containing the Charter on Economic Rights and Duties of States—the formula "appropriate compensation" was reintroduced. Thus, in art. 2:2 of the Charter it was said that appropriate compensation should be paid by the state adopting nationalization or expropriation measures, "taking into account its relevant laws and regulations and all circumstances that the State considers pertinent". The text contained no references to obligations under international law. However, the general duty to pay *some* form of compensation seemed to be reaffirmed. The absence of any international standard for compensation led 16 industrialized states to abstain or cast a negative vote when the resolution was adopted by the General Assembly. All the developing nations were represented among the 120 states that supported the resolution. Only Thailand and Fiji indicated, in their declarations of vote, that they were not fully at ease with the adopted maximum standard of national treatment.[83] For other developing states, the fact that the compensation issue was subordinated to the principle of national sovereignty seemed to be the main reason for their support of the text.[84]

[80] Barbados, Ghana, Haiti, India, Indonesia, Ivory Coast, Malawi, Malaysia, Nepal, Nicaragua, the Philippines, Ruanda, Singapore, Sri Lanka and Thailand.

[81] GA Official Records, 28th Session, 2nd Committee, 1973, p. 425.

[82] *Ibid.*, p. 427.

[83] GA Provisional Verbation Record of the 2315th Plenary Meeting, December 12, 1974, pp. 13, 46.

[84] Argentina, Libya, Venezuela, Cuba and Iraq. GA Official Records, 29th Session, 2nd Committee, 1974, pp. 432, 444, 445 and 448, and GA Provisional Verbatim Record of the 2316th Plenary Meeting, December 12, 1974, p. 23.

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Although resolutions of the General Assembly are not legally binding, this does not mean that they are legally insignificant. In deciding whether a customary rule has developed or changed, one has to consider the totality of acts in the international community. Statements and vote-casting in international fora are state acts, although they only amount to positions *in abstracto*. From a legal point of view, the important thing when evaluating state practice is not the extent to which a certain practice can be considered as concrete acts but the extent to which the acts express an *opinio juris*. Today, customary law is created not only by concrete acts of states but also by the legal conscience and conviction of nations as expressed in the various fora of modern international life. Where there is a general and clearly manifested *opinio juris* (in itself an expression of state practice), there is also a rule of international customary law.[85]

In the United Nations the developing states have shown that there exists a consensus among themselves as regards the question of compensation for nationalized property. This consensus, as expressed for example in the Charter of Economic Rights and Duties of States, clearly implies acceptance of the principle of national treatment. Seen in conjunction with other manifestations of state practice (the inter-American conferences, negotiations on compensation questions, the UNCTAD resolution of 1972), it can be concluded that this consensus amounts to an *opinio juris* in the sense that the principle embraced is regarded as part of existing law, or as a necessary part of future law.

IV. CONCLUSIONS AS TO EXISTING LAW

A general practice of states accepted as law would provide evidence of a customary rule in international law. In the field of protection of foreign property, however, there does not exist any *general* practice.

The industrialized states adhere to the notion of an international minimum standard as regards, *inter alia*, compensation for nationalized property. Compensation should be "adequate", "full", or "just"; it should be "prompt" or furnished with "reasonable promptness" and it should be "effective".

The Latin American states have clearly rejected the notion of an international minimum standard. The practice of the African and Asian states

[85] See Cheng, "UN Resolutions on Outer Space: Instant International Customary Law", 5 *Indian Journal of International Law* 1965, p. 36, and Hjertonsson, *The New Law of the Sea*, Leyden and Stockholm 1973, p. 127.

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indicates a similar position, even if this practice is not so unequivocal as the Latin American stand. A number of bilateral investment treaties concluded by Afro-Asian states contrast with the actual nationalization practice of these states. The investment treaties also contrast with the voting pattern of the Afro-Asian states in the UN in the matter of permanent sovereignty over natural resources.

It has been pointed out that the explanation of this discrepancy in state practice lies in the fact that bilateral treaties, in contrast with many other forms of state practice, cannot readily be presumed to express an *opinio juris*. It is true that many bilateral treaties might be concluded in order to reaffirm a legal situation, but more often they tend either to regulate a situation which is not covered by existing law or they tend to deviate from customary law or go beyond what is accepted as customary law. As a consequence bilateral treaties cannot be considered to express opinions of what the law is, unless there is support for such an interpretation in other forms of state practice involving the same states. As regards the African and Asian states and the question of an international minimum standard for protection of foreign property, such support is nowhere to be found.

Many manifestations of the capital-importing states in matters of investment protection are not always unambiguous or conclusive in the isolated case. But when these manifestations are viewed in their totality the pattern of an *opinio juris* of the Third World becomes quite clear. This *opinio juris* basically rejects any international standard for the protection of foreign property, but admits a principle of non-discrimination against foreign investors.

Since general international law consists of rules which constitute limitations of state sovereignty, and since the capital-exporting states—in the field of nationalization and compensation—recognize more far-reaching limitations in state sovereignty than do the capital-importing states, the assessment of existing law becomes a question of finding a common denominator in the practice of states.

When applying the "common denominator approach" to the specific problem of nationalization, the following conclusions present themselves:

(1) The sovereign right of states to expropriate or nationalize foreign property is not completely unlimited. The traditional requirements of *public purpose* and *non-discrimination* have not *per se* been challenged by the non-occidental trend in international law. However, the strong position held by the concept of sovereignty in today's world (to a great extent a consequence of the non-occidental trend) restricts the impact of these two traditional requirements. Thus, it is legally difficult for one state to assert that a nationalization within the territory of another is not for a public

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purpose, if the nationalizing state itself has deemed this to be the case. The principle of equal rights and self-determination of peoples, enshrined in the UN Charter,[86] implies that the nationalizing state is the sole judge in its own domestic affairs. Only in extreme cases, where expropriated property is handed over to personal friends of the ruling élite, is it possible for the principle of public purpose to play a significant role.

Further, the rule of non-discrimination, though confirmed by Latin American diplomacy and the Asian African Legal Consultative Committee, cannot today be given an absolute interpretation. A strict prohibition against discrimination may conflict with "reasons of public utility, security or the national interest"—to quote the elaboration of the public-purpose criterion in General Assembly Resolution 1803 (XVII) 1962. In such situations, the demands of state sovereignty tend to override claims for an absolute protection of foreign property. For example, the stated reason for selective nationalizations in Indonesia in 1958 (aimed at Dutch property) and in Cuba in 1960 (aimed at US property) was a public need to release the nationalizing state from an economic and political dependence on specific foreign interests.

(2) The traditionally recognized general obligation of states to pay compensation upon expropriating foreign property has not been challenged by the non-occidental trend in state practice. Already in 1963 Jiménez de Aréchaga, having examined the flow of compensation agreements since the second world war, noted that all the "en bloc compensation agreements, taken together, constitute a recognition by the various legal systems of the civilized world that the state which nationalized foreign-owned property has, under general international law, a duty to compensate the state of nationality of those foreign owners".[87] This conclusion—that at least *some* compensation is required by international customary law—is reaffirmed by the nationalization practice of developing states during the last few decades.

(3) The classical formula of "prompt, adequate and effective" compensation is largely obsolete.[88] Only the requirement of effectiveness is still

[86] This principle has been reaffirmed and elaborated in the so-called Friendly Relations Declaration, adopted by the General Assembly in 1970. The Declaration stated that "all peoples have the right freely" to pursue, without external interference, "their economic, social and cultural development". GA Res. 2625 (XXV) 1970.

[87] Aréchaga, Working Paper on "The Duty to Compensate for the Nationalization of Foreign Property", *Yearbook of the International Law Commission* 1963, vol. II, p. 240.

[88] Already in 1963 it was noted in a UN report that the compensation agreements "do not provide in all cases for full or even adequate compensation and often they only represent a percentage of the existing claims". Aréchaga, *Yearbook of the International Law Commission* 1963, vol. II, p. 239. Lillich and Weston have, in their examination of 139 "lump sum" agreements concluded during the years 1946–71, shown that the median time span between the nationalization and the settlement agreement is roughly 15 years; and that, when instalments

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supported by a general practice among states. This criterion—that compensation shall be of real economic value to the investor—has never been controversial. In fact, it is inherent in the general obligation to compensate.

It should be noted that the traditional compensation formula cannot be based on the doctrine of acquired rights, since that doctrine has failed to gain support from the capital-importing states. This lack of support has been explained by the fact that the concept of acquired rights takes into account ownership "not in its social function, but exclusively as an object of an absolute right of the individual".[89] Many constitutions of developing countries stress "the social function of property" and thereby give priority to the needs and general interests of the national community.[90]

(4) No generally recognized international standard or formula with regard to the *quantum* of compensation can be inferred from state practice. It can only be said that the duty to pay compensation is to be exercised *bona fide*; that is to say, the amount offered should be related to the factual circumstances of the case and be paid without undue delay.

It has been hoped that the principle of "unjust enrichment" could play a role in this context. In theory this principle could provide a balance between the interests of capital-exporting and capital-importing states. A nationalizing state would then have to pay the full equivalent of the property taken;[91] but, on the other hand, private investors enriched by years of exploitation would have to face deductions for "excess profits" from the normal amount of compensation. Neither this solution nor other compensation formulas (like "updated net book value") have been applied with such regularity in state practice that a customary rule is in the process of being established.

In conclusion, and as has been stated by another author, "in the absence of a positive rule in the matter it would seem to be legally incorrect to require states to observe, in their relations with foreigners, a higher standard of conduct than that observed towards their own nationals."[92] How-

are provided for, the median time span for payments is roughly five years. *International Claims: Their Settlement by Lump Sum Agreements*, Part I, 1975, pp. 210 f.

[89] Francioni, "Compensation for Nationalization of Foreign Property: The Borderline between Law and Equity", 24 *International and Comparative Law Quarterly* 1975, p. 262.

[90] This is true, for example, for Bolivia (art. 22), Chile (art. 10: 10), Colombia (art. 30), Cuba (art. 87), Ecuador (art. 47), El Salvador (art. 137), Haiti (art. 22), Nicaragua (art. 84), Panama (art. 44), Paraguay (art. 96), Venezuela (art. 99), Congo-Brazzaville (art. 33), Egypt (art. 32), Mozambique (art. 13) and Syria (art. 26). See Blaustein & Flanz, *Constitutions of the Countries of the World*, New York.

[91] According to a traditional view, this is the only aspect of the principle of unjust enrichment. See O'Connell, *International Law*, vol. II, London 1970, pp. 780 f.

[92] S. Friedman, *Expropriation in International Law*, London 1953, p. 133.

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ever, statements of this kind cannot affect the duty to compensate, as such, only the *quantum* issue.

(5) The principle of permanent sovereignty over natural resources, as this principle has been repeatedly reaffirmed in the United Nations, implies that compensation is not a *sine qua non* for the legality of a nationalization. Several resolutions adopted by the General Assembly, including the Charter of Economic Rights and Duties by States, deal with the sovereign right to nationalize and the obligation to pay compensation as separate questions. Thus, according to the Charter:

> Each state has the right: ... to nationalize, expropriate or transfer ownership of foreign property, *in which case* appropriate compensation should be paid. (Italics added.)

One comes to the conclusion that, according to the majority in the United Nations, the right to nationalize is not conditional upon the payment of compensation. The duty to compensate constitutes a separate and independent legal obligation. This has been confirmed by the procedure in most of the nationalization cases since 1951, where the expropriation has been carried out first and the compensation issue has been solved later.

However, there are still situations in which a nationalization must be considered illegal. The non-occidental trend has not challenged the traditional view that an expropriation which is not for a *bona fide* public purpose, which is discriminatory without being grounded on a public need, or which is in contravention of a valid treaty is unlawful.

It may be repeated that the question whether an act of nationalization as such is lawful or unlawful is not purely of academic interest. An unlawful nationalization gives rise to valid claims for restitution of the property taken. Since restitution in kind is seldom (if ever) possible, the reparation required will in fact take the form of compensation. And this implies, as the Permanent Court of International Justice put it in the Chorzow Factory Case 1928, "payment of a sum corresponding to the value which a restitution in kind would bear". This in fact means that in cases of illegal nationalization the concept of an international standard is still relevant.

Finally, it should be noted that the conclusions with regard to existing law have their limitations. The manifestations of Latin American and Afro-Asian practice which have been considered relate basically to expropriations of a general or impersonal character, or to individual but extensive and politically motivated deprivations. These types of expropriations could be classified as *nationalizations;* and with regard to nationalizations so defined the conclusions are valid. On the other hand, the material does not lend itself to any definite conclusions as to other expropriations, i.e. ad-

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ministrative expropriations of a more or less routine character. These expropriations, which could be referred to as *individual non-political expropriations,* might continue to be regulated by an international minimum standard.

Another limitation lies in the fact that the conclusions are only valid for the situation in general international law. It is still possible to argue that, for example, the formula "prompt, adequate and effective" has a legal standing in regional international law, that is to say among the developed Western states.

Even if the formula "prompt, adequate and effective" today only expresses existing law in a regional context, it could still serve as a basis—a non-legal basis—for negotiations in other cases. The author feels that Western governments affording diplomatic protection to their own nationals should avoid asserting the classical formula as a *legal* principle. He suspects that the Western insistence on the traditional norms in the UN and in other fora may have been counterproductive in the sense that the prospects for international adjudication in investment disputes have been impaired. The Latin American states are not parties to the Convention on Settlement of Investment Disputes of 1965 and the General Assembly in 1974 refused to endorse a principle that investment disputes should be settled through arbitration or international adjudication. As long as capital-importing states can envisage an international application of norms to which they themselves object, the prospects for international settlement of investment disputes will remain unsatisfactory.

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