EXPROPRIATION OF FOREIGN PROPERTY WITH SPECIAL REFERENCE TO INDIA

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PREFACE

This dissertation grew out of an interest which has been developed in the subject during my LL.B. from the University of Delhi. The M.Phil. from the Division of International Legal Studies, Centre for the Study of Diplomacy, International Law and Economics at School of International Studies, Jawaharlal Nehru University provided an ideal opportunity to pursue this interest.

This dissertation might not have seen the light of the day without the constant encouragement, guidance and inspiration provided by my esteemed supervisor, Professor R.P.Anand, who bore a many intrusions on his time with remarkable patience. I am greatly indebted to Professor Rahmatullah Khan and Dr.B.S.Chimni, for their valuable suggestions and encouragement. I thank my friends, Amitabh Mattoo, Harmeet Singh, Kumar Swami, Satish Chikkarra and Vikash Shukla who not only helped in numerous ways in the completion of this dissertation but imposed a constant check to keep me on the track of hard work. My special thanks to special friends Anurag Walia, Jitendra Singh Gehlut and Mrs.Neelam Trivedi for the kind of help and support which cannot be described in words.

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INTRODUCTION

The taking or seizure of foreign owned property is described by a variety of terms, such as expropriation, nationalisation, socialisation, confiscation, etc. While the terms are analytically distinct, their use involves ambiguity and results in some confusion in the literature on the law of expropriation of foreign property. Conceptually, expropriation is taking of alien property for a public purpose and payment of compensation as a condition for expropriation. These criteria may be said to have emerged by evolution of the practice among states. The meaning of the term expropriation in the present study is taken as the compulsory transfer to the State by virtue of legislative or executive acts of a general and impersonal character, of private property, or activities, for the fulfilment of a public interest. The term property extends to all property rights, interests and investments. As the present study is mainly concerned with overall examination of broad features of law of expropriation as a concept, for the sake of convenience it is assumed that there is no distinction between expropriation and nationalisation, both being used interchangeably.

Importance of the Study

The law of expropriation of foreign property has for long been one of the most controversial subjects within the field of international law and is today a most pressing problem. Expropriation or nationalisation of foreign properties is the major issue encompassing the North-South dialogue on New

International Economic Order. The endemic lack of mutual understanding in the North-South dialogue is nowhere more flagrant than the context of the debate over compensation with respect to expropriation of foreign property.

Objective of the Study

International law recognises the right of a sovereign state to nationalise or expropriate foreign owned property within its territory in the public interest but bitter disputes have arisen on whether the exercise of this right must be accompanied by the compensation and if so, on the quantum of compensation.

A U.N. study describes the present situation with regard to standards of compensation as representing a vanishing consensus on the basic principle of international law governing the protection of foreign private investments. While the traditional law of expropriation no longer holds the ground, there is no consensus on the law of expropriation at present. The concern of present day debate is to decide as to what in the context of general and fundamental socio-economic and political reform should be the compensation for the taking of foreign owned property.

In the light of the present realities of international affairs, when the gap between the rich and the poor countries is increasing, and an impressive wave of expropriation has taken place in many countries of the Third World, it is

appropriate and necessary to examine the state of law of expropriation of foreign property today.

The rapid disappearance of the colonial system in the post-war period, as well as the establishment of large multi-national business on the part of capital exporting powers, have altered the social context in which evaluation of international law concerning compensation for the taking of foreign property has to be made.

If one adds to these basic factors the established trend in post-war practice of settling compensation claims by way of lump-sum agreements, which represent an equitable compromise for the competing interests involved, a fresh approach to the whole matter of law of expropriation of foreign property is necessary.

In the relatively short span of time since independence, India has emerged as a major actor in the world scene with a deep involvement in international affairs. India's actions and attitude have an impact far beyond its borders because of its position in the Third World. The course pursued by India has been motivated by considerations of furthering its development and promoting the cause of the Third World by strengthening its solidarity in negotiations of the South with the North. India along with other Third World countries perceives the present international economic system as heavily biased in favour of the developed world. It believes that a modification of this system in order to accommodate the legitimate needs and aspirations of the developing world is a

prerequisite for lasting international peace and stability.

While the debate over law of expropriation goes on unabated, with consensus no where in sight, it is relevant to examine how India, a leading member of the Third World, has dealt with the problem of expropriation of foreign property.

The purpose of the study is confined to examining the major aspects of law of expropriation, controversy on the question of compensation being the central one, and the difference of opinion on such aspects on the law of expropriation between the developed and the developing countries. It may be made clear at the outset that it is not proposed to suggest a new norm of international law in these areas. The evolution of new law is a long and complex process that might take several years to complete. An attempt will be made here only to examine some of the principles involved as well as the process of evolution of such norms.

The present study has limited scope and does not include concepts like requisition, confiscation, or indirect expropriation, and various legal aspects attached to such concepts. It does not deal with a situation in which re-negotiations or revision of a contract would tentamount to expropriation of property.

Further, the study does not include in its scope the remedial aspect of the problem of expropriation. Remedies available to the foreigner whose property has been expropriated,

and doctrines such as local remedies rules and Calvo doctrine attached to such remedies, therefore, fall outside the scope of study.

Scheme of Work:

The present cannot be assessed nor future correctly projected without an understanding of the past. The first chapter of the study attempts to examine briefly historical factors and developments that have led to impasse in the law of expropriation and made the examination and evaluation of the subject an urgent need.

The Second chapter deals with the present state of law of expropriation of foreign property as it stands today. It seeks to examine the divergent and conflicting stands of the developed and the developing countries and the continuing inconclusive debate.

Chapter III, A specific study of India, deals with India's practice of expropriation of foreign property, underlying factors behind such practice and its impact on the evolution of law. We shall try to examine the limitations the developing countries face in carrying into effect the changes they seek in the law of expropriation of foreign property.

Chapter IV deals with general conclusions of the study of the subject in which there are still no final conclusions reached. Describing the urgency of the need of finality about law of expropriation, this chapter makes an appeal to the international community to arrive at the consensus which is hard to come.

CHAPTER - I

HISTORICAL CONTEXT

> Legal norms relating to foreign wealth deprivations have been determined, at any given period in history by the economic, political and social processes of the time.(1)

Before reviewing the present state of the law of expropriation, it is necessary to examine the historical factors and developments which have led to the existing impasse in the law of expropriation of foreign property.

Colonial Factor

The colonial economic system, as developed during the nineteenth century, had clearly ordained a position of dominance for western metropolitan powers in the exploitation of economic resources of the countries known today as the third world countries. Contracts or leases were obtained in favour of European investors in the colonial territories themselves or under unequal treaties and agreements imposed upon nations not directly under colonial rule.

The industrially advanced nations of Western Europe had a common faith in Laissez Faire economics and in identical rules interests and institutions. They also had a common goal viz. safety of foreign investments made by them in the colonial and

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1 F.G.Dawson & B.H.Weston, "Prompt, Adequate and Effective: A Universal Standard of Compensation?" Fordham Law Review (New York), vol.30, 1962, p.728.

underdeveloped territories. The colonial powers did not hesitate to use force to extract special privileges for their nationals or to vindicate the standards of behaviour enunciated by them in order to protect their business interests. This phenomenon led the foreigner and his state to demand and assert in favour of the former certain rights in the host state. Thus, the doctrine of responsibility of states were devised as a legal cloak to serve and protect the imperialistic interests of the European powers.

In the words of S.N.Guha Roy:

> This branch of international law grew up to its present maturity in the nineteenth and the first half of the twentieth century, in the midst of a contest among a number of important members of the contemporary international community for the mastery of the politically and economically underdeveloped regimes of the globe. The history of its development thus became an aspect of the history of imperialism or dollar diplomacy.(2)

The principles of international law on the responsibility of states for injuries to aliens, (including principles on exptopriation of alien property), have the notorious reputation of being weapons of colonial exploitation. Judge Padilla Nervo observed in a separate opinion in Barcelona Traction Light and Power Co.Ltd. case

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2 S.N.Guha Roy, "Is the Responsibility of States for Injuries to Aliens a Part of Universal International Law", A.J.I.L., (Washington, D.C.), vol.55, 1961, p.864.

> the history of responsibility of states in respect to the treatment of foreign nationals is the history of abuse, illegal interference in the domestic jurisdiction of weaker states, unjust claims, threats and even military aggression under flag of exercising rights of protection and imposing sanctions in order to oblige a government to make the reparations demanded. (3)

According to Professor R.P.Anand,

> ....this law not only permitted discrimination against the non-western people, but sanctified their exploitation and subjugation..... /I/t sanctified colonialism and accepted the unequal treaties forced upon weaker states as valid and legal. (4)

Thus the history of the imperialist age and the rights exercised by the imperialist powers are reflected in the rules of international law specially in law of expropriation of foreign property and were bound to be challenged after the demise of colonialism.

Horizontal Expansion of International Community

The bulk of existing international law is an undoubted legacy from the international community which was limited both racially and geographically.

In the last few decades there has been a radical transformation of the international community because of emergence

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3 ICJ Reports (1970), pp.246-47.

4 R.P.Anand, New States and International Law (Delhi, 1972), p.44.

of several countries of Asia and Africa as independent states. These states which were treated merely as objects of international law have challenged the validity of the norms created out of unequal relationship between colonial powers and colonized territories. These countries demand that principles formulated without their participation and in fact against their interests must be changed. The principles which were invoked to perpetuate the economic domination of the weak by the powerful states ought to be replaced by new rules of international law.

To exercise their right of sovereignty over natural resources these countries consider it necessary to free themselves from the bondage of onerous and unequal obligations imposed upon them by expropriating foreign investments. Traditional law of expropriation stands as a hurdle in their way to economic independence. Therefore, these countries demand complete overhau of the traditional norms governing expropriation of foreign property which in their view are not only unjust but also unrealistic in the changed circumstances.

Change in the Concept of Private Property

Another significant development in the course of time which had tremendous effect on law of expropriation of foreign property is the change in the concept of private property.

Private property was worshipped on the altar of law, unchallenged by doctrines of communism and claims of national sovereignty over natural resources. But the Russian revolution,

national trauma of two world wars, the great depression, the evolution of the corporate and welfare states, etc., jolted governments into a recognition of the public interest in private property.

S.Friedman observes:

> whilest property was originally regarded as an absolute right of an essentially individualistic character, at the present stage of legal development this aspect has been considerably modified. The absolute right is replaced by a right that is only relative and is conditioned more and more by the needs of community.(5)

Rudolf Von Ihering advocating a social theory of property explained

> expropriation was not something abnormal, something inconsistent with the idea of property, but constituted the solution of the task to reconcile the interest of society with those of the owner, it renders property a practically viable institution, without it property would become a curse upon the society.(6)

In other words property is no longer regarded as the exercise of a private competence of discretionary character but is, on the contrary, subordinated to the interest of the social group and to the economic planning of the means of production.

The extent of state intervention in economic and social affairs is such that the right of private persons are normally

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5 S.Friedman, Expropriation in International Law (London, 1953), p.6.

6 I.Husik, Law as a Means to an End, trans. (New York, 1924), p.397.

bound to be affected extensively and frequently.

Post War Expropriations

Interference in the economic process during the nineteenth century was confined principally to the regulation of private wealth. In that period social reforms and political movements to create national ownership in property did not produce general nationalizations or socialization of private property, including foreign owned property.

It was primarily during this period of limited deprivations that the legal norms concerning law of expropriation were formulated.

The post-War nationalization acts do not come under any traditional category of a legal system based on capitalist economy. Post war nationalizations represent a revolutionary development and it would be futile to attempt to associate it with past legal concepts. Rather, it should be looked upon as a suigeneris matter and be dealt with accordingly.

Sir Harsch Lauterpacht holds the view that

> the rule is clearly established that a state is bound to respect the property of aliens. This rule is qualified not abolished... [A] modification must be recognized in cases in which fundamental changes in the political system and economic structure of the state or for reaching social reforms entail interference, on a large scale with private property. In such cases neither the principle of absolute respect for alien property nor rigid equality with the dispossessed nationals offer a satisfactory solution

of the difficulty.[7]

It is anachronistic to apply the philosophy that the compulsory taking of property is in the nature of tresspass to the conditions of present time when it frequently happens that the property of individuals has to be expropriated for important public purposes. Now impersonal nationalization or expropriation is considered as part of a programme of socio-economic reform and public welfare a legitimate state objective in itself.

International law must reflect and be responsive to be viccissittudes of socio-economic and political relationship between, among and within states. These developments call out for new norms of law of expropriation in accordance with present circumstances and the line of thought prevailing in the world.

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7 Oppenheim, International Law, H.Lauterpacht, (ed.) (London, 1955), edn.8, vol.1, p.352.

CHAPTER - II

LAW OF EXPROPRIATION OF FOREIGN PROPERTY AS IT STANDS TODAY

"In most of the areas in which international law operates, uncertainty looms large", asserts a contemporary jurist. And he adds: "but the uncertainty in respect of principles governing the expropriation of alien property is more pronounced".[1]

United States Supreme Court declared in Sabbattino case that:

> there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.(2)

In other words, there are, at present, no meaningful, precise and well set norms or standards of law of expropriation of foreign property. This fact of uncertainty and inconclusiveness shall be borne out by the discussion of law of expropriation of foreign property in this chapter.

International Standard Vs. National Standard

One of the most perplexing question posed by expropriation of foreign property is the threshold inquiry; which

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1 S.C.Jain, Nationalization of Foreign Property (Delhi, 1983), p.105.

2 Banco Nacional de Cuba, V.Sabbatino, 376, US 398 (1963), International Legal Materials, vol.2, (1963), pp.1009, et. seq.

law governs the expropriation, whether international minimum standard or the national standard. According to Verwey and Schrijver:

> In brief and at the risk of some over-generalization, it can be said that legal doctrine belonging to 'traditional' (basically pre UN era) international law is marked by a contradiction between the so-called 'international minimum standard', adhered to by most of western countries, and the 'national standard', advocated by the countries of Latin America and subsequently adopted by other developing countries.(3)

Capital exporting countries of industrialized west insist upon international minimum standard of law as a well established principle and assert that a state cannot invoke its municipal legislation as a reason for avoiding its international obligations while expropriating foreign property. These countries admit that a state possesses the right to expropriate a property belonging to foreign nationals in its territory, but it is entitled to do so only subject to conditions laid down by the minimum standard of law.

Developing countries, on the other hand, dispute whether there exists any international minimum standard of law according to which not only it is obligatory on the expropriating state to pay compensation but that the compensation paid

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3 W.D.Verwey and N.J.Schrijver, "The taking of Foreign Property under International Law : A New Legal Perspective?", Netherlands Year Book of International Law, vol.XV, 1984, pp.6-7.

should be "prompt, adequate and effective", as part of universal international law to be binding on all states.

Oscar Schachter, after examining the various judicial decisions reached the conclusion that:

> argument that, prompt, adequate and effective formula is "traditional" international law finds little support in state practice or authoritative treaties and monographs.(4)

Similarly Wolfgang Friedmann observes:

> it is nothing short of absurd to pretend that the pretension of the rule of 'free, prompt and adequate compensation'.... in all circumstances is representative of contemporary international law.(5)

According to S.N.Guha Roy,

> ....law has to owe its binding character to the consent, either express or implied, of each member of the international community. The validity of all rules of international law for any state must accordingly be tested primarily on that touchstone. If any particular rule does not stand that test, it ought to cease to be universally binding, though it may still be binding among some states because of their acceptance of it in one way or another.(6)

An early decision supporting the position that a state's municipal law was to be applied to disputes arising from

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4 Oscar Schachter, "Compensation for Expropriation", AJIL, vol.78, 1984, p.122.

5 Wolfgang Friedmann, "National Courts and the International Legal Order", Geroge Washington Law Review, vol.5, no.34, 1960, p.443.

6 S.N.Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a part of Universal International Law", AJIL, vol.55, 1961, p.867.

contracts between foreign investors and their host states was rendered by the permanent Court of International Justice in the Serbian Loans case. The Court held:

> Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of same country.(7)

Developing countries advocate national standard as correct law to be applicable in case of expropriation of foreign property and rely upon Article 2(2)(c) of the Charter of Economic Rights and Duties of States which provides -

> 2. Each State has the right:
>
> (c) to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.(8)

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7 "Payment of Certain Serbian Loans Issued in France", P.C.I.J., Ser.A, no.20, 1929.

8 U.N.Doc.A/9631 (1974, The text of the Charter is reproduced in full in 14 ILM, 1975, p.251.

Visualising the difficulty of applying international standard to the act of expropriation, De Visscher observes that

> nationalisation is an internal measure often dictated by reasons that are more political than economic. In principle, its legality is not to be determined, by only international criterion.(9)

Despite many efforts at international level this controversy between international minimum standard and national standard remains unresolved till today.

TRADITIONAL LAW OF EXPROPRIATION AND CHALLENGES IT FACES

Right to Expropriate

After a review of the long history of law relating to expropriation of alien property Professor Mann poses the question "Can property be expropriated at all?". He then himself answers that all the available evidence goes to show that at all stages of history the individual owner was liable to have his property taken from him. Never and nowhere was there any support for the proposition that property could not in any circumstances be taken, that it was sacrosanct, inviolable. Nor is there any evidence that in reality this was

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9 De Visscher, Theory and Reality in Public International Law, trans. P.E.Corbett (Princeton, 1968), p.201.

ever doubted. On the contrary, the long struggle about the conditions of and the restrictions upon expropriation could not have occured had the right of expropriation not been assumed and treated as superior to right of property.[10]

Whether or not there existed a right to expropriate property in the past, the right to expropriate as such is no longer the subject of debate. The right of the state is now recognized as an attribute of its sovereignty in the sense of the supreme power which it possesses in relation to all persons and things within its territorial jurisdiction. Archega points out:

> Traditional international law considered any interference by a state with foreign-owned property a violation of acquired rights, which were internationally protected and thus an international unlawful act. Today any measure of nationalization or expropriation constitutes the exercise of a sovereign right of the state and its consequently entirely lawful.(11)

The United Nations General Assembly has repeatedly recognised this right in its various resolutions, notable among those being resolution 1803 (XVII) in Dec. 1962, [12] resolution 3016 (XXVII) of Dec. 18, 1972,[13] resolution 3171

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10 F.A.Mann, "Outlines of a History of Expropriation", Law Quarterly Review, vol.75, 1959, p.189.

11 Archega in Kamal Hossain (ed.), Legal Aspects of the New International Economic Order (London, 1980), p.220.

12 G.A.Doc. A.5344/Add.I (1962).

13 12 ILM 226 (1973).

(XXVIII) of Dec 17, 1973,[14] resolution 3201 (S-VI) of May 9, 1974,[15] resolution 3202 (S-VI) of May 16, 1974,[16] and resolution 3281 (XXIX) of Dec 12, 1974.[17]

Thus in the United Nations era, the recognition of the principles of economic self determination and of "permanent sovereignty over natural resources and wealth" has merely refined, rather than modified the legal basis of right to expropriation.

Professor Dupuy in Texas Overseas Petroleum Co/ California Asiatic Oil Co Vs Libiyan Arab Republic Arbitration case[18] acknowledges that "the right of a host state to nationalize is an unquestionable rule of customary international law.

LEGAL EFFECT OF LONG TERM ECONOMIC DEVELOPMENT AGREEMENT OR STABILIZATION CLAUSE ON RIGHT TO EXPROPRIATE

There is a vigorous debate going on between developing countries and the developed nations on the question of whether

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14 13 ILM, 263 (1974).

15 13 ILM, 744(1974).

16 13 ILM, 744(1974).

17 14 ILM, 251(1975).

18 ILR, vol.53 (1979), p.389.

whether economic development agreements or stabilization clauses in the agreements, confer rights on alien investors which cannot be abrogated by the host government. It is argued on the other hand that the host state retains residual sovereignty over its resources which subordinates all other circumstances and if a government feels it must make changes with respect to commitments embodied in specific arrangements, it can renounce its obligations.

The question involves the status of the principle of permanent sovereignty over natural resources and wealth under international law. Has this principle developed to a peremptory norm of international law, so that a state can never be restricted in its rights to nationalize foreign property by a bilateral investment agreement ?

The developed nations rely upon the traditional international law precept that international obligations must be kept. This principle is embodied in the United Nations General Assembly Resolution 1803 (XVII) 1962, which requires that "foreign investment agreement freely entered into by or between states shall be observed in good faith".[19]

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19. G.A.Doc.A. 5344/Add.I (1962).

The arbitrators in the Saudi Arabia V. Arabian American Oil Co. (Aramco) held that "nothing can prevent a state, in the exercise of its sovereignty, from binding itself, irrevocably by the provisions of a concession and from granting to the concessionaire irretractable rights. Such right have the character of acquired rights ----. The restrictions of its powers, which a state accepts by contract; are a manifestation of its sovereignty and states are bound to fulfil their obligations to the same extent as private persons. The principle of respect for acquired rights prevents the state from derogating from this undertaking".[20]

In Reverse Copper Arbitration case where the Jamaican government enacted a legislation which revoked certain bauxite mining concessions granted to Reverse Copper and Brass with whom it concluded an investment agreement in 1967, the arbitral tribunal regarded long-term economic development agreements as sui generis and held that "while not made between governments and therefore wholly international, are basically international in that they are entered into as part of contemporary international process of economic development. The 1967 Agreement falls within this category of a long term development agreement and...principle of public international law apply to it insofar as the government party is concerned....The question of breach by

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20. ILM, Vol.27 (1958), pp.117, 168.

such party cannot be determined solely by municipal law....[I]t would be contrary to well established principle of international law to leave the question of state responsibility to the alien party to the determination by that state as what it lawfully could or could not do. Parliamentary supremacy and state sovereignty cannot...be the decisive criteria where the contract involved is international in nature and falls within category of long term economic development agreement".[21]

Thus the, Reverse Copper decision follows the exception put forward in the Aramco arbitration for long term economic development agreements, and expresses only the view of developed states.

But in Texaco V.Libya Arbitration case the view was expressed that the principle of permanent sovereignty over natural resources precludes a state from divesting itself of its sovereign rights over its natural resources or 'alienating its sovereignty over them, but that a state may by agreement accept a partial limitation of the exercise of its sovereignty in respect of certain resources in particular areas for a specified period of time. The result is that a state cannot invoke its sovereignty to

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21. ILM, vol.17 (1978), pp.1321, 1331.

disregard commitment freely undertaken through the exercise of the same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract."[22]

Garica Amador observes that "if the nationalization measure is in violation of a treaty obligation or of a special arrangement between the government and foreigners, or of a recognized principle of public international law, the measures then become perse a tortious act which involves state responsibility, a principle confirmed in recent draft conventions".[23]

According to Verwey and Schrijver, the exercise of the right to nationalization will be invalid if the taking of foreign property is contrary to a treaty or contract, which provides for 'stabilization clauses' or unassailability clause : Violation of the contractual guarantee provided for in a treaty or concession (notably in the form of stabilization clauses) amounts to violation of international law.

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22. ILR, vol.53 (1979), pp.389, 475.

23. Report by the Special Rapporteur, P.C.Garcia Amador on International Responsibility, especially the Fourth Report 1959; International Law Commission Yearbook, UN Doc.A/CN.4/125.

Commenting on the principle of permanent sovereignty over Natural Resources and wealth, they observe that "the term 'permanent' is not meant to serve as a 'blank cheque' for unobstructed taking, whatever agreements freely entered into may show to the contrary."[24]

The developing countries, on the other hand, committed to re-distribution of the world's wealth, declare their continuing sovereignty over their natural resources and assert their authority to amend or nullify long term economic development agreement. These countries, while not denying the general duty of all states to fulfil their obligations in good faith, take the position that the law governing long-term economic development agreements must be the municipal law of the host state. These countries argue that investment agreements are not international agreements since these are not concluded between states, such agreements do not have international status because private companies are not subjects of international law, and, therefore, these are governed by the domestic law of the state concerned. This position was justified by the International Court of Justice in the Anglo Iranian case where the court did not accept the view that a concessionary

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24. W.D.Verwey and N.J.Schrijver, "The Taking of Foreign property under International Law : A New Legal Perspective?", Netherlands Yearbook of International Law, vol.XV (1984), p.26.

contract signed between a government and a foreign private corporation could be considered to be an International Treaty.[25]

Arechega rules out that contracts containing a stabilization clause are not subject to the law of the contracting state but to international law; because he believes that there is no international law of contracts and argues further that, even if it were so, international law contains the fundamental and overriding principle of permanent sovereignty over Natural Resources and wealth.[26]

Reacting to stipulation inserted into contracts of this type providing that they would be governed by international law or by the general principles of international, designed to make the contract escape from the municipal law of the host state, thus obtaining a sort of indirect or disguised stabilization clause, Arechaga holds that such stipulation does not achieve the function of a real stabilization clause because international law does not forbid a nationalization, nor does it the result in the

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25. ICJ Reports (1952), p.112.

26. Eduardo Jumenez de Arechaga, "Application of the Rules of State Responsibility for the Nationalisation of Foreign owned property", in Kamal Hossain (ed.), Legal Aspects of the New International Economic Order (New York, 1980), p.230.

cancellation of the contract, provided appropriate compensation is paid. He also considers it unnecessary because international law is always applicable to the situation resulting from the cancellation of the contract or the nationalisation of the enterprise without appropriate compensation. To reach that result it is not necessary to stipulate that the contract will be governed by international law. It is not the contract as such, but the stipulation as a whole which is governed by international law, whether or not the parties have so stipulated.[27]

The next question is, whether a government can bind itself not to nationalize or change the terms of concession contract in such economic development agreements so as to loose such right by an express undertaking. According to M.Sornarajah, "it is inconsistent with the theory of state sovereignty to argue that a government can bind a state in perpetuity by giving guarantees to an alien. Were there such a rule, future action consistent with national interest would be fettered indefinitely. A government must be held incapable of acting against the future common good of its people.[28]

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27. Ibid., p.230.

28. M.Sornarajah, "Compensation for Expropriation: The Emergence of New Standards", Journal of World Trade Law, vol.13, 1979, pp.122-3.

A view that stabilization clauses deprive the host state of the power to put an end to the concession except with the private party's concern runs counter to the fundamental concept and purpose of the principle of permanent sovereignty over natural resources and wealth proclaimed in the charter and in other General Assembly resolutions. Arechaga considers the right to nationalize a corollary of the principle of permanent sovereignty over natural resources and describes it as a "legal capacity" which cannot be lost. He observes: "contemporary international law recognizes the right of every state to nationalize foreign owned property, even if a predecessor state or a previous government engaged itself, by treaty or by contract, not to do so."[29]

Ian Brownlie states that the proposition that an express provision of a concession agreement not to expropriate operates to divest the state of the right to expropriate "almost certainly does not represent the positive law."[30]

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29. Jimenez de Arechaga, "International Law in the Part Third of a Century", Recueil des Cours, vol.I (1978-I), p.297.

30. Ian Brownlie, "Legal Status of Natural Resources in International Law (Some Aspects)", Recueil des Cours, vol.I (1979), p.262.

Subrata Roy Chowdhury concludes that the principle of permanent sovereignty over natural resources, emanating as it does from the juscogens principle of self-determination, is a fundamental principles of contemporary international law and is applicable in principle to economic development agreements and investment treaties. If a particular treaty or a particular provision therein, including stabilization or immutability clauses, amount to an alienation of sovereignty, it should be held that the particular agreement or treaty or particular offending provisions are ultravires the juscogens principle of permanent sovereignty over natural resources.[31]

The report of the Australian Branch of the International Law Association, prepared by David Flint, concludes that economic development agreements by their very nature cannot realistically be seen to be immutable. After examining the respective views of Prof. Weil Verwey and Judge Arechaga on the effect of stabilization clauses in municipal law and international law, the report observes :

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31. Kamal Hossain and Subrata Roy Chowdhury, Permanent Sovereignty Over Natural Resources in International Law: Principle and Practice, (London, 1984), p.57.

> Perhaps the advantage of stabilization clause is therefore political or moral rather than legal. While the stabilization clause will be of little effect in municipal law, at least in England and Australian municipal law, it is hard to see that it could have any greater effect in international law unless the contract itself can be said to be subject to a non-state legal system: our evaluation of arguments in support of such delocalization of economic development agreements suggests that this is unlikely, or that even if it occurs, such agreements are not immutable.[32]

The principle of permanent sovereignty over natural resources it is submitted has now become a rule of customary international law. The concept of sovereignty is to establish the competence of a state to exercise its sovereignty in respect of its natural resources at any time. It means that a state has unfettered right of expropriation at any time. International law will not recognise the fettering of sovereignty of a state in this regard, perhaps except under a treaty between states.

It is submitted that the effect of the economic development agreements or stabilisation clause is not to fetter the ability of the host state to expropriate but it does mean that any expropriation being a breach of the international contract will cost the host state more. To put

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32. David Flint, "Foreign Investment and the New International Economic Order", in Kamal Hossain and Subrata Roy Chowdhry (eds.), Permanent Sovereignty Over Natural Resources in International Law : Principles and Practices (London, 1984), p.180.

in the words of Arechaga, "this does not mean that such stabilization clauses have no legal effect and may be considered as unwritten. An anticipated cancellation in violation of a contractual stipulation of such a nature would give rise to special right to compensation; the amount of indemnity would have to be much higher than in a normal case."[33]

In the light of the above discussion, it is submitted that neither the bilateral treaties in corporating investment protection clauses, enforcing traditional standards of law of expropriation represent present customary law of expropriation nor do these clauses negate the effect of the Article 2 (2) C of the CERDS as opinojusis of the majority of international community today.

Although the sovereign right of a state to expropriate alien property has been well established, whether this right is subject to any limitation and, if so, what limitations, has been a subject of great controversy. According to traditional international law, an expropriation to be valid should be for a public purpose, non-discriminatory and preceeded by "prompt, adequate and effective" compensation.

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33. Archega, n.26, p.230.

Public Purpose

In the traditional view right to expropriate foreign property is qualified to the extent that the property has to be taken for a public purpose or in public interest. Several publicists have emphasised that expropriation finds its juridical basis in the general welfare of the community. The very basis of an expropriatory measure is said to reside in public purpose, However, the views of publicists are divided even on the very existence and desirability of this doctrine, as well as its scope.

According to Gillan White, in absence of any other element of illegality, the mere lack of public utility motive will not render an expropriation illegal.[34] Baade believes that public utility or public interest is not to be treated as a limitation but a purported authorisation.[35]

This division of publicists opinion is also reflected in the nationalizations of oil concessions by Libya, in which tribunals faced the question as to the relevance of motives in determining the validity of the Libyan nationalizations.

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34. Gillian White, Nationalization of Foreign Property (London, 1961), p.146.

35. Baade in R.S.Miller and R.S.Stanger (eds.), Essays on Expropriations (Ohio State University Press, 1967), p.23.

In Texaco Co Cal asiatic case[36], the tribunal held that "it must regard the Libyan government as having acted in accordance with the sovereign appreciation of the national interest" and declined to go into motives of the Libyan government's actions.

In B.P.Exploration Co case[37] the sole arbitrator Lagergren, took a different view and held that Libya's action was prompted by "purely extraneous political reasons and, being arbitrary and discriminatory, violated public international law".

In the LIAMCO case,[38] the tribunal expressed the view that "public utility principle is not a necessary requisite for the legality of an nationalization."

Burns H.Weston is of the view that "although early declared by Grotius as a limitation upon a sovereign's power of eminent domain and while understandably incorporated into many domestic systems to protect against executive and legislative abuse, the doctrine has found scant support in

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36. ILM, vol.17, (1978), p.25.
37. ILR, vol.53, (1979), p.329.
38. ILR, vol.20 (1981), p.58.

practice as a "rule" of international law whose violation independently engages international responsibility. Research has yet to reveal any international legal dispute that has turned on the public purpose issue alone".[39]

Summarising the position, an American official publication declared

> "Although the requirement that the taking of an alien's property be for a public purpose or be based on reasons of public necessity or public utility- is frequently mentioned in international adjudications and the works of text writers, there is little authority in international law establishing any useful criteria by which a state's own determination of public purpose can be questioned. There appear to be few, if any, cases in which a taking has been held unlawful under international law on the sole and specific ground that it was not for a public purpose."[40]

In 1962, the General Assembly of United Nations recognised the doctrine of public purpose in its resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources and Wealth[41] paragraph four of which stipulates: "Nationalization, expropriation or requistioning shall be based on

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39. Burns H.Weston, "the Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth", A.J.I.L, vol.75 (1981),pp.439-440.

40. Restatement (second) of Foreign Relations Law of the United States 185, comment b, at 553 (1965).

41. G.A.Res. 1803 (XVII), n.12.

grounds or reasons of public utility, security or the national interests which are recognised as overriding purely individual or private interests...." [42]

However, Article 2, paragraph 2(c) of the Charter of Economic Rights and Duties of States[42] which talks of right of expropriation or nationalization, omits mention of the 'public purpose' doctrine i.e. the contention that foreign property, rights and interests can't be "taken" except for reasons of public necessity or utility. Western efforts aimed at ensuring reference to "public purpose" in the CEROs were defeated.[43]

Various terms may be used by the state to denote the same purpose such as 'public purpose', 'public utility', 'public necessity; even 'vital necessity'. However, it is difficult to specify their exact scope and nature. Proper scope of the 'public purpose' doctrine is obscure in the international juristic opinion. A generally recognised definition of 'public purpose' does not exist.

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42. G.A.Res. 3281 (XXIX), UN GAOR, Supp. (No.31) p.50; UN Doc. A/9631 (1974). The text of the Charter is reproduced in full in 69. A.J.I.L. (1975),p.484 and 14 I.L.M. (1975),p.251.

43. See the relevant 14 power amendment, UN Doc. A/C, 2/L, 1404.

Amir Rafat is of the opinion that, "As long as the international community remains composed of states with social systems so divergent from one another as they appear to be at the present time, one can't hope for the emergence of an internationally agreed upon definition of public utility".[44]

Keeping in view the lack of clear cut meaning and scope of 'public purpose' doctrine, ultimately it is the expropriating state which judges the public purpose or utility of a particular wealth deprivation according to municipal law. Garcia-Amador, who was a special Rapporteur of International Law Commission on 'State Responsibility' says,".....the discretionary powers of the state in the matter are in practice unlimited, provided that the latter view is understood to mean only that it is for municipal law, and not for international law, to define in each case the 'public interest' or other motive, or purpose of the like character which justifies expropriation."[45]

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44. Amir Rafat, "Applicability of the Public Purpose Principle to cases arising under International Law From the Expropriation of Alien Property", University of Detroit Law Journal, vol.43,(Detroit), 1965-66, p.401.

45. Year Book of the International Law Commission (New York), vol.2 (1959),p.16.

Even though there are difficulties in laying down objective criteria for determining whether property of an alien has been expropriated for public purpose or not, two observations can be made with certainty. Firist, even in its most moderate form, the 'public utility' or public interest phrase, the requirement implies that the taking of foreign property must be in the public socio-economic interest. Secondly, the public utility must be of an economic not of a purely or even predominantly political nature.

Non Discrimination

The principle of non-discrimination in expropriation of property has always been considered as a substantial part and legal requirement of the 'international minimum standard', expounded by western jurists and insisted upon by their countries.

The basic question is, does this term refer to the relationship between nationals and foreigners, or to that between foreigners only, or to both ? Under traditional international law, discrimination both between nationals and aliens, as well as aliens inter se, is supposed to be prohibited.

In several of its judgements the Permanent Court of International Justice regarded as unlawful discriminations between nationals of different countries.[46] The Court reaffirmed this conception in the Oscar Chinn case (1934), holding that : "The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of this nationality as between persons belonging to different national groups."[47]

Official reactions and western writings about expropriations of a clearly discriminatory nature like the exclusive taking of Dutch owned enterprises by Indonesia in 1958,[48] the selective taking of all property in which American nationals had an interest by Cuba in

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46. P.C.I.J. Series, A No.7, p.22; Series A, No.9, p.27.

47. P.C.I.J. Series A/B, No.63, p.87

48. See the Netherlands Note of 18 Dec 1959 regarding Nationalization of Dutch Owned Enterprises, A.I.J.L, vol.54 (1960), pp.485-487, 489.

1960,[49] or the selective nationalization of British and American oil interest by Libya in 1971 and 1973,[50] leave no doubt that discrimination as between foreigners is considered to be forbidden.

As far as discrimination between foreigners and nationals is concerned, the developing countries are not prepared to accept an obligation to guarantee the same economic rights to non-nationals as they confer on their nationals.

In certain situations application of the rule of non-discrimination may virtually deny a state the right to expropriate. For example, Kenneth L.Karst observes that "when a given form of property is largely in the hands of foreign owners, a strict application of the non-

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49. Nationalization Law No.851 of 6 July 1960 authorised "the nationalization through expropriation of the properties or concerns belonging to natural or juridical persons, nationals of the USA or the concerns in which said persons have a majority interest or participation" (text in A.J.I.L.vol.55 (1961), p.823). The US Government rejected the law as being "in its essence discriminatory between foreigners" and, therefore, contrary to standard of international law and was supported by the US District Court of New York in its decision on the Banco Nacional De Cubo vs Sabbatino case (text in A.J.I.L., vol.55 (1961), p.745.

50. I.L.M., vol.XIII (1974), pp.769, 777.

discrimination principle would effectively prevent the taking of the property..."[51]

According to Gillan White, "(t)here is as yet no rule of international law which provides that a state is guilty of illegal discrimination if it nationalises alien property in a field where there are no national interests capable of being affected."[52]

In Baade's words :

> "[N]ationalizations in many underdeveloped countries with few major natural resources tend to be discriminatory by the mere force of circumstances, because the natural resource that is nationalized is exclusively in the control of enterprises belonging to one foreign power, mostly the former colonial power.....If it is urged that even such discrimination are to be proscribed, the purpose of the asserted rule becomes clear. It is not envisaged as an enumeration of the conditions of the legality of nationalizations, but as an attempt to insulate one of the most important areas of international investment from nationalization completely. It is in other words an attempt to substitute the restrictions of international law for the restraints previously imposed by colonialism and gunboat diplomacy".[53]

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51. Kenneth L.Karst in Miller and Stanger (ed.), Essays on Expropriation (Ohio State University Press, 1967), pp.79-80.

52. G.White, Nationalization of Foreign Property (London, 1961), p.144.

53. Baade in N.51, pp.24-25.

The Developing countries are no longer prepared to accept formulations which either explicitly or implicitly prohibite discrimination between nationals and foreigners. Article 2, paragraph 2(c) of the Charter of Economic Rights and Duties of States, which provides each state the right to nationalize, expropriate or transfer ownership of foreign property disregards the principle of 'non discrimination'. Article 2(2) (c), by referring only to 'foreign' property implicitly authorizes a state to exempt its own nationals from wealth deprivation measures. To the contrary, the right to practice such discrimination was inserted in the New International Economic Order Declaration,[54] where it is said that "each state is entitled to....the right of nationalization or transfer of ownership to its nationals (para 4.c).

In view of discussion above, there is substantial need for objective reappraisal of the doctrine of alien non-discrimination against aliens as espoused in traditional law.

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54. G.A.Res. 3281 (XXIX), UNGAOR supp. (No.31), 50 UN Doc. A/9631 (1974).

PROMPT, ADEQUATE AND EFFECTIVE COMPENSATION

Traditional international law requires that when alien property is expropriated "prompt adequate and effective" compensation ought to be paid by the expropriating state. Sometimes this compensation formula also known as classical formula is expressed in terms of "full, prompt and effective or "due-prompt and effective" compensation. According to the traditional law if a expropriating state fails to meet the requirement of "prompt, adequate and effective" compensation, it does so in violation of minimum standards of law.

Although the traditional compensation formula has been advocated for so long, it still remains indeterminate as to its content and scope. There is no unanimity even among the western publicists as to the substance of the "prompt adequate and effective" compensation formula. There is, in short, a dearth of enlightenment about the way in which the generally accepted but ambigous "prompt, adequate and effective" compensation rule is to be given practical meaning.

Prompt Compensation

The term "prompt" compensation refers to the time of payment of compensation for expropriation of foreign property. According to traditional claims both, the amount of

compensation should be assessed and payment made at the time of, or even prior to the act of dispossession. But this meaning of 'prompt' compensation is not accepted by many publicists. In this connection Schwarzenberger observes that "in equity prompt compensation does not mean immediate compensation. It means compensation after a reasonable interval of discussion on all the relevant aspects of expropriation".[55] According to Rosalyn Higgins, the requirement of promptness is imprecise and has to be interpreted in the light of the facts. She points out that international tribunals have declined to interpret it to mean prior to or before the actual act of expropriation.[56] Freidman observes that the writers favouring payment of compensation prior to expropriation are influenced by municipal law provisions and that there is no conclusive precedent or authority for this requirement.[57]

Moreover, maintenance of such a rigid formula is not in accordance with actual state practice. According to Jain, "the rule concerning 'prompt' payment of compensation is

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55. G.Schwarzeuberger, Foreign Investments and International Law (London,1969), p.11.

56. Rosalyn Higgins, Conflict of Interests (London,1965), p.57.

57. S.Freidman, Expropriation in International Law (London,1953), p.218.

observed more in breach and does not have much support in state practice".[58] The experts with special knowledge on the problem of compensation observe thus: "Historic practice.....seriously challenges theories of immediate or prior payment, emphasizing instead the deferred character of compensation".[59] Muller is also of the view that generally, the compensation is not paid in full directly after the taking, especially when a broad programme for nationalization is undertaken, it is undesirable for the nationalising state to pay enormous amounts at once.[60]

In the case of lump sum settlements a comprehensive study of 139 agreements concluded during the period 1946-1971, revealed that the average period elapsing between the act of taking and the conclusion of a settlement agreement was about 15 years.[61] The obvious conclusion is that requirement of payment of compensation before or at the time of expropriation of foreign property was not followed.

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58. S.C.Jain, Nationalization of Foreign Property (New Delhi, 1983), p.127.

59. See A.Drueker, "The Nationalization of United Nations Property in Europe", Transactions of the Grotius Society (London), vol.36 (1951), p.100; Gillian White, Nationalization of Foreign Property (London, 1961), p.202

60. Martin H.Muller, "Compensation for Nationalization: A North South Dialogue", Columbia Journal of Transactional Law, vol.19 (1981), p.48.

61. See Lillich and Westen, International Claims: Their Settlement by Lumpsum Agreements (Chalottesville, 1975), p.210.

Verwey and Schrijver point out that significantly, the traditional formula "without delay" has often been replaced by "without undue delay", a development exemplified by the explicit insertion of the latter phrase in 1962 and 1967 in the O.E.C.D. Draft Convention on the Protection of Foreign Property and into 68 bilateral investment protection treaties concluded upto 1983".[62] The usual assumption today is that the taking government should both assess and pay the compensation "within a reasonable period" after the act of taking".[63]

The meaning of the phrase 'prompt' is hard to specify in concrete terms, since its concrete meaning depends on the particular circumstances of each case of expropriation. The International Law Commission observes : "It is clear that the time limit for the payment of the agreed compensation necessarily depends on the circumstances in each case and in particular on the expropriatory state's resources and actual ability to pay. Even in the case of 'partial' compensation very few states have in practice been in a sufficient strong economic and financial position to be able to pay the agreed

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62. W.D.Verwey and N.J.Schrijver, "The Taking of Foreign Property under International Law: A New Legal Perspective?", Netherlands Yearbook of International Law, (The Hague), vol.XV (1984), p.18.

63. C.F.Amersinghe, State Responsibility for Injuries to Aliens (Oxford, 1967), p.162.

compensation immediately and in full".[64]

Thus, it is no longer valid that payment of compensation should be made prior or at the time of expropriation as might have been required by the traditional law, if at all, but it depends on various factors and circumstances which determine the time of payment of compensation. However, it is submitted that payment of compensation should be made within reasonable time. Though no well set time limit can be laid down, it has to be reasonable keeping in view all the circumstances.

Adequate Compensation

"In the familiar formula "prompt, adequate and effective compensation", the concepts of 'prompt' and effective are difficult enough to elaborate, but the term "adequate", standing by itself, is only a feeble flame in the prevailing darkness. It is one of the conventions of international life that "adequate" is taken to represent a demand for "full" compensation or compensation in terms of "fair market value".[65]

"Full", "fair", "reasonable" or "just" compensation are regarded as equivalent to "adequate" compensation and has been used interchangeably in practice. For instance,

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64. Yearbook of International Law Commission, vol.2, (1959), p.22; UN Doc.A/C, 4/119.

65. R.R.Baxter in Forward to Richard B.Lillich, The Valuation of Nationalized Property in International Law (ed.), vol.11 (Cherlottesville, 1973), pp.(vii), (viii).

Schwarzenberger states that the difference between the terms "full" and "adequate" compensation is merely one between synonyms.[66]

The traditional United States view as to what constitutes 'adequate' compensation is found in the Harvard Draft Convention on the Law of Treaties, Article 10 of the Draft Covenant which interalia provides that a taking is wrongful if not accompanied by (b) just compensation in terms of their fair market value of the property or of the use thereof unaffected by this or other takings or by conduct attributable to the state and designed to depress the value of the property in anticipation of the taking ; or (c) if no fair market value exists, just compensation in terms of the fair value of such property or use thereof".[67] United States government has consistently maintained that the "foreign investors are entitled to the fair market value of their interests".[68] In a recent policy statement, section 712 of the draft article of the American Law Institute's

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66. G. Schwarzenberger, Foreign Investments and International Law (London, 1969), p. 10.

67. Harvard Draft Convention reprinted in John and Baxter Responsibility of States for Injuries to the Economic Interest of Aliens, A.J.I.L., vol. 55 (1961), pp. 545-553.

68. United States Policy on Foreign Investment and Nationalization Restated, Dec. 30, 1975, reprinted in 74, Deptt. of St. Bull (No. 910), 1976, p. 138.

Restatement of the Foreign Relations Law of the United States (Revised) provides that " [a] state is responsible under international law for injury resulting from (1) a taking by the state of the property of a national of another state.. when provision is not made for just compensation."[69] In the comments that follow this section, the draft Restatement refers to the principle of section 712 as an expression of the traditional rule on expropriation.[70] The comments also acknowledge that the United States consistently maintained that "just compensation" means prompt, adequate and effective compensation[71] which means 'fair market value of the property'.

In a number of treaties of friendship, commerce, as well as in bilateral investment agreements, industrialized countries have followed the concept of "adequate" compensation to mean the payment of "fair market value". For instance, a 1975 agreement for promotion and protection of investments, between Britain and Egypt stipulates: "Investment shall not be nationalized.....except for public purpose.....and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment

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69. Restatement of the Foreign Relations Law of the United States (Revised) 712 (Tent.Draft No.3, 1982).

70. Ibid Comment (a)

71. Ibid Comment (e)

expropriated..."[72]

The OECD Draft Convention on the Protection of Foreign Property of Oct 1967[73] requires the nationalizing state to pay "just" compensation which will represent the "genuine value" of the property affected.[74] In a comment accompanying the text it is explained that this would mean that the fair market value should be paid.[75]

Thus, 'adequate' compensation generally implies at the full market value of the property.

However, the traditional claim that the full market value must be paid under all circumstances nowadays meets with widespread opposition. It is recognised in particular that this demand has become incompatable with the development process in the Third World countries, since it would make the taking of foreign property by most of them virtually impossible, thereby frustrating the process of socio-economic transformation served by the taking measure. Muller observes in this regard :

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72. ICC, Bilateral Treaties for International Investment (1980), pp. 32-33.

73. OECD Draft Convention on the Protection of Foreign Property (1967), reprinted in ILM, vol.7 (1968), p.117.

74. Ibid, Art 3(111) at 124.

75. Ibid, Comment 9(b) at 127.

> "Nationalization often occur when less Developing countries decide to make fundamental changes in their socio-economic system. These sweeping changes are introduced to further development goals and to attain control over vital and strategic industries. A duty to pay the full market value for the nationalized properties, would effectively block them from exercising their sovereign and legitimate rights to reorganize their own economic system.[76]

Alexelord and Saul Mendloritz warn that "attempt to reinforce a full value compensation norm is apt to generate underdeveloped nations contempt for international law and thus weaken further the fragile net of order to which the law contributes".[77]

It is sometimes asserted that not only the value of the property of the dispossessed persons, but also the interest on this sum should be taken into account in the determination of what is adequate. Lissitzyn points out that there is tendency in the west to recognize that the formula may be unrealistic in many situations and that it may have to be replaced by a more flexible test, such as reasonable compensation, the latter being determined in the light of several relevant factors other than the full value of the property.[78]

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76. Martin H.Muller, "Compensation for Nationalization: A North South Dialogue", Columbia Journal of Trans national Law, vol.19 (1981),p.45.

77. Axelord and Saw Mendloritz, "Expropriation and Underdeveloped Nations: The Analogy of US Constitutional Law", in Miller Stanger (eds), Essays on Expropriation (Ohio State University Press,1967),p.138.

78. O.J.Lissitzyn, International Law Today and Tomorrow (New York,1965),p.85.

Several western authors now recommend that factors like the expediency and socio-economic necessity of the expropriating state and the financial capacity of the taking state to pay compensation should be considered in the assessment of 'adequate' or 'just' compensation.

Garcia Amador is of the view that " (I)n determining the amount of compensation to be paid it is necessary to take into account equitable, practical, technical and political considerations as well as juridical concerns. The argument of impossibility to pay is of great importance here if one desires to remain consistent with the idea which legitimates the institution of expropriation in general- namely that private interests, national or foreign must yield to the interest of the community. It could be unjust to deprive these less wealthy developing countries of the power to directly exploit their natural resources and public services, industries or other undertakings established in their territory just because of their inability to pay compensation.[79]

Norman Girvan, who is viewed as an advocate for the less-developed countries, lists a number of deductions which, he

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79. Garcia Amador, "The Proposed New International Economic Order: A New Approach to the Law Concerning Nationalization and Compensation", University of Miami Journal of International Law, vol.12, (1980), pp.1, 49.

feels, these countries are entitled to make before determining their "net liability" after nationalization. These deductions include (a) direct liabilities due to the community for historical expropriation and exploitation ; (b) unpaid taxes due to a variety of questionable financial practices ; (c) economic rent due to the state as represented by excess profits (d) employee benefits owed or owable ; and (e) compensaton for environmental damage.[80]

The first deduction would affect companies which owe their origins directly to colonial occupation and conquests... and having reaped large profits over a long period of time. Deduction (b) alludes to the practice of "transfer-pricing" by multi National Corporations in order to escape taxes. The third category of deductions include profits made in excess of a "reasonable" rate of return.

The right of a taking government to deduct excess profits was first practised by Chile with respect to the major copper mining enterprises and the Andean mining company,[81] followed by Libya with respect to Bunket Hunt[82] and by Kuwait with

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80. Norman Girvan, "Expropriating the Expropriators: Compensation Criteria from a Third World view point" in Lillich The valuation of Nationalized Property in International Law (ed), vol. III, (Charlottesville, 1973), pp. 149-173.

81. See Chilie's Decree No.92 concerning Excess Profits of Copper Companies of 28 Sept 1971; ILM, vol.XIV (1975), p.983.

82. See Law No.42 to June 1973, ILM, vol.XII (1974), pp.58-59.

respect to Aminoil (following an arbitral award). In arbitration between Kuwait and the American Independent Oil Co, tribunal concluded that, "the total due must consist of the sum of the profits received by the company in excess of what would have constituted a reasonable rate of return, after taking into account of its operating conditions, such a rate of return having always been the basis of its position and legitimate expectations at this time."[83]

Komal Hossain and Subroto Roy Chowdhry argue :

> "the guidelines for the formulations of pertinent circumstances must be found within the parameters of the concept that nationalization is a legitimate exercise of the right of permanent sovereignty on the one hand, and the obligation of equitable restitution on the other. Thus it has been suggested that the following circumstances should be considered as pertinent : (1) the host state's financial capacity to pay; (2) the period during which the nationalized undertaking has exploited the resources; (3) whether or not it has recovered its initial investment; (4) whether or not profits received have been excessive; (5) whether or not there has been any undue enrichment as a result of a colonial situation; (6) the contribution of the nationalized undertaking to the economic and social development of the host country; (7) the reinvestment policies of the nationalized undertaking due to cancellation in spite of a stabilization clause".[84]

The growing trend in post war period of settling compensation claims by way of lumpsum payment by the expropriating state to the home state of the aliens in satisfaction of

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83. I.L.M., vol. XXI (1982), p. 1017.

84. Komal Hossain and Subroto Roy Chowdhry, Principles of Sovereignty Over Natural Resources in International Law (London, 1984), p. 16.

their claims, has contributed, among other factors, to paving the way towards a more flexible interpretation of the requirement of "adequate" compensation that is full market value of the property.

Lumpsum settlements are very important from the point of view of their impact on the customary international law relating to expropriation of alien property. A large number of lumpsum agreements arrived at on the basis of partial compensation indicate the emergence of a realistic trend consistent with changing conditions. Such agreements represent an equitable compromise for the competing interests. Some publicists contend that because these negotiated settlements are in the nature of treaties, they fail to detract whatsoever from universally recognized traditional standards of compensation. Martin Domke is of the view that "in concluding global compensation agreements and accepting lumpsum payments, states have acquiesced in an adjustment of the liability of the debtor government, a prerogative open to them in accepting less than what was due to them. However, such practice does not amount to a new trend, much less to an abrogation of the existing customary international law, but rather a compromise in a given situation".[85]

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85. Martin Domke, "Foreign Nationalization", A.J.I.L., vol.55 (1961), p.609.

Such a dogmatic view, it is submitted, is against logic, without substance, devoid of reality and hurdle in the way of progressive development of law of expropriation of foreign property. As Dawson and Burns Weston observe that "to suggest, that internationally negotiated settlements which seek the fair adjustment and compromise of conflicting interests are but quasi-legal aberrations, not indicative of uniformity, is to expose a parochial view of international law".[86]

A significant sign of flexibility with respect to the demand for "adequacy" and indeed the entire 'triple standard' can be found in recent western practice in particular to agree with expropriating governments on a compensaton package deal in which apart from the decreased value of the property, the value of future business operations in the form of export, transport and service contract, is recognized as part of an "adequate" and not unduly delayed compensation. This has occurred for instance, in the cases of the expropriation by Venezuela in 1974 of American oil interests and the taking of by Peru in 1975 of the Marcona Ore Company.

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86. Frank G. Dawson and Burns H. Weston, "Prompt adequate and Effective: A Universal Standard of Compensation', Fordhan Law Review, (New York), vol. 30 (1962), p. 750.

In both cases, agreement was reached on a combination of moderate amount of cash and a substantial long term business relationship involving service, marketing, transport, production scales and other contracts.

This flexible practice further obscures the issue of compensation. It is difficult to assess the value of new contracts and as a consequence the requirement of 'adequate' compensation receives another setback.

In conclusion, although the formula of compensation may have remained the same over the years, the rules have been relaxed or at least their interpretation has become subject to a substantial degree of flexibility. This development marks the gradual emergence of a readiness to take into account, apart from the interests of the dispossessed foreign investor, the interest and needs of the host country. It is the notion of equitable restitution that offers the potential of a widely accepted standard for the compensation of expropriated property.

Effective Compensation

In traditional international law of expropriation of foreign property for meeting the requirement of 'effective' compensation it has to be in the currency of the claimant state or in a freely convertible currency. But because of

the difficulty of meeting this requirement,'effective' compensation has come to mean that the compensation which could be really used by the alien to his benefit. It should be paid in a beneficial form which is of real economic value to the former. It is not the currency in which payment is effectuated which is decisive but rather its proper use.

In the view of Rosalyn Higgins, "effectiveness means that the payment must not be illusory; the alien must be able to withdraw it from the country concerned and use it to his benefit. The particular currency in which payment is made for example would often be of relevance here".[87]

According to Kronfol "effectiveness usually refers to the precise form of indemnity and especially to the possibility ofimmediate utilization by the recipient".[88]

In the Anglo-Iranian Oil case, the UK memorial explained the term "effective compensation" thus :

> The claimant must be able to make use of it. He must, for instance be able, if he wishes to use it to set up a new enterprise to replace the one that has been

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87. Rosalyn Higgins, Conflict of Interest (London,1965),p.57

88. Z.A.Kronfol, Protection of Foreign Investment: A Study in International Law (London,1972), p.117.

> expropriated or to use it for such other purposes as he wishes. Monetary compensation which is in blocked currency is not effective because, where the person has to be compensated is a foreigner, he is not in a position to use it or obtain the benefit of it. The compensation therefore must be freely transferable from the country paying it and, so far as that country's restrictions are concerned, convertible into other currencies.89

The American Law Institute Restatement on "Responsibility of State for Injuries to Aliens" specifically envisages compensation in kind as an 'effective' mode of payment. Section 190 of the Restatement provides "compensation to be effectively realizable form....must be in the form of cash or property validity convertible into cash".[90]

Payment in kind may be as effective a compensation as payment in cash. Nationalizations or revisions of investment agreements increasingly result in a new continuing form of cooperation between the host country and the foreign enterprise; the new contracts are regarded as part of the compensation.

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89. Anglo Iranian Oil Co case (UK V Iran 1952), ICJ Pleadings, pp.106-107.

90. American Law Institute, Restatement of Law, Second Foreign Relations Law of the US (1965), p.569.

Similarly, payment in the currency of the expropriating state may be as effective as payment in the currency of the claimant's state. "Whether local currency payment is effective depends on all the circumstances of the case; i.e. the convertibility of the currency, whether or not it is useful to the foreign owner for new investment within the country etc., which can only be determined at the time of, and would usually be determined in the course of negotiations...."[91]

In any case, the basic criteria has to be whether compensation could be put to an effective use by the alien claimant. If an alien claimant has been expelled after expropriation of his property, payment in local currency could hardly be considered effective, particularly if currency is not convertible.

"There is a clear preference on the part of developing countries for deferred payment in government bonds. Payment in cash is either financially impossible or often inconsistent with the purpose of expropriation, since nationalization is

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91. Memorandum of the Office of the Assistant Legal Adviser for Economic Affairs, quoted in Whiteman, Digest of International Law, vol.8, (1967),p.1183.

frequently motivated by the needs to use the foreign exchange, large capital flows may often imperil their balance of payments."[92]

Jain reaches the conclusion that :

> "juristic opinion and practice of state as to whether compensation should be paid in currency of the claimant or the expropriating state is not uniform and consistent".[93]

New trends are emerging regarding the mode of payment of compensation in the form of awarding new contracts to retain foreign domestic market, or supply of raw materials, of selling management skills and technology etc. It reduces pressure on the nationalising state to pay in cash and avoid aggravating the already difficult foreign exchange position.

Thus the question of effectiveness of the compensation is not limited to the currency but depends on numerous factors and in each case of expropriation circumstances determine whether the compensation is effective or not.

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93. S.C.Jain, Nationalization of Foreign Property (New Delhi, 1983), p.136.

Is "Adequate, Prompt and Effective" compensation Formula Valid Today ?

After examining the different elements of "adequate, prompt and effective" compensation formula it may be pertinent to examine whether this classic formula stands the test of validity today, whether it is a binding principle of international law or not.

In the post-World War II period, it may be asserted that the formula of "adequate, prompt and effective" compensation has weakened to a point where it could no longer be considered as a binding principle of international law. As Bishop states: "The International Court of Justice might well rule today, that there was no clear violation of international law in case some reasonable amount of compensation, though less than full value were paid."[94] According to the International Law Association's Montreal Report, "there is no evidence that the classical formula continues to exist as part of the customary international law. On the contrary evidence indicates that it has been replaced by a variety of flexible formulae depending upon the balance of

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94. William Bishop, "General Course of Public International Law," Recuei Des Cours (Leyden), vol.115, (1965), pp.409-410.

interests...."[95] Dolzer points out that the continued validity of the Hull rule could neither be sustained from the point of view of the state practice nor the necessary opinojuris. It was not even generally followed in the state practice of the developed countries. An empirical survey shows that a large number of lumpsum agreements were concluded which did not follow the Hull rule; on the contrary, political and economic expediency have regulated the amount, time and mode of payment of compensation. The second traditional element regarding the status of customary law, i.e. the necessary opinio-juris, does not support the Hull rule either. The continued validity of a rule of customary law requires that a clear majority of states view this rule as legally binding. There is no evidence of any legal conviction that the majority of states consider that compliance with the Hull rule is legally required.[96]

A more or less similar view has also been taken by Garcia Amador. According to him, the general trends seems

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95. International Law Association Report of the Sixtieth Conference, (Montreal 1982), p.93 b.

96. Rudolf Dolzer, "New Foundations of the Law of Expropriation of Alien Property", A.J.I.L., (Washington D.C.) vol.75 (1981), pp.565, 557-64.

to establish that none of the three components of the Hull rule, i.e. promptness, adequacy and effectiveness, was followed by and large in post war state practice. On the contrary, the trend indicates the adoption of partial and negotiated compensation agreement, depending upon the circumstances of each case.[97]

That the international climate has changed considerably in the recent past, is clearly reflected in the varying contents of United Nations resolutions regarding the law applicable to the expropriation of alien property. As we have noted earlier, General Assembly Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources, adopted in 1962 provides that "in case of nationalization, expropriation or requisitioning "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 controversy, the national jurisdiction of the state

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97. F.V.Garcia Amador, "The Proposed New International Economic Order", Lawyer of America, vol.12 (1980), pp.45-50.

taking such measures shall be exhausted".[98]

But the term 'appropriate' compensation was not defined. In fact, it could not be defined because of the perception of the other's position as irreconciliable with one's own; during the debate the term 'appropriate' compensation came to be interpreted differently by different groups of states. The representative of the United States stated that (in the context of para 4 of the draft) 'appropriate' compensation could only mean "prompt, adequate and effective" compensation.[99]

Though the term 'appropriate' compensation in the resolution attempted to reach compromise between the positions of capital exporting and capital importing states, it failed to seriously build a bridge between the contradictory views.

On the whole, the resolution of 1962 was viewed in the West as representing an expression of a minimum standard of law. On the basis of phrase "in accordance with

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98. G.A.Res. 1803 (XVII), 17 UNGAOR, Supp.(No.17) 15; UN Doc. A/5217 (1962).

99. Official Records of the G.A., Seventh Session Second Committee, UN Doc. A/AC 97/L. 7(1962),p.234.

international law", it was asserted that international customary law provided for "prompt, adequate and effective" compensation. However, such a view is untenable keeping in mind the history, background and negotiations of the resolution. As Karol Gess observed in this regard the "since the resolution under consideration was the result of hard bargaining and compromise, it would obviously be wrong to infer from the resolution any support for the traditional formula, i.e. "adequate, prompt and effective" compensation even though the interpretation of the United States was not directly opposed or contradicted in debate".[100]

Similarly, Stanley Metzger is of the opinion that "after a struggle the underdeveloped countries succeeded in watering down the traditional formulation of "just" or "full" compensation in respect of taking to "appropriate" compensation. While the United States made statements for the record that "appropriate" compensation meant the same thing as "prompt, adequate and effective" compensation, this could hardly be

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100. Karol N. Gess, "Permanent Sovereignty Over Natural Resources", International Comparative (London) vol.13 (1964), p.428

convincing in view of the negotiating and voting history of the resolution".[101]

Article 2(2) (c) of Charter of Economic Rights and Duties of States, while providing for "appropriate" compensation upon the deprivation of foreign property significantly omits reference to international law as in case of Resolution 1803 of 1962 and subjects it only to relevant laws and regulations and all circumstances that the depriving state considers pertinent. It mandates that all compensation controversies "shall be settled under the domestic law of the nationalizing state and by its tribunals" (except insofar as the concerned parties might "freely or mutually" choose otherwise).[102]

The intent of this provision is surely to renounce international law or its relevance in this realm because of the attitude of western states that international law means the traditional law of expropriation. The elimination of the phrase "in accordance with international law was the

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101. S.D.Metzger, "Private Foreign Investment and International Organizations", International Organization (Boston), vol.22, (1960), pp.296-97.

102. UN Doc. A/C/2/S.R. 1638, (1974), p. 383-84.

response of the developing countries to the traditional international law of expropriation provided for prompt, adequate and effective compensation. Citing the remarks of the Chairman of the UNCTAD working group charged with drafting the NIEO Charter (Ambassador Jorge Castaneda), in the General Assembly[103] Judge Are'chaga maintains that the drafters intended only to avoid the inference of the industrial west that "appropriate compensation....the accordance with international law" necessarily meant "prompt, adequate and effective compensation.

It is sometimes argued that the resolutions of the General Assembly have no legal character and they simply stand for political opinions. It is submitted that resolutions dealing with legal matters, at the least, reflect a strong evidence of state practice and may well in time acquire the character of customary international law. Brownlie observes in this connection that "....when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of governments in the widest forum for expression of such opinions. Even when they are framed as general principles, resolution of this kind provide a basis for the

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103. Are'chaga, "International Law in the Part Third of a Century", Des Cours Reucid (Leyden) vol.I (1978.I) pp. 302-03.

progressive development of the law and the speedy consolidation of customary rule".[104]

A question may be raised about the significance of the almost 100 votes that were cast, after unsuccessful negotiations between essentially two groups of states in 1974 in favour of Article 2(2)(c) of the Charter of Economic Rights and Duties of states. While it may be admitted that in view of strong objection of Western states Article 2(2)(c) does not establish a new rule of international law, it may be said that because of the overwhelming the votes cast for Article 2(2)(c) of the Charter the formula "adequate, prompt and effective" compensation formula as a rule of present law is no longer sustainable by the prevailing doctrinal opinion within the international community.[105]

The classic compensation formula is unrealistic because the standards it lays down are incapable of achievement in a great many situations. It can scarcely be complied with practice even by the developed states, not to

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104. Ian Brownlie, Principles of Public International Law (London, 1973), p.14.

105. Rudolf Dolzer, "New Foundation of the Law of Expropriation of Alien Property", A.J.I.L. (Washington D.C.) vol.75 (1981), p.565.

speak of developing states. It also does not correspond to the needs of newly independent developing countries. Rather, it is heavily biased against their interests. Far, as Dunn has observed, "if extensive deprivations are to be governed by traditional compensation standards, the dominant capital exporting states could exercise a veto power over legitimate attempts of poorer nations to achieve fundamental social and economic reform".[106]

Dawson and Weston offer a wise counsel in the following terms :

> "Appeals to the somewhat metaphysical standard of "prompt, adequate and effective" compensation are not only unrealistic.....but frustrate efforts to achieve at least minimum stability of interaction in a world of violent and radical change".[107]

The developed nations have to grasp that the continued effectiveness of international law depends upon the pragmatic self-interests of the participants, including new states, as conceived by them rather than upon dry juristic logic which has lost touch with life.

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106. Dunn, "International Law and Private Property", Columbia Law Review, vol. 28 (1928), p.168.

107. F.G.Dawson and B.H.Weston, "Prompt, Adequate and Effective: A Universal Standard of Compensation", Fordhan Law Review (New York), vol.30 (1962),p.749.

Impact of Bilateral Treaties

There is fast growing practice of bilateral investment protection treaties among states. Since the beginning of the 1960's more than 150 of these bilateral treaties have been concluded.[108] It is noted by several publicists who have done study of such bilateral treaties that there is a tendency to follow 'triple standard', such as formulations to provisions dealing with the taking of foreign property in investment protection treaties. Martin H.Muller points out that indications are that the more traditional rules concerning nationalizations and compensation find their way into agreements.[109] W.E.Verwey's and N.J. Schrijver's analysis of 195 bilateral and one multilateral investment protection treaties also brings out the tendency to re-emphasize "triple standard".[110] Rudolf Dolzer also points out that Lome II agreement concluded in 1980 between the nine member states of the European community and 58 African, Carribbean and Pacific states contain a "most favoured nation clause (Article 64) which in effect means

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110. See, ICC Bilateral Treaties of International Investment (1980),p.7.

111. Martin H.Muller, "Compensation for Nationalization: A North South Dialogue", Columbia Journal of International Law, vol.19 (1981), p.77.

112. W.D.Verwey and N.J.Schrijver,"The Taking of Foreign Property under International Law: A New Legal Perspective? Netherlands Yearbook of International Law,vol XV (1984), p.75.

that the protection of large portions of foreign investment in these areas comes fairly close to the Hull standard".[113]

What inferences can be drawn from these contemporary examples of state practice about the applicability of rules of international law to the expropriation of foreign property? It is widely accepted that under certain circumstances, the presence of similar regulations in a large number of international treaties can lead to the formation of customary law. From the point of view of emerging international law, development of bilateral investment protection treaties can be of significance since these agreements are evidence of state practice and might thus influence customary international law.

The question is, whether the states concluding these treaties feel themselves legally obliged to regulate their relationship, in the way phrased the compensation clause in the treaty itself. In other words, whether the developing countries adopting the treaty standards have done so as a matter of discretion or convenience or with the firm belief that they are under a legal obligation to do so. If the parties to such treaties do not intend to follow the so called treaty standards as a legal obligation when treaties are concluded, then the property protection clauses in

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113 Rudolf Dolzer, "New Foundations of Expropriation Law", A.J.I.L., vol.75 (1981),p.565.

existing bilateral treaties cannot be seen as evidence of a rule of customary law.

Davis R.Robinson argues that the provisions controlling compensation in expropriations contained in bilateral friendship, commerce and navigation treaties, and in recent the bilateral investment treaties, calling for compensation in terms equivalent to the traditional standard, although there are still drafting variations, reflect actual state practice, and by incorporating the appropriate international standard for compensation, the parties to the treaties reinforce the traditional customary rules. He also states that the history of these agreements indicates that the parties recognized that they were thereby making the customary rule of international law explicit in the treaty language and reaffirming its effect.[114]

Refuting Robinson's argument that recent bilateral investment treaties constitute persuasive evidence of customary law, Oscar Schachter maintains[115] that although majority of these treaties, though not all of them, incorporate clauses similar to Hull rule, it is not itself sufficient to prove the customary law. He observes :

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114. Davis R.Robinson, "Expropriation in the Restatement" (Revised), A.J.I.L., vol.78 (1984),pp.177-78.

115. Oscar Schachter, "Compensation for Expropriation", A.J.I.L., vol.78 (1984), p.126.

> It is relevant, that states which grant specific rights to foreign investors (including detailed compensation standards) also receive benefits in the treaties themselves or in related trade and aid arrangements. Hence, it cannot be assumed that the rights granted to investors would be considered obligatory in the absence of the treaty. The very negotiations of such contractual commitments as part of the quid pro quo show that they are not merely declaratory of existing obligations. The sound conclusion is that the various bilateral investment treaties are essentially contractual, the product of negotiations based on variety of considerations influencing the parties. If any inference of opinojuris is to be made, it would be limited to the highly general, though not insignificant -- finding that such agreements are further evidence of the generally accepted rule that compensation should be paid when property is expropriated.[116]

In this connection Rudolf Dolzer observes :

> In evaluating the impact of bilateral and multilateral treaties, it should be firmly kept in mind that the property protection clause by no means constitute the only object of these treaties. They usually provide for a closer general form of cooperation....In other words, the existence of these treaties in itself does not support an argument that the relevant clauses are declaratory of the present state of customary law.[117]

Apart from the nature of treaties itself which goes against their acceptance as representative of customary law of expropriation of foreign property, let us further examine whether the parties to treaties incorporating property

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116. Ibid., p.127.

117. Rudolf Dolzer, n.109, pp.565-66.

protection clause enter into such treaties under legal compulsion so as to infer that such treaties are evidence of present customary law of expropriation of foreign property.

International Court of Justice observed in the North Sea Continental Shelf cases that in order to constitute the opiniojuris or attain the status of customary international law two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such; or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[118] Doehring rightly suggests that international treaties create customary law only if the interests expressed in these treaties carry such weight in the view of the states concerned that any act violating these interests must be judged as delictual.[119]

Testing the weight of treaty practice for protection of investment in the light of Doehring's formula, Rudolf Dolzer concludes that given the strong evidence of the voting on Article 2(2)(c) of the Charter of Economic Rights and Duties of states, there is not sufficient evidence at this point for the proposition that the developing states will assume that

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118. ICJ Reports (1979), p.73.

119. Quoted in Rudolf Dolzer, "New Foundations of Expropriation Law", AJIL, vol.75 (1981), p.568.

delictual conduct has occured when the treatment of alien property differs from that typically guaranteed by investment treaties.[120]

Following the test laid down in North Sea Continental Shelf cases Subrato Roy Chowdhry submits that "there is not a shred of evidence to suggest that property protection clauses in the bilateral treaties concluded since 1974 have been accepted by the developing countries in the firm belief that they are under a legal obligation to do so. On the contrary, apart from the unequal bargaining power, the developing countries have accepted the treaty standards as a matter of convenience. Accordingly, the treaty standards perse cannot be regarded as norms of customary international law".[121]

Francioni is also of opinion that,"apart from the basic question whether these treaties have been adhered to on the basis of a truly free determination of consent on the part of the less developed countries, there is hardly any evidence to sustain the theory that their consent is declaratory of general international law."[122]

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120. Ibid., p.568.

121. Kamal Hossain and Subrata Roy Chowdhry, Permanent Sovereignty Over Natural Resources in International Law: Principles and Practices (London,1984),p.83.

122. Francesco Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity", ICLQ, vol.24 (1975), p.264.

Thus, in view of the conditions laid down by International Court of Justice in North Sea Continental Shelf cases and the Doehring's formula it can be said that the bilateral treaties for protection of investment treaties do not represent the customary rules of international law relating to expropriation of foreign property.

Another argument advanced by the spokesman of the developed states is that a trend of acceptability of foreign investments under conditions of traditional international law by the developing countries in bilateral treaties, renders Article 2(2)(c) of the CERDS ineffective as the states do not follow this principle in practice. As W.D.Verwey and N.J.Schrijver observe :

> "Even if the norms embodied in Article 2(2)(c) of the CERDS were to reflect Group of 77's opinio juris, the conspicuous and consistent lack of a corresponding usus in the treaty practice of both the developed and the developing countries have prevented their further evolution into new principles of customary international law both global and regional".[123]

Replying to this argument of Rudolf Dolzer, Garcia Amador rules out contradiction between the conduct and the attitudes of countries that voted for Article 2(2)(c) and the previously or subsequently concluded investment treaties with the property protection clauses because of the special benefit

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123. W.D.Verwey and N.J.Schrijver, n.108, p.88.

that developing countries enjoy under such treaties and holds that the relevance of the votes cast in the United Nations can not now be questioned on the grounds of a given treaty practice.[124]

In order to appreciate opinojuris in the developing countries, the position of the Asia-Afro Legal Consultative Committee (AALLC) as expressed in the Colombo meeting of 1981, may be referred to. It was asserted in that meeting that while the principles enshrined in the Charter (CERDS) are well accepted, in their treaty practice, the developing countries ⟶ have 'merely' decided to use their discretion in a manner not detracting from the legal validity of these principles".[125]

Subrata Roy Chowdhry submits that "no significant trends emerge from some of the recent bilateral treaties which can be said to run counter tothe letter and spirit of CERDS."[126]

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124. Rudolf Dolzer, n.109, p.567.

125. Quoted in Kamal Hossain and Subrata Roy Chowdhry, n.117, p.82.

126. Ibid., p.85.

In the light of the above discussion, it is submitted that neither the bilateral treaties incorporating investment protection clauses enforcing traditional standards of law of expropriation represent present customary law of expropriation, nor do these clauses negate the effect of the Article 2(2)(c) of the CERDS as opiniojuris of the majority of international community today.

CHAPTER - III

A SPECIFIC STUDY OF INDIA

Elaborate doctrinal discussion as to whether expropriation of foreign property without payment of 'prompt due and effective' compensation is lawful or unlawful, as evident from the examination of the positions of the developed, and the developing countries in the current debate on the law of expropriation, is not likely to be helpful towards satisfying the urgent and pressing needs for obtaining a consensus on law of expropriation of foreign property. The fact is that no precise and clear answer emerges from the existing legal materials in this regard.

It is for this reason that the state practice in regard to the law of expropriation of foreign property is extremely important. Traditional international law is no more valid and contemporary international law of expropriation of foreign property is still in a state of flux. The initiative of different states, therefore, will play a crucial role in the emergence of such new standards.

Importance and Objective of Study of India's Practice

The changing needs of the expanded international community have led to a movement, initiated by the developing countries to achieve an international economic order on a more equitable basis. It is being forcefully emphasized that

the concepts of international law must be so framed as to facilitate material equality to the developing countries. The Prime Minister of India, Mrs. Indira Gandhi in her inaugural speech at the Fifty-Sixth Conference of the International Law Association, on 30th December 1974 at New Delhi, pointed out:

> (T)he fact stands out that laws designed to protect the political or economic power of a few against the rights of the many must, sooner or later, yield place to laws which enlarge the area of equality and the law itself should be an ally and instrument of change.(1)

Achievement of a new international economic order entails exercise of permanent sovereignty over natural resources which in turn, raises the problems of expropriation or nationalisation of foreign property. Recent developments in and outside the United Nations clearly demonstrate that the problem of expropriation of foreign property constitutes an important segment of the North-South Dialogue.

India, in this North-South conflict obviously, belongs geographically, culturally, politically and economically to

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1 "International Law for Equitable Distribution of Resources PM's Call to Affluent Nations", Indian and Foreign Review (New Delhi), vol.12(7), 15 Jan. 1975, p.5.

the South and has identified itself with the South in its many sided struggle against the North. India shares in many respects the recent historical experiences of the developing countries and fully represents the varying needs and aspirations of the poor countries striving for economic development. India as one of the leading members of the Third World has a major role to play in the struggle of the poor South against the rich North in creating a new international economic order. Given the considerable influence India has within the Third World, its policies and actions shall go a long way in determining the outcome of this struggle. It is, therefore, important to study India's practice regarding expropriation of foreign property, the underlying factors for its practice, its relevance and impact on the evolution of the law in this regard.

In order to understand the underlying factors and implications of India's practice in its true perspective, it is relevant to bear in mind the unique position of India in the Third World. Although India belongs to the Third World, a number of factors, such as the level of economic development, stage of industrialisation and technological advancement of India make it stand out differently from a majority of other Third world countries. India is in urgent need of foreign capital and technology. At the same time, a great deal of India's capital, both public and private, is invested in many development projects in the Third World which makes

India both an investment recipient as well as an investor. Before examining India's practice of nationalization of foreign enterprises it is necessary to have an overall view of India's constitutional philosophy as far as relevant for this study and pertinent features of economic system which India has adopted through constitutional provisions and the industrial policy declared from time to time.

Constitutional Philosophy and Basic Features of Economic Set Up of India:

The preamble to a legislative Act normally sets out the main objectives which the legislation is intended to achieve. It serves as key to the intention of the makers of the Act where a preamble is added to the Constitution, it normally expresses the political, social and moral values which the Constitution is intended to promote. The preamble to the Indian constitution embodies the great purposes, objectives and the policy underlying its provisions besides the basic character of the State which is declared India, inter alia to be a socialist[2] country. The word socialist indicates the interpretation of the philosophy in

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2 Expression 'socialist' was introduced in the Preamble by the Constitution (Forty-Second Amendment) Act 1976.

the Constitution which may enable the Courts to lean more and more in the favour of nationalisation and state ownership of an industry.[3]

Part IV of the Constitution enumerates certain directive principles of state policy. These principles are intended to be the imperative basis of the State Policy. They are really in the nature of instructions issued to future legislatures and executives for their guidance. True the Directive Principles of State Policy are not justiciable. However, the significant thing to note about them is, as Mathew J. pointed out in the Kesavananda Bharti[4] case that although they are expressly made unforceable that does not affect their fundamental character. They still very much form part of the constitutional law of the land.

Article 39 of the Indian Constitution provides that the State shall in particular direct its policy towards securing:

> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

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3 Excel Wear Vs. Union of India, 4SCC, 1978, pp.244-45.

4 4SSC, 1973, pp.225-877.

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The expression 'socialist' country finds its meaning in this article which implies that state ownership of the material resources of the community is the command of the constitution to the legislature and the executive. Those principles are fundamental in the governance of the country and it is the duty of the State to endeavour to apply these principles in making laws and its policies.

The question of nationalisation has immediate relevance to the economic development and is directly related to the kind of economic set up, and development goals India has set for itself. In India, as in the case of several other developing countries, the concept of nationalisation has become enmeshed in the institutional structure and conceptual framework of a mixed economy. The concept of mixed economy in economic terminology means the state of economics in which the state capital and private capital co-exist. It recognises the necessity for the intervention of the state in the economic affairs of the society.[5]

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5 See K.V.R.Reddy, "Nationalisation Why?", Janta (Madras) vol.34(25), 5 Aug. 1979, pp.7-12.

An important aspect of India's conception of industrialisation is the idea of a mixed economy, that is the co-existence and interaction of the public and private sectors. Since industrialisation in the country with a backward and multistructural economy encounters serious obstacles, its success depends on the State's contribution to industrial development. Thus the government has been responsible for the establishment and development of several new heavy industries. The government economic functions are expected to be greatly expanded. It is expected to participate directly in business, assist the private sector in setting up new industries, and coordinate and control the development of the two sectors.

The Industrial Policy resolutions of 1948 and 1956 legitimised the mixed economy through enormous emphasis placed on the growth of public sector in vital sectors of Indian economy. Since these two policy resolutions are founding stones of the Indian economic set up it is advisable to discuss them in a little detail to have a good insight into decisions of nationalisation of the Indian government.

Even before the constitution was adopted for the country, an industrial policy for the nation had been hammered out and implemented. The Industrial Policy Resolution of 1948 was the first formal, official pronouncement of the government in which the proposed state control over

major methods of production was first introduced. The resolution declared that the State must play a progressively active role in the development of industries but recognised that in view of the circumstances then existing there were obvious limits to state enterprise. It therefore laid down that the State should contribute more quickly to the increase of national wealth.

It also conceded that the mechanism and the resources of the state might not permit it to function forthwith in industry as widely as mightb be desirable. Hence it was decided to have complete state monopoly only in three industries, namely, arms and ammunition, atomic energy and railway transport. The state was also to be exclusively responsible for the establishment of new undertakings in certain areas while allowing the existing undertakings in these fields to develop for a period of ten years. Such industries included coal, iron and steel, aircraft manufacture, ship building, manufacture of telephone, telegraph, wireless apparatus and mineral oils. The State reserved the right to acquire such undertakings at any time on payment of compensation.[6]

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6 See National Industrial Policy, Lok Sabha Secretariat, (New Delhi, 1985).

The basic and general principles as laid down in the Constitution

were given a more precise direction when the Parliament adopted a resolution in December 1954, declaring that the object of the country's economic policy should be a socialistic pattern of society. Speaking on the resolution, Prime Minister Nehru said that "progressively as the socialistic pattern grows, there is bound to be more and more nationalised industry...."[7]

The adoption of the socialist pattern of society as the national objective, as well as the need for planned and rapid development, required that all industries of basic and strategic importance or in the nature of public utility services should be in the public sector.

In order to understand the full implications of "socialistic pattern of society", it is necessary to refer to Congress ideology and the views of its prime architect Nehru's view on it. Since the Avadi Session of the Indian National Congress in 1955, the official goal of the party has been to establish a socialistic pattern of society. The

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7 Quoted in the Government document, "National Industrial Policy, Lok Sabha Secretariat (New Delhi, 1985), p.2.

socialistic pattern of society was defined as one where the principle means of production are under social ownership, and there is equitable distribution of the national wealth. In November 1963, the All-India Congress Committee meeting in Jaipur declared that the goal was the establishment in India, by peaceful and constitutional means of a socialist state. In the industrial sector, the goal was to bring commanding sectors of economy under the control and ownership of the state. In a signed article in the Souvenir published on the occasion of the Sixty-eighth Session of the Indian National Congress[8] Prime Minister Nehru wrote that although India had deliberately adopted a mixed economy all the strategic points of that economy should be controlled on behalf of the people. Explaining the concept of socialism, he wrote that it means inter alia that the major methods of production should be controlled and owned by the state.

This thinking and forthright declaration of goals, resulted in passing of Industrial Policy Resolution in 1956 by Parliament which reviewed and replaced the Industrial Policy Resolution of 1948.

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8 Extract from this article were published in the Hindustan Times (New Delhi), January 8, 1964 (dak edition).

The Industrial Policy Resolution of 1956 laid stress on accelerating the speed of industrialization, in particular heavy industries, expansion of public sector, and the growth of cooperative sector. The State was to progressively assume a predominant and direct responsibility for setting up new industrial undertakings and for developing transport facilities. Industries of basic and strategic importance, and those in the nature of public utility services, were to be in the public sector. Those industries which required huge investment, which only the state could mobilize, also had to be in the public sector.

State's entry into certain strategic fields to accelerate the pace of economic growth assured a vital role to the public sector. The public sector was expected to control the strategic points of economy while the private sector would develop within the given limitations and the criteria laid down for its advancement.

Industrialisation in the state capitalist structure had tobe preceded by the organisational efforts of government institutions in mobilising finances, constructing planned projects, training and spreading technical skills, etc., which thrust the major responsibility on the shoulders of the state. A variety of sweepi g measures on the part of the State were required to put nto practice these principles of industrialisation. A few f these measures shall be

discussed under the heading "Nationalisation of foreign property in India". After discussing the constitutional philosophy and basic features of economic set up, let us proceed to examine briefly the government policy towards nationalisation of foreign property to bring out the attitude of the Indian government towards the law of expropriation of foreign property.

India's Policy on Nationalisation of Foreign Property

Although there has been no specific and separate policy of the government on nationalisation of foreign property, it can be discerned from the various statements, pronouncements made in the Lok Sabha, and other official documents and publications.

The Government policy on nationalisation of foreign property has been dictated by and large by its policy on foreign investments. A detailed discussion pointing out the close nexus between the two shall be done under the heading "Underlying factors".

The cardinal principles reflecting government attitude to foreign investment were formulated as early as 1949. Prime Minister Nehru stated in the Constituent Assembly on the 6th April 1949 that, "if and when foreign enterprises are

compulsorily acquired, compensation will be paid on a fair and equitable basis".[9]

The then Finance Minister of India indicated as early as 1959 India's policy on nationalization on foreign investment thus:

> On the subject of nationalization I made it clear that we did not believe in nationalization as a creed and had therefore, no programme of nationalisation as such. This did not mean however that particular industries would not be nationalised if the public interest so demanded. In such an event compensation would be paid. There was no scope for apprehension on the part of foreign investors in regard to the security of their investments in India. To reassure such investors further, the Government of India had expressed its readiness to consider entering into suitable agreements with those countries which had programmes for insuring investments of their nationals in foreign countries, in cases specifically approved by both the governments concerned against expropriation without payment of full compensation.(10)

In pursuance of the above approach, the Government of India entered into investment guarantee agreements with USA and West Germany through exchanges of letters in 1957 and 1964 respectively.

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9 Constituent Assembly (Legislative Debates), vol.II, IV. I, col.2386.

10 Quoted in S.C.Jain, Nationalization of Foreign Property (New Delhi, 1983), p.232.

The Government of India signed an Investment Guarantee Treaty with the US on December 7, 1959 which provided for a fee, an American investor through the US government, a guarantee against any loss on his investment in India as a result of expropriation with inadequate compensation. The agreement between the two governments usually provided that, in case of disagreement on what was fair compensation, the issues could be submitted to arbitration.[11]

The Government of India entered into similar agreement with West Germany in 1964 which envisages the payment of "fair and equitable compensation if a German investor is" directly or indirectly deprived of his investment by nationalisation or expropriation. The agreement contains the following statement which throws light on India's policy towards nationalisation of foreign property:

> The Government of India do not intend as a rule to nationalise or expropriate approved foreign investments, Any decision to nationalize or expropriate a German investment or part of it taken by the Government of India shall be based on practical considerations and be taken in the national interest.(12)

In a reply to a question on nationalisation of foreign firms the concerned minister stated in 1972 that the "Government

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11 Ibid., pp.232-233.

12 Ibid., p.233.

do not have any general policy of nationalising foreign companies in India. Decision on nationalisation of any enterprise whether Indian or foreign, is taken with reference to the needs of the economy and of public interest.[13]

According to an official publication "Investing in India: A Guide to Entrepreneur" of India Investment Centre (IIC), a government of India organisation for the promotion of foreign private investment in India:

> India normally does not resort to nationalisation of industry. However if nationalisation becomes necessary under very special circumstances in the overall interests of the country, fair compensation is invariably paid. In this matter there is no discrimination between foreign investment and Indian investment.(14)

On nationalisation, another publication of IIC similarly states:

> India does not normally resort to nationalisation of foreign investment made in India. If under very special circumstances nationalisation is considered necessary in the overall interest of the country, fair and equitable compensation is invariably paid. In this respect there is no discrimination between

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13 Lok Sabha Debates, Fifth Series, vol.15, Nos.41-50 1972, p.110.

14 Investing in India : A Guide to Entrepreneurs, Indian Investment Centre (New Delhi, 1983), p.32.

> investments made by the Indian nationals and foreigners. In fact, preferential treatment was shown in the case of foreign companies when the major banks were nationalised in 1969 and 1980, while the Indian banks were nationalised, foreign banks were left out.(15)

Allaying the apprehensions of foreign investor in India another IIC publication states:

> Investment in India is safe. The fear of nationalisation in India is unrealistic as the government of India does not follow a policy of nationalism for its own sake. Indian constitution and civil laws provide fair compensation in case of nationalisation. Besides once an investment proposal by a foreign company is approved it is considered at par with Indian companies and there is no discrimination towards the foreign company.(16)

This takes us to examine as to what is the national treatment and what kind of fair compensation is guaranteed by the constitutional laws of the country.

National Treatment

The power of eminent domain connotes the legal capacity of individuals for public purposes. The importance of the power of eminent domain to the life of the state need hardly

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15 Foreign Investment in India : Opportunities and Incentives of Technology Transfer and Collaboration, IIC (New Delhi, 1980), p.42.

16 Myths and Realities of Foreign Investor in India, IIC (New Delhi, 1985), p.3.

be emphasised. It is the offspring of political necessity. The power is inalienable for it is founded upon the common necessity and interests of the whole community.

It has always been recognised that the power of eminent domain is an essential attribute of sovereignty. Since the power of eminent domain is an inseparable incidence of sovereignty, there is no need to confer this authority expressly by the Constitution act. It exists without any declaration to that effect, while the existence of the power is recognised, constitutional provisions provide safeguards subject to which the right may be recognised.

Article 300-A[17] under Chapter IV - Right to Property of Part XII of the Constitution lays down

> 300-A No person shall be deprived of his property save by authority of law.

Actually, Article 300-A is the same as former clause (1) of Article 31 of the Constitution which has been deleted. So to know the import of these words by judicial interpretation, cases decided under clause 1 of Art. 31 must be referred to.

The clause, while recognising the superior right of the state to take the private property of an individual,

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17 Added by the Constitution (Forty-fourth Amendment), Act, 1978.

requires the authority of law before a person can be deprived of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order.[18]

The law in the expression "authority of law" should be taken to mean the law of legislature or statute law. But it must be a valid law and to be a valid law it must satisfy the following three tests:[19]

i) the authority which has enacted the law must be a competent authority;

ii) it must not infringe any other fundamental rights guaranteed by Part III of the Constitution; and

iii) it must not violate any other express provision of the Constitution.

The protection under clause 1 of Art.31 (now Art.300-A) extends to aliens also. Moreover, the word 'person' in Article 31 (now Art. 300-A) includes natural as well as juristic persons. Incorporated companies are accordingly entitled to protection of this Clause.[20]

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18 State of West Bengal Vs. Subodh Gopal Bose, AIR SC 1954, pp.92,110.

19 Hamdard Dawakhana Vs. Union of India, 2.SCR (1960) p.671. Jalan Trading Co.Pvt.Ltd. Vs. Mill Mazdoor Sabha, AIR, 1967, SC p.691.

20 Chiranjit Lal Chowdhury Vs. Union of India, SCR, 1950, p.869.

Although Article 300-A of the Constitution does not lay down specifically that no person shall be deprived of his authority except for public purpose since the government in its policy procurements has recurrently propagated that no nationalisation shall be done except in the national interest that is for public purpose, it is relevant to see what "public purpose" is as seen in the judicial interpretation.

While public purpose was made a condition for the exercise of state's power of compulsory acquisition of private property initially, no definition of the phrase was given in the Constitution. There are a number of cases which have considered the words, "public purpose", but none of them has proposed to lay down a definition or the extent of the expression. Certain general considerations or guidelines relating to the meaning of the expression deduciable from these cases may be stated.

In Somavanti Vs. State of Punjab[21] the Supreme Court said:

> Broadly speaking, the expression "public purpose", would, however, include a purpose in which the general interest of the community as opposed to the particular interest of the individuals, is directly and vitally concerned.

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21 2 SCR 1963, p.774; AIR 1963 SC p.151.

The phrase "public purpose" does not have a static connotation which is fixed for all times. In Kameshwar Singh[22] case Mahajan, J. observed:

> the phrase "public purpose" has to be construed according to the spirit of the times, in which the particular legislation is enacted. Public purpose is bound to vary with the times and the prevailing conditions.

The modern view of public use or necessity has to be made liberal as the functions of the government are fast changing and increasing their fold. Since the concept of public purpose varies from time to time, it is not possible to lay down a definition of what public purpose is. In Smt. Somavanti[23] case, the Court asserted that it would not be a practical proposition even to attempt a comprehensive definition. Das J. in the State of Bihar V. Kameshwar Singh[24] said:

> No hard and fast definition can be laid down as to what is a public purpose as the concept has been rapidly changing in all countries.

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22 AIR 1952 SC, p.252.

23 2 SCR (1963), p.774; AIR 1963 SC, p.151.

24 AIR 1952 SC, p.252.

After discussing the meaning and scope of "public purpose", the next question about compensation is the most vital for the law of expropriation of foreign property. The government policy pronouncements invariably refer to guarantee of "fair and equitable" compensation. The question is does the constitutional law of the country guarantee it?

Article 300-A of the Constitution dealing with right to property does not speak of compensation or amount tobe paid in case of deprivation of property. To know why it does not do so, what is implied therein, and what is current law relating to compensation, we shall have to go back to the legislative history of Article 300-A, reasons that led to the passing of Article 300A and what was the law of the country as regards compensation before Article 300-A of the Constitution was enacted.

Before the Forty-fourth Constitutional Amendment, the right to property was a fundamental right and law relating to compensation was dealt by Article 31 of the Constitution under Part III on Fundamental Rights. After that it has been subjected to various constitutional amendments. We shall make a brief study relevant for our purpose as stated above.

The relevant portions of Article 31 as originally enacted were in the following terms:

> (1) No person shall be deprived of his property save by authority of law.
>
> (2) No property, movable or immovable, including any interest in or in any company owning any commercial or industrial undertaking shall be taken possession of or acquired for public purpose under any law authorising the taking of such possession of or such acquisition, unless the law provides for compensation for the property taken possession or acquired and either fixes the amount of the compensation, or specieis the principles on which and the manner in which the compensation is to be determined and given.

As regards compensation, it is significant to note that even though Art.31 of the Constitution did not qualify the word 'compensation' by any such adjective as 'just' or "reasonable" or "due", it was nevertheless held by the Courts that compensation meant a full and fair money equivalent of what the owner had been deprived of.

The requirement of payment of compensation to the owner whose property was acquired or taken possession of was considered in State of West Bengal V. Mrs. Bella Banerjee.[25] The Court considered the provision of Art.31(2) of the Constitution and arrived at the following conclusion:

> While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated,

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25 AIR 1954, SC, p.170.

> such principles must ensure that what is determined as payable must be compensation, that is just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgement as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclusive matters which are to be neglected, is a justiciable issue to be adjudicated by the Court.

Apart from these limits laid down by the Court, the legislature could choose to pay the compensation in a lump sum or in instalments with or without interest. It could choose between payment in cash or in the form of bonds, or securities or shares, or might provide that compensation would be paid partly in cash and partly in bonds.

The decision of the Supreme Court in the Bella Banerjee case created an alarming situation. It meant that in all cases of compulsory acquisition of property, the government must pay full and fair compensation. It meant, secondly, that the quantum of compensation or the principles on which it was to be determined was a matter on which the Courts and not the Parliament would have the final say. The decision greatly jeopardised the social and economic programmes of the government.

The Parliament therefor decided to amend Clause (2) of Art.31 and make it clear th t a law made under it "shall

not be called in question in any Court on the ground that the compensation provided by that law is not adequate".[26] Prime Minister Nehru, speaking in the Lok Sabha, explained the social philosophy of this amendment:

> ...when what is aimed at is changes in the social structure, then, you cannot think in terms of what is called full compensation. You can't do so because first, due to lack of resources and other because it would be improper and unjust to do so. In any scheme of social engineering you cannot give full compensation. In considering all factors, political social, economic, judiciary is not the competent authority to sit over judgement of Parliament as regards compensation given.(27)

The effect of the Constitution (~~Forty-~~ fourth Amendment) Act 1955 was to substitute the discretion of the legislature for the discretion of the Court in deciding the question whether the compensation provided for was adequate or not. The new clause (2) of Art.31 of the Constitution settled that the principles on which and the manner in which the compensation should be determined and given would be fixed by law and such a law would not be called in question in any Court on the ground that the compensation

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26 The Constitution (Forty-fourth Amendment(Act 1955.

27 Lok Sabha Debates, vol.11, Part II, 1955, colum 1953-

provided by it was not adequate. It, in effect, superseded the Supreme Court decision in the Bella Banerjee case.

In the case of P.Vajravelu V. Spl.Dy.Collector[28] the State argued that after the Fourth Amendment in 1955 no Court had jurisdiction to question a law for acquisition or inadequacy of compensation. The Court held that in spite of the bar created by the Fourth Amendment to the Constitution, it would strike down a law as a fraud on the Constitution if the principles for determining compensation were irrelevant to the value of the property at or about the time of acquisition or if the law provided for illusory compensation. In arriving at this conclusion, the Court asserted that the authoritative interpretation of the word compensation was taken to mean a just equivalent of what the owner had been deprived of, meaning thereby that all relevant elements must be taken into consideration and all irrelevant elements must be excluded in arriving at the compensation.

This case thus resurrected to a great extent the decision in the Bella Banerjee case which was supposed to have been buried deep by the Constitution (Fourth Amendment) Act 1955. The doctrine of "just equivalent" remained, notwithstanding the amendment, as valid as before in protecting individual right to property.

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28 AIR 1965 SC, p.1017.

The decision in Vajravelu case was followed in Union of India V. Metal Corporation.[29] It reiterated that the law providing for compensation, has to provide for payment of 'just equivalent' at or about the time of acquisition, to the property acquired. If some of the principles prescribed did not ensure that the resulting compensation would be just equivalent, then such a law must fail.

In the State of Gujarat V. Shantilal Mangaldas[30] case the Supreme Court reconsidered the question of compensation payable for property acquired by the State, and reverted to a position which was different from what it had taken so far. The Supreme Court shifted its stand and stated that adequacy of compensation fixed by the legislature or awarded according to the principles specified by the legislature for determination was not justiciable, and the compensation was what the legislative justly regarded as proper and fair recompense for compulsory expropriation of property. If, however, the compensation so fixed was illusory or could in no sense be regarded as compensation, then it was no compensation within the meaning of Art.31(2) of the Constitution.

But the Supreme Court reverted to its earlier stand in the R.C.Cooper V. Union of India[31] and held that the bank

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29 AIR 1967 SC, p.637; 1967 1 SCR, p.55.

30 1 SCC 1969, p.509.

31 1 SCC, 1970, p.248.

nationalisation law was liable to be struck down as it failed to provide to the expropriated banks compensation determined according to relevant principles. It was not acceptable to the Supreme Court that a principle specified by Parliament for determining compensation was conclusive. The principles specified by the Parliament for determining compensation was beyond the pale of challenge only if it was relevant for the determination of compensation.

A true interpretation of Art.31(2) would have been that the legislative determination of quantum of compensation or of principles governing it was not open to judicial review even where the provisions resulted in what the Courts might be inclined to call illusory compensation. The difference between illusory and inadequate compensation is political and not legal. One of the assumptions of the doctrine of judicial review is that the Courts must abstain from deciding upon political questions. The judicial review of "fair equivalent" as determined by the legislature can not but land the Court into deciding upon political questions.[32]

What is "fair equivalent" is largely a question of State policy and cannot be divorced from such considerations as the nature of the property expropriated, its history and

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32 H.M.Jain, Right to Property Under the Indian Constitution (Allahabad, 1968), pp.173, 182.

origin, to what use it was put, how much profit it has already earned, its existing use, its relation to the scheme of social reform and welfare and the paying capacity of the community. The Parliament therefore advisedly decided by expressly stating so by the Constitutional (Fourth Amendment, 1955 to leave it to the legislature to decide in each case what would be the fair equivalent of the property acquired.

When that decision was upset by the Courts, the Parliament once again made the Twenty-fifth Constitutional amendment to reinstate that resolve. The Amendment[33] dropped the word "compensation" and instead inserted the word "amount" in Art. 31(2) in order to avoid judicial review of "compensation" as "just equivalent". For the same reasons were added in the last sentence of Clause (2) the words, "the whole of that amount or part of it may be given otherwise than in cash."

In Kesvananda Bharati V. State of Kerala[34] the Supreme Court considered the question of the validity of the Twenty-fifth Constitutional amendment. It was unanimously held that the Twenty-fifth Amendment in so far as it introduced changes

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33 The Constitution (Twenty-fifth Amendment) Act, 1971. Ibid.

34 4 SCC, 1973, p.225.

in Art.31(2) is valid. The majority of the judges held that the amount fixed by law could be questioned in a Court only if the amount so fixed is illusory or if the principles specified were irrelevant. However, the payment of just equivalent or recompense at the market value of the property acquired or requisitioned was abandoned. In Bhimsinghji V. Union of India,[35] the Supreme Court reiterated that the matter of adequacy of compensation was placed beyond the pale of controversy and made non-justiciable issue by the Twenty-fifth Constitutional Amendment unless the amount was illusory or confiscatory.

Finally, to put end to all controversies whether real or unreal and to confer absolute freedom by giving legislature free hand to determine the amount of compensation the Constitution (44th Amendment) Act 1978, took away the right to property from the Chapter on Fundamental Rights and gave it the status of an ordinary right. The changes made in this regard are as follows:

(i) the right to acquire, hold and dispose of property under Article 19(1)(f) was declared;

(ii) The right to property against deprivation without authority of law was taken away by deleting Article 31 and adding

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35 AIR 1981 SC, p.166; 2 SCC 1981, p.234.

Chapter IV in Part XII Article 300-A, Right to Property which provides that no person shall be deprived of his property except by authority of law.

It is clear from the above discussion why Article 300A is silent on the question of compensation. It means that the question of compensation is closed so far as the courts are concerned and it shall solely be determined by the discretion of the legislative. Although the adequacy of compensation or amount is not at all for the courts to judge, but if such amount or compensation in lieu of expropriation of property is "illusory" and amounts to no compensation in reality then it may be challenged in the courts for being arbitrary and unreasonable.

Besides the quantum of compensation, there are other aspects on the basis of which expropriation of property may be challenged in the court. It would seem that the courts can appropriately interfere (a) where the law permits outright confiscation without giving any compensation whatsoever; (b) where the legislative leaves it to the executive to acquire or requisition property on payment of any compensation it may choose to fix in its discretion and does not itself lay down any principles on which the compensation is to be determined; and (c) where the law does not fix the amount of compensation but lays down the principles on which and the manner in which the compensation is to be determined and given and the executive commits any deviation from the principles laid down by the legislature.

After discussing what is national treatment in case of expropriation of property let us now proceed to study briefly the actual practice of India in nationalization of foreign property.

Nationalisation of Foreign Property in India:

The propagated government policy of no undue nationalisation and payment of fair compensation has been carried out in actual practice. A brief resume of the major nationalisations of foreign owned properties by India bears this forth.

Air transport was nationalised in 1953 when the industry was in poor financial condition, badly organised and inefficiently run. Both domestic and international airlines required large investments which the government alone was in a position to make. Moreover, virtually every country in the world excepting the United States had assumed public ownership of this important public service. Weigning the importance of air transportation to the nation and the state of affairs in which it was the government decided to nationalise it in the overall interest of the nation.

Compensation was paid on the basis of valuation of the assets of the private airlines. Moreover, many concessions were made. The government assumed the debts without any deduction from the value of assets. Depreciation was

reckoned on extremely favourable terms. Special compensation was allowed for overhauls before appropriation. The terms of payment were also good. Ten percent was paid in cash and the balance in the form of five year bonds bearing 3.5 percent interest. The government of India guaranteed the bonds. The compensation was considered very favourable and this was reflected by a substantial rise in the share of the expropriated air companies in 1953 after the terms of compensation were announced.[36]

In 1955, on the recommendations of the All India Rural Credit Survey Committee, the Imperial Bank of India, owned to the extent of ten percent by British share holders, was nationalised to provide for adequate rural credit facilities for Indian agriculture, and for the successful implementation of development plans in the public interest.

Compensation was based upon the average price of the shares of the Imperial Bank of India during the year preceding announcement of the nationalisation of December 20, 1954. This resulted in a payment of Rs.1750 and odd for a share with a par value of Rs.500 or over, three times the original paid up capital. Payment up to Rs.10,000 were made in cash.

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36 See M.J.Kust, Foreign Enterprises in India : Laws and Policies (Bombay, 1964), p.100.

The Parliament provided that compensation would be payable in central government securities but a share holder was given the choice to also apply for transfer to him of shares in the new State Bank of India in lieu of compensation. It is significant to note that foreign share holders were compensated fully in cash.

Following this, on September 1st, 1956, the Life Insurance Companies were nationalised including eight foreign insurers which were doing business in India. The chief reasons behind it were the state of affairs of life insurance business and government strategy of mobilising more funds for development plans. During the years 1944-54 some twentyfive companies failed. A like number were taken over by other companies. This entailed losses to policy holders. The principal argument given at that time was that the deposits of the policy holders were used by the Indian and foreign companies to earn huge funds. Nationalisation was undertaken to enable the government to invest such funds and profits emerging therefrom, in the socially most necessary lines of investment in accordance with the priorities laid down in the plans.[37] The then finance minister stated in the parliament that, "the

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37 Budder Dutt, "Nationalisation Facts and Fancies", Mainstream, vol.17 (30), 24 March 1979, p.12.

nationalisation of life insurance is a further step in the direction of more effective mobilisation of the peoples savings.[38]

The principle adopted for determination of the compensation was to calculate compensation at twenty times the annual average of the surplus allocated to shareholders in the two actual years proceedings preceding January 1955, or ten times such average plus paid capital. Each company could choose in the alternative giving it the greater compensation. If no surplus had been calculated during the base period, the insure could get the value of the assets less liabilities.[39]

The compensation formula evoked considerable outcry from the Indian Insurance Companies Association and other interested parties. There were several protests that the compensation was unfair. But apart from such criticisms which are natural, the compensation given can be termed as fair and 'adequate' in the sense of classical formula of compensation under the traditional international law of expropriation.

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38 Parliamentary Debates, Lok Sabha, vol.11, No.26, 1956, col. 2927.

39 See, n.36, p.102.

Nationalisation of Kolar gold mines, a wholly foreign owned enterprise by the Mysore government, generated a lot of controversy as regards the amount of compensation. The company claimed eight million dollars based upon the value of the assets less liabilities plus the loss of earnings expected from the remaining life of the mining leases. The Mysore government offered 1,750,000 dollars. The Government of India intervened and pressed for fair compensation as a result of which 2,380,000 dollars compensation was paid. Computed on the basis of the market value of the company share formula. Testing on the classical formula compensation can be adjudged as fair and adequate.[40]

The Coal Bearing Areas (Acquisition and Development) Act was enacted by the Parliament in 1957 which, inter alia, authorised the government to acquire coal mining lands and rights. The Act was passed to establish greater public control over the coal mining industry and its development by providing for the acquisition by the state of unworked land containing or likely to contain coal deposits or of rights in or over such land, for the extinguishment or modification of such rights accruing by virtue of any agreement, lease, license or otherwise for the land. The act

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40 Ibid., p.102. See also S.C.Jain, Nationalisation of Foreign Property : A Study in North-South Dialogue, (New Delhi, 1983), p.237.

provided compensation on the basis of market value of the land without mineral rights. For mining rights compensation was based on actual investment on the lease plus interest.[41]

The historic decision of Bank Nationalisation was taken so that the state could have control over the strategic sectors of the economy. Such control was necessary to help the economically weaker sections, to further financial investment for the development of agriculture, rural areas and the small scale sectors and to direct investment on priority lines in the interest of national development. Consequently, fourteen major commercial banks were nationalised but, as noted previously, the foreign banks were not nationalised.

The next and the most noteworthy case of nationalisation of alien property in India was of foreign oil companies, namely, ESSO, Burmah Shell and Caltex. The process of taking over foreign oil companies began in 1974. These companies were set up in India during the period from 1953 to 1955 for the purpose of producing marketing and distributing in India petroleum products. It was also provided in these agreements that the companies would not be taken over for twenty five years unless agreements were mutually amended or rescinded. The agreements sought to provide that the companies could purchase crude oil at the world market prices prevailing at

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41 Ibid., p.102.

the time and place of shipment with the freedom of choice as to the source of supply. The amount paid to these oil companies was very much higher than the prevailing prices on which the government could get the crude oil. The Government could save a lot of money by entering into long term contract with the oil producing countries directly on a government to government basis. After the government's unsuccessful efforts to have the crude oil prices reduced and after protracted negotiations, the government decided to take over the undertakings of the foreign oil companies. The legislations[42] concerning acquisition of the undertakings followed signing of the agreements with the concerned companies.

The four enactments under which these oil companies were taken over provide that it is in the 'public interest' to acquire business of these companies in order that the products produced, marketed and/or distributed by them are "so distributed as best to subserve the common good." Thus, enactments were passed to carry out the constitutional obligation imposed on the government by Article 39(b) of the constitution which enjoins →

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42 The ESSO (Acquisition of undertakings in India) Act 1976. The Burmah Shell (Acquisition of undertakings in India) Act 1976. The Caltex (Acquisition of shares of Caltex Oil Refining, India Ltd. and the undertakings in India of Caltex India Ltd) Act 1977. Burmah Oil Company (Acquisition of shares of Oil India Ltd. and of the undertakings in India of Assam Oil Company Ltd. and the Burmah Oil Company, India Trading Ltd.) Act 1982.

——————→ to direct its policy towards ensuring that the ownership and control of the material resources of the community are distributed in such a manner as best to subserve the common good.

The first oil company to be taken over was the ESSO, whose 74 percent shares were acquired by the government in March 1974. By October 1976, the government also acquired the remaining 26 per cent of equity holdings of the ESSO Eastern in the corporation. The total compensation for the takeover the ESSO was fixed at Rs.18 crores (21.438 million dollars). Payments were made in US dollars in only three instalments for the 74 percent of shares and immediately in case of acquisition of 26 percent of the shares. The interest at the rate of 6.5 percent till the date of payment was also paid.[43]

The government of India and Burmah Shell signed an agreement for the takeover of the shell refining and marketing operations in India on December 24, 1975. According to the memorandum of understanding signed, the company got a compensation of Rs.38 crores in foreign exchange for its refinery and marketing operations. Rs.5.68 crores was to be paid before 31 December and the rest in yearly instalments.

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43 Times of India, 26 September 1976.

The payments were made in the UK pound sterling and tax-free interest of 8 percent was paid on the money for the remaining instalments.[44] At the time of approval the bill for the takeover of Burmah Shall, there was some criticism of the compensation payable in foreign exchange and interest thereto in the parliament, but the Minister Mr.K.D.Malviya who piloted the measures defended the figure as reasonable in view of the vast distribution which company had built up over the years.[45]

The President promulgated an ordinance providing for the acquisition of the shares of the Caltex Oil Refining India Ltd. and for the acquisition and transfer of the right, title and interest of the Caltex India Ltd. in relation to its undertaking in India on December 30, 1976. Following promulgamation of the ordinance, Rs.4.5 lakhs shares of the Caltex Oil Refining, India Ltd. were transferred to the government.

The memorandum with the Caltex Petroleum Corporation fixed Rs.13 crores as net amount payable in U.S. dollars in five instalments with the interest of 8 percent, for the acquisition of their refining and marketing assets and

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44 Commerce, vol.131 (3368), 6 Dec. 1975, p.933.

45 National Herald (New Delni), 17 Jan. 1977.

operations in India. Caltex company also agreed to supply from Gulf countries 1.5 million tonnes of crude annually for the next five years on commercial basis.[46]

Britisn owned Oil Company Ltd. which was jointly owned by the Government of India and Burman Shell, eacn owing 50 percent shares, for exploration and production of crude oil, was taken over by the Burmah Oil Company (Acquisition of shares of Oil India Ltd. and of the undertakings in India of Assam Oil Limited and the Burmah Oil Company India Trading Limited) Act 1981. Section 10 of the Act provides for the payment of Rs.21 crores and 56 lakhs, free of taxes to the Burmah Oil Company. It was further provided that the amount would be allowed to be remitted to the company in one instalment in pound sterling calculated at the exchange rate in force on the date of such remittance. If the amount was not paid by the October 15, 1981, it was to carry simple interest, free of taxes, at the rate of 8 per cent per annum from that date, till the date of payment.[47]

The brief survey of nationalisation of foreign undertakings in India shows that India has implemented the classic formula of prompt, due, effective and adequate compensation and also fulfilled the other conditions of traditional law of

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46 Times of India (New Delhi), Oct. 15, 1976.

47 n.40, p.240.

expropriation, i.e., all the nationalisation were done for public purpose and were non-discriminatory in nature.[48]

After studying India's practice of nationalisation of foreign property and seeing its conformance to the rules of traditional law of expropriation of foreign property, it is relevant to study further the underlying factors behind India's practice to view the significance of such practice in its true perspective.

Underlying Factors:

As noted in the beginning of the chapter, India's policy and practice of nationalisation of foreign property is directly related, rather dictated, by the policy of foreign investments shaped by the state of India's domestic economy.

The policies of the Indian government towards foreign investment and its policy of nationalisation of foreign undertakings, being one of those, are not based on any arbitrary or doctrinaire considerations, but on sound economic reasons. The single most important basis lies in the fact that India is a country short of capital and with a very low

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48 Ibid., p.241.

per capita income. The weakness of the country's industrial base makes industrialisation dependent on the import of technology, designs and equipments to a greater extent. More advanced and complicated technology needed for widening of industrial base makes the dependence greater. Foreign private investment is treated as vehicle for the transfer of technology to fill the technology gap and for the much needed promotion of export to take care of the balance of payments problem. The combination of difficult world economic scene and the pressures for growth in the domestic economy seem to have made it necessary for India to rely on foreign investment, to achieve our investment targets. The pace of economic development in India can be substantially improved by having a favourable climate for foreign private investment by making greater use of external resources.

Another important reason for India's practice of nationalisation of foreign property is the fact that India is capital importer as well as capital exporter. India is one of those few semi-industrialised countries which serve as an important source of foreign directed investment. The concept of Indian joint ventures abroad mostly in the Third World countries, as an instrument of fostering economic cooperation and increasing efficiency and productivity of the available factors of production is widely recognised. India's capability

to set up industrial plants abroad is growing day by day. The first Indian joint venture was a textile mill established in Ethiopia in 1956. By November 1977, a total of 83 Indian joint ventures were in operation throughout the world, their combined assets being valued at approximately 244 million US dollars.[49] On 31st December 1984, there were 236 Indian joint ventures in different sectors of industry set up in 39 countries including some developed ones.[50]

Indian investment experiences abroad had an important effect on the politics of foreign investment in India. During the last 15 to 20 years out of 28 African countries which had won independence, military coups had taken place in 23, with the result that several successful joint ventures in many of these countries were nationalised. In its confidential memorandum to Parliament the Federation of Indian Chambers of Commerce and Industry (FICCI) argued:[51]

> As India is emerging as an exporter of enterprise and capital equipment which forms the basis for our joint ventures abroad, it is important to be circumspect as regards the treatment we meet out to foreign enterprises and foreigners doing

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49 Dennis J.Encarnation, "The Political Economy of Indian Joint Industrial Ventures Abroad", International Organisation (Boston), vol.36 (1982), p.31.

50 See Handbook of Information on Facilities and Incentives for Foreign Investment in India (IIC Publications,1985).

51 FICCI, "Correspondence and Relevant Documents Relating to Important Questions dealt with by the Federation during the year 1972" (New Delhi, 1973), pp.55-64.

> business with and in India.... Not only may such foreign capital and technology that we would like to attract in the interest of speedy economic growth, not be forthcoming, but our industries and business interests may face similar disabilities.

Thus not only the need of foreign investments in the country but India's own business interests abroad tie down the hands of the government in its treatment of foreign investments. No wonder, India has subscribed to the 'adequate' and 'fair' com pensation in a few nationalisations of foreign companies it has undertaken.

Conclusions

The Legislations concerning acquisition of the undertakings followed signing of the agreements with the concerned companies. The fact that agreements were signed before enacting acquisition legislations suggests that the amount represented negotiated compensation. Due to lack of availability of material on the negotiations since they are deemed confidential, and limited scope of the study, it has not been possible to analyse how negotiated amount was arrived at, and what considerations were taken into account to decide the compensation amount. Since the amount of compensation was mutually agreed no legal suit followed in the national courts to determine whether the compensation paid was 'adequate' and 'fair'.

Keeping in mind the fact of negotiated compensation and

the actual amount and terms of payment from the brief survey of nationalisations of foreign undertakings in India, it can be fairly concluded that principles of international law, even by the traditional standards, have been adhered to by India. The compensation paid was "prompt, due, effective and adequate".

Although the constitutional law of the country, as it stands today, gives ample freedom to the legislature to determine the compensation in lieu of expropriation of property, whether of nationals or foreigners, the government of India true to its policy pronouncements, has fulfilled the commitment of 'adequate' and 'fair' compensation. Considerations of faster economic growth and convergence of interests on matters relating to foreign investment has led India to adopt this approach to the rules of international law of expropriation of foreign property.

India, a leading member of the Group of 77, and an active member of the Working Group of CERDS, stood firmly with the Third World when Article 2(2)(c) of CERDS laying down the rules of appropriate compensation as determined by the state expropriating the foreign property, was passed by the General Assembly of the United Nations. This means that as far as India's stand on the legality of rules of traditional law of expropriation of foreign property is concerned, it rejects those and instead supports Article 2(2)(c) proposition

along with other developing countries. But in practice it has adhered to what the Indian representative made it clear in a statement before the General Assembly. He stated:[52]

> (A)lthough nationalisation or expropriation on grounds of public utility, security, or national interest did not imply any limitation of the right of the country to decide on nationalisation if appropriate, but it was obvious that the right of adequate compensation went hand in hand with it. The matter was not only of principle but also of expediency because country which nationalised foreign investments could hardly expect them. Since the development of the underdeveloped countries would take many years, they had much to gain by importing foreign capital on mutually acceptable and honourable terms.

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52 UN Doc.A/C.2/SR 835, 1962, p.235.

CHAPTER — IV

CONCLUSIONS

The debate on the law of expropriation has been going on for over fifty years and does not seem to end, yet no common point of encounter has been reached. Many western writers still argue that the expropriation of foreign property gives rise on the part of expropriating state an obligations to pay "prompt, due, adequate and effective" compensation. The practice of States with respect to compensation for expropriated property is so diverse that one can not speak of any international custom as evidence of a general practice accepted as law.

Keeping in mind the nature of international law which is based upon the consent of States, it is submitted that although the rule of appropriate compensation as determined by the expropriating state laid down by Article 2(2)(c) of CERDS might still not have become part of the customary principles of international law, in view of the strong objection by western states, but for once and all, it declared the demise of traditional international law of expropriation of foreign property. It is an entirely different matter that the developing countries desperately seeking to change the law along with exploitative and one sided international economic system, have not been able to carry into effect the changes they seek. The heritage of old colonial system which still holds good in new forms under different name of neo-colonialism,

and various other limitations both acquired and self-created still stand in their way. The so-called inconsistency, the gap between rhetoric and practice on which western authors harp so much, should not and cannot be used to rob off Article 2(2)(C) of CERDS of its legal as well as political significance. The gap only highlights the hard struggle which is to go on for quite sometime and daunting nature of the task developing countries are face to face with.

Despite all the confusion, chaos and controversies it can be fairly concluded about the law of expropriation that states have an absolute right to control their natural resources and economic activities through expropriation and this right cannot be fettered by any agreement with a non-state entity. States have the right to expropriate foreign property provided they do for a public purpose as determined by the expropriating State. Expropriation for a public purpose must be accompanied by "appropriate compensation" calculated, inter alia, by having regard to the resources and economic development of the host state and to the level of return yielded prior to the expropriation to the investor. The host state can determine the basis of calculation under its own municipal laws.

Need for Change:

New standards of international law on the expropriation law problem will have to be evolved in the fast changing environment. While the new standards have not clearly emerged

but there is already a realization for this need. The jurists from even western countries often speak of the new patterns and futility of the old concepts. The new born world community must have a new set of laws to govern the international relations of the members. This new set of laws may of course be built around a nucleus of as much of the old law as may be found to be conducive to the larger interests, not only of some of the members of this new community, but of all the states.

There is real need to work out the new rules in a genuine spirit of accommodation and reconciliation of conflicting interests and points of view. This requires a courage of conviction which does not recoil from the risk of drastic operations of and when they are essential for the removal of conge-
gus growths in international life. It is not solely the influence of collectivist philosophy that calls for this modification, but also, and perhaps primarily, the glaring imbalance between poor and prosperous nations compelling the former to achieve social and economic reforms within a minimum period.

International law is not a body of rules which may be gleaned from textbook headings, relatively unchanged over time. The objective of harmonising political relations between nations would be a better rallying point for the formulation of rules of expropriation of foreign property. What is needed today is flexibility, adaptability to the changing circumstances. To this end it is necessary to emphasize not the legal

forms but the concrete realities behind them. Legal concepts are relevant and meaningful only to the extent that they correspond to the economic and political facts. Legal rules should become more political, if politics is to become more law abiding.

The effectiveness of authority of any legal system depends in the long run upon the common underlying interests of the participation in the system and their common recognition of such common interests. If the capital exporting states and the Third World countries remain as divided as they are today on this issue, international legal rules would enjoy little credibility.

The South has to strengthen its solidarity and a programme of communication between the North and South has to be worked out to remove the misunderstandings and explode some of the myths that had grown out of tiresome and tortuous debates. There is a need for continuous process of consultations and dialogue as a means for facilitating a better understanding by the developed countries of the interests and concerns of the developing countries. Eventually the developed countries have to compromise in arriving at a new framework of law of expropriation of foreign property. The earlier this is done the better it would be for the whole international community.

Need for Codification

It is extremely important that the rules of expropriation of foreign property be formulated and codified. Some very significant areas of international law such as State Responsibility for injuries to aliens, are already under consideration of the International Law Commission which has a mandate not only to codify existing laws but to help in their progressive development.

There has been several attempts to codify the law on this problem by several private bodies i.e. Institute of International Law, International Law Association, Asian and African Legal Consultative Committee and under the auspices of the United Nations. This indicates the importance attached to the problem under consideration.

The chief object of all endeavours must be to establish substantive or basic principles concerning the nature and extent of the problem which are due to foreign property and possible interference with it. This objective can only be achieved when prevailing legal opinion in all the countries adheres to the basic tenet that development of stable economic relations in the world is in the interest of all countries.

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