EXPROPRIATION AWARDS OF THE IRAN-US CLAIMS TRIBUNAL

Dissertation submitted to the Jawaharlal Nehru University
in partial fulfilment of the requirements for the
award of the Degree of
MASTER OF PHILOSOPHY

HOOSHANG PISHVA AZAD

CENTRE FOR DIPLOMACY, INTERNATIONAL LAW & ECONOMICS
SCHOOL OF INTERNATIONAL STUDIES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI-110067
1984

CONTENTS

ACKNOWLEDGEMENTS

As any research work, this study is bound to have its roots in the work of many others without the guidance of which this work would not have been presented.

Firstly and primarily, I express my sincere appreciation to Professor Rahmatullah Khan, my supervisor with whom I have had the pleasure of spending more than two years discussing this subject and other issues in international law.

I take this opportunity to express my gratitude and indebtedness to Professor R.P.Anand, Dean of the School of International Studies for his valuable suggestions.

I have had the opportunity of discussing matters of both academic and non-academic nature with Professor K.R.Singh of West Asian Studies to whom I am thankful.

I am sincerely thankful to Mr.Chand Sharma for his assistance and for typing out this work in record time.

HOOSHANG PISHVA AZAD

INTRODUCTION

Nationalization of foreign property has played an important role in the economic development of the Third World since World War II. The structure of the political organization is based on nation state. When United Nations was founded there were only fifty states. Today, there are more than one hundred and fifty. This has brought about a change in values. The collapse of colonialism is a political reality today. The world society consists of poor and rich nations, and it is also divided on ideological grounds. Attainment of ideological parity is an unrealistic goal. Similarly, aiming at equality in the distribution of wealth may sound utopian, but all nations enjoy equality before law. The new political and social realities of the contemporary world entail restructuring it on the basis of a new international legal order. The new international legal order need not be obtained by revolution, but through lawful acts of state within its territorial jurisdiction and by a proper exercise of its legal power.

The developing countries have a legitimate aspiration to change their economic conditions to the better. They no longer are willing to remain as passive objects of international law. But despite their struggle and their faith in self-help, the nature and character of traditional international law forces them to accept certain conditions

for the development of their societies. The economic, technological, managerial muscle of the developed countries prevents the developing states from attaining their developmental objectives. Law is accepted as an instrument of change in national societies. But, unhappily, it has come to play a negative role on the international plane. Whenever a conflict of interest arises between states international law tends to favour the rich and powerful by an insistence on the status quo. Such conflicts plague sovereign states all too often, and in most cases lead to a political conflict. This is the perennial problem between developed and developing states. But there is an alternative. An industrialised state looks for markets for its products and a developing state needs a reliable supplier of such goods. International trade in industrial products, however, is riven with conditions imposed by the strong on the weak, by the rich on the poor. International law, unfortunately, lends its imprimatur to such unfair practices.

Societies, like individuals, develop through processes of evolution and change. Law must change with the changing conditions and needs of societies, and with the changes in values and in accordance with the realities of international trade and economic relations. Law, in particular, relating to responsibility of states for treatment

of alien property can not remain immune to this principle of evolution and change. The present study endeavours to highlight this problem by reference to cases decided by the Iran-US Claims Tribunal raising issues of expropriation.

The Islamic Republic of Iran and United States of America concluded a claim settlement agreement on 19 January 1981. The Government of the Democratic and Popular Republic of Algeria, acting as intermediary, helped in providing a mutually acceptable resolution of the disputes between the parties. One aspect of the multiple solution related to the termination of all litigation between the Governments of each party and to bring about the settlement and termination of all such claims. According to the procedures provided in what has come to be known as the Algiers Declarations, particularly the one relating to the claims settlement, the United States agreed to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, and to nullify all attachments and judgements obtained therein. The United States pledged that it is and it will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

Article II of the Claims Settlement Declaration provides:

> An international arbitral Tribunal (the Iran United States Claims Tribunal) is hereby

> established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transactions, or occurance that constitutes the subject matter of the national's claim, if such claims and counter claims are outstanding on the date of this agreement, whether or not filed in any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees) expropriations or other measures affecting property rights.(1)

Article V of the Claims Settlement Declaration provides:

> The Tribunal shall decide all cases on the basis of respect for law applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.(2)

The international legal community welcomed the establishment of the Tribunal for obvious reasons. It was expected to resolve some knotty legal problems that pester the world community and give a push to the progressive development of international law. Mr. Eric Suy, Under Secretary-General and the Legal Counsel of the United Nations, observed that the decisions and awards of the Tribunal will contribute to the

---

1 Iran-US Claims Tribunal Reports (Cambridge, 1983), vol.1, p.9.

2 Ibid., p.11.

development of international economic law in relations between North and South in the content of legal principles concerning nationalisation and compensation.[3] This work seeks to analyse the decisions made by the Tribunal on four cases of expropriation. These cases, it will be noted, belie the expectations of the international legal community. The Tribunal was not able to adopt an effective approach to the development of international economic law, particularly the one relating to expropriation.

One of the main reasons for the Tribunal's failure is that the Tribunal seems to have ignored its mandate to consider "changed circumstance" in the commercial and industrial life of one of the parties which had experienced a unique Revolution, involving a drastic change in its cultural and economic life. The Iranian society had experienced nearly violent changes in the distribution of property, and its natural resources, and in ending unreasonable privileges of a small section of society which had collaborated with foreigners in exploiting the resources of the country through improper banking activities, international contracts, mutual cooperation agreements, etc. The Tribunal refused to take those factors into

---

3 Eric Suy, "Settling U.S. Claims Against Iran Through Arbitration", American Journal of Comparative Law, vol.29 (1981), pp.523-529.

consideration. The conditions of trade and contracts were evaluated by the Tribunal in such a way as if two equal parties with reasonable attitudes and good faith were entering into international obligations. The Tribunal in fact seems to have lost an opportunity of creating an equal and acceptable basis for the North and South dialogue. It adopted a method in relation to the payment of interest, and evaluation of property taken that is hardly conducive to the development of international economic law. It may actually have helped in the development of ambiguous and unholy norms in international arbitration procedures.

Chapter - I

A REVIEW OF THE EXPROPRIATION CASES

Chapter - I

A REVIEW OF THE EXPROPRIATION CASES

A. THE AIG CASE[1]

Claims of American International Group

On 20 October 1981 American International Group Inc. (AIG) filed its statement of claim against BIMEN IRAN seeking compensation for the nationalisation of an Iranian insurance company in which AIG had an "equity" interest. AIG claimed that the Government of Iran had nationalized the Iran-American Insurance Company (Iran-America) on 25 June 1979. Iran-America originally started its operation on December 1974. It was organized as an Iranian Public Joint Stock Company having 10 per cent of shares issued each with four American companies: (1) American Life Insurance Company (ALICO), a corporation organized under the laws of the state of Delaware, USA; (2) American International Reinsurance Company Limited (AIRCO), a corporation organized under the laws of Bermuda; (3)American International Underwriters Overseas Limited (AIUO), a corporation organized under the laws of Bermuda; and (4) The Underwriter Bank Incorporated (UBANK), a corporation organized under the laws of the State of Connecticut having 5 per cent of the shares issued in its name.

---

1 American International Group Inc. and American Insurance Company v. Bemoh Markazi Iran, Case No.2, Award No.93-2-3.

All the four companies were wholly subsidiaries of AIG.

On 25 June 1979 all insurance companies operating in Iran were declared nationalized by the Law of Nationalization of Insurance Corporations.[2]

AIG contended that the claim arose out of "expropriation" or "other measures" affecting "property rights" within the meaning of Article II, paragraph I, of the Claims Settlement Declaration. The AIG in its statement of claim maintained that:[3]

(a) Nationalization of Iran-America was a violation of international law; (b) was not accompanied by "prompt", "adequate", and "effective" compensation; and (c) had violated the Treaty of Amity and Consular Rights of 1957. Therefore, AIG sought payment of "just" compensation equal to the "full value" of their interest. And in order to determine the "just" amount of compensation, AIG maintained that the company's value must be measured as a "going concern". The full value of Iran-America as a going concern on the date of nationalization, according to AIG, was US $ 111,670,000.[4] Therefore,

---

2 Award, n.1, p.4.

3 Ibid., p.6.

4 Ibid., p.11.

AIG requested compensation should be made in the amount of US $ 39,010,000 (which was equivalent to 35 per cent of its share).

The Defense of BIMEN

BIMEH argued that nationalization did not ipso facto constitute expropriation under International Law, nationalization of Iranian companies was an Act of State which was not subject to review by an international tribunal (the Tribunal having jurisdiction only in cases of expropriation); and that AIG has failed to exhaust local remedies provided under the law. As respects international law, BIMEN denied that there have been any violation of the principles of customary international law and argued that the right of a state to nationalization was universally recognized, and it was an expression of a state's permanent sovereignty over its natural resources and economic activities within its territory. BIMEN denied that the standard of "prompt" compensation was a norm of customary international law and contended that there must be an actual payment within a reasonable time and that the payment could be spread out over years.[5]

BIMEN further argued that in case of the insurance industry there was no international legal requirement to

---

5 Award, n.1, p.15.

compensate the "full value" of the property nationalized. According to BIMEH, the traditional law standard of prompt, adequate and effective compensation has been repudiated by modern developments which find expression in resolution 3281 (XXIX) of the United Nations.[6] BIMEH rejected the idea of "just" compensation for "full value" of property as a "going concern". Instead, it argued that the method of valuation required by modern international law was merely an assessment of the "actual worth of assets owned on the date of nationalization". BIMEH offered, therefore, the "net book value", defined as assets minus liability without consequential damages.

BIMEH accepted that it was the duty of every state to compensate the former owner of nationalized property and proposed a method of valuation under which the net value of Iran-America were determined. For this purpose BIMEH submitted a valuation of the company's net assets which was prepared by professional accountants. The said report estimated that the value of the company ranged from US $ 4,631,491 to US $ 5,352,962. Thus the value of the AIG's interest would range from US $ 1,625,222 to US $ 1,873,537. Furthermore BIMEH asserted that US $ 1,581,571 should be deducted from the value of AIG's

---

6 Award, n.1, p.16.

interest representing an amount due from AIG under various contracts. Thus BIMEH stated that no compensation was owing to AIG but rather AIG was indebted to BIMEH.[7]

Position of the Tribunal on Expropriation

The Tribunal made some observations of a general character on expropriation, and went on to determine the value of compensation. In the opinion of Tribunal

> it can not be held that the nationalization of Iran-America was by itself unlawful, (8) either under customary international law or under the Treaty of Amity, as there is not sufficient evidence before the Tribunal to show that the nationalization was not carried out for a public purpose as part of a larger reform programme as was discriminatory. (9) On the other hand, it is a general principle of public international law that even in the case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken. (10)
>
> The Tribunal finds that its jurisdiction over "expropriation" by virtue of Article II paragraph 1 of the Claims Settlement Declaration applies equally to "nationalization" and other forms of taking. In any event, the Tribunal's jurisdiction over "other measures" affecting property right is by itself sufficiently broad to encompass the subject matters of the claim in this case. (11)

---

7 Award, n.1, p.14.

8 Ibid., p.14.

9 Ibid., p.14.

10 Ibid., p.15.

11 Ibid., p.9.

Thus, the Tribunal rejected the distinction drawn by BIMEH between "nationalization" and "expropriation"; and upheld the nationalization of AIG as legal; but ruled that even lawful nationalization must be followed by compensation for the "value" of the property taken. Let us see how the Tribunal defined this value.

Evaluation of the Nationalized Property

As was stated above AIG had maintained that, it was entitled to "just" compensation equal to the "full value" of its interest in Iran-America at the date of nationalization. And BIMEH had argued that there was no legal entitlement to compensation equal to the full value of the property nationalized, and had further maintained that the traditional standard of "prompt", "adequate" and "effective" compensation had been repudiated under the Charter of Economic Rights and Duties of States, according to which only "appropriate" compensation was required.

Furthermore, the parties had disagreed with the method of valuation to be applied. AIG maintained that Iran-America should be made exclusively on the basis of the "net book" or "break up" value. In order to support its statement AIG submitted two reports from two independent actuaries. In the first report, which was prepared by a Swedish insurance actuary, the total worth of the company at the date of nationalization

was approximately US $ 147 million.[12] In the second report made by a Consulting Actuaries of London, the value of the company at the crucial time was approximately between US $ 74 million to US $ 111 million,[13] depending on the allowance made for future business. At the hearing on January 1982 the same expert of Consulting Actuaries of London re-examined its assumption for the same fiscal year. As a result the expert lowered the value to about US $ 80 million.

BIMEH also submitted a financial report prepared by a public accountants company of Tehran. In this report the accountants evaluated the shares at the date of nationalization as between US $ 4,643,490 and US $ 5,352,962.[14] The accountants stated in their report, however, that in their final balance sheet the company had neither been fully considered as a "going concern" nor had it been regarded as a breaking-up business. The adopted basis was a combination of both.

The Tribunal rejected the method of analysis employed by the claimant's and Respondents' experts for the following reasons:

(1) that the appraisals did not significantly consider the

---

12 Award, n.1, p.17.

13 Ibid., p.17.

14 Ibid., p.14.

changes in general, social and economic conditions in Iran which had taken place between the autumn of 1978 and June 1979;[15]

(2) that the appraisals did not account for the effect of certain Iranian taxes upon net profitability;[16]

(3) that changes in the company's financial position between March 1979 and the date of nationalisation were not reflected in the expert's revised evaluation;[17]

(4) that the company had been conducting its business only for little more than 4½ years and such a short period provided an insufficient basis for projecting future profits; and

(5) that a close examination of the (Respondent's) audit report, with particular attention paid to the data contained in the notes to it, made it clear that the estimate was too low. It was evident that had they employed standard accounting principles for the evaluation of the company's shares, they would have come to a considerably higher amount.[18]

The Tribunal held that the "appropriate" method was to value the company as a "going concern" taking into account not

---

15 Award, n.1, p.19

16 Ibid.

17 Ibid.

18 Ibid., p.21.

only the "net book value" of its assets but also such elements as goodwill and likely "future profitability", had the company been allowed to continue its business under its former management. The book value, according to the Tribunal, was used mainly for liquidation purposes.[19]

Finally the Tribunal held that there was no sufficient evidence of any government actions aimed at diminishing the value of the shares prior to the date of nationalization. The Tribunal ruled that "neither" the effect of the very act of nationalization should be taken into account nor the effect of events that occurred subsequent to the nationalization but rather the valuation should be made on the basis of "fair market value" of the shares in Iran-America at the date of nationalization.[20]

After going through all evidence and hearing the parties' argument the Tribunal concluded:

> The evidence in this case indicates that there has not been an active market for Iran-America's share....(21) The Tribunal believes that the fair market value on "going concern" value of Iran-America at the date of nationalization is significantly less than even the lowest figure arrived at by the experts of the claimants...(22)

---

19 Award, n.1, p.21.

20 Ibid., p.16.

21 Ibid., p.17.

22 Ibid., p.20.

> From what has been stated above it might be possible to draw some conclusions regarding the higher and the lower limits of the range within which the value of the company could reasonably be assumed to lie. But the limits are widely apart. In order to determine the value within those limits to which value the compensation should be related, the Tribunal will therefore have to make an "approximation" of that value,(23) taking into account all relevant circumstances in the case. In so doing, the Tribunal fixes the value of the shares for which amount the claimants should now be compensated at US $ 10,000,000.

Thus, the Tribunal's method of valuation could be construed as a rejection of the mixture of "going concern" and "breaking-up" valuation methods suggested by Iran. It adopted the claimant's method of valuation as a "going concern" alone, the basis of computation of which was, according to the Tribunal, "the fair market value". That, in turn, was constructed on an "approximation" of its own because there was a difference in the estimates submitted by the parties.

B. DAMES AND MOORE CASE[24]

Facts:

On 17 November 1981, claimant, DAMES AND MOORE ("D & M") filed its claims before the Tribunal against the Respondents,

---

23 Award, n.2, p.22.

24 Dames and Moore V. The Atomic Energy Organization of Iran, Case No.54, Award No.97-54-3.

the ATOMIC ENERGY ORGANIZATION OF IRAN ("AEOI") for breach of a contract between AEOI and D & M International S.R.L. (a Venezuelan limited liability company). Claimant contended that the Tribunal had jurisdiction over the claim arising out of the contract, debts, "expropriations" or other measures affecting property rights. The claim was based upon claimant's contention that certain of its equipments were expropriated.

On 8 December 1977 D & M and AEOI entered into a contract under which D & M agreed to perform site validation and environmental studies in connection with a Proposed Nuclear Power Plant project in the province of Isfahan, Iran. AEOI terminated the contract on 30 June 1979 prior to its completion, in accordance with the terms of the contract. Claimant alleged that in the course of its work in Iran, it accumulated substantial movable property which it claimed had been "expropriated" by Iran.

D & M stated that the subject matter of its claim fell within the terms of Article II, Paragraph 1, of the Claims Settlement Declaration and thus argued that the Tribunal had jurisdiction over the claim. According to D & M, the property, which included vehicles, office equipments, instruments and other equipments was kept at a "rented warehouse" and at three field laboratories in various other locations.

D & M submitted sworn statements from the Managing

Director and General Manager of D & M activities in Iran during the relevant period. They both stated that, in the autumn of 1980, representatives of the government of Iran had occupied the warehouse and informed representatives of D & M that the warehouse was to be used for housing refugees of the war and that any useful equipment stored therein would be turned over to the Iranian army. The affidavits further stated that representatives of D & M were thereafter "denied access" to the equipment.[25] Claimant also submitted a list of equipment, it alleged to have stored in the warehouse, as derived from its inventory records, along with the original purchase date and price of each item. The Claimant sought to recover the total original cost of the equipment of US $ 354,924.[26] With regard to three field laboratories, the Claimant alleged that it had been unable to recover any of the equipment left at the field locations. The affidavits stated that company's record indicated that the equipments had an original purchase price of US $ 80,000 which amount the claimant sought as relief.[27]

AEOI submitted in defence that the claimants were not the owner of the equipment in issue. AEOI alleged that authorized representatives of D & M had convoyed all of the equipments

---

25 Award, n.24, p.19.

26 Ibid., p.20.

27 Ibid.

concerned to various Iranian individuals and companies before the time of the alleged taking. In support of its allegation AEOI presented an affidavit of the custodian of the warehouse equipment, who stated that he was given a power of attorney by D & M General Manager in Iran, authorizing him to assign ownership of the equipment to anyone, including himself. He further stated that, in order to "reimburse" himself for certain unpaid expenses he incurred on behalf of the claimant, he subsequently conveyed all of the equipments, to himself. With regard to three field laboratories he stated that one was sold by D & M to a firm doing business as Zamiran Company and one has previously been placed in the warehouse and conveyed along with the other equipment, to himself. He also stated that the claimant's records in Iran reveal that the third field laboratory was not at a separate site and suggested that the equipment must have been included with the equipment of the other two sites.[28]

Attached to the affidavits were a power of attorney dated 3 April 1979 purportedly signed by D & M's General Manager in Iran; two documents indicating debts allegedly owned by the Claimant to the custodian arising out of his termination from prior employment and expenses incurred by him on behalf

---

28 Award, n.24, p.21.

of the claimant; a statement of ownership interest dated 22 March 1979, again purportedly signed by D & M General Manager of Iran, indicating that all of the warehouse equipment belonged to D & M custodian and that claimant had no further claim on the equipment and an undated letter to D & M from Zamiran Consulting Engineers indicating that the claimant had sold one of the field laboratories to Zamiran on 18 August 1979, requesting the payment of rent for D & M's continued use of the equipment through 21 November 1979 and a handwritten notation, indicating that the requested payment had been made in full.[29]

From what has been stated above one may draw the following conclusions:

(1) that the warehouse was rented therefore as for as the warehouse by itself was concerned there was no such entitlement as the ownership vested with D & M (claimant); therefore the alleged occupation of a rented warehouse of a company could not be constitute an expropriation;

(2) that the monthly rent of the warehouse and monthly salary of the custodian had not been paid by D & M; therefore the Managing Director of D & M had conveyed the equipments in issue to the custodian for recovering on the terminated employment contract;

---

29 Award, n.24, p.14.

(3) that the Power of Attorney dated 3 April 1979 signed by the General Manager of D & M in Iran had given proper ownership right to the custodian to act in the capacity of the owner of the equipments;

(4) that the undated letter from the Zamiran company impliedly indicated that the equipment in issue was rented for a long period and therefore it had lost its commercial value and D & M had received the proper rent for continued use of such equipment;

(5) that from the date that such power of attorney was signed by D & M General Manager the ownership right had been vested with the custodian, thus D & M had no entitlement or ownership right to sue AEOI.

Given the foregoing facts, it is interesting to see how the Tribunal framed the issue and on what ground the award was issued.

The Tribunal held that:

> Neither the Government of Iran nor AEOI contest claimant's evidence that the warehouse and its contents have been "sequestered" by government representatives. The unilateral taking of possession of property and the denial of its use to the rightful owners may amount to an "expropriation" even without a formal decree regarding title to the property. (30)

---

30 Award, n.24, p.22.

> The interference with the use of the stored equipment in the present case is so complete that it must be deemed unreasonable. The Tribunal concludes that a taking of the property occurred no later than 1 January 1981.[31]
>
> The evidence of "taking" with regard to the field laboratory which would demonstrate that its equipment has been taken and was not rebutted by Respondent's evidence that ownership of one of the field laboratories has been conveyed. Respondent's evidence indicates, however, that another of the field laboratories had previously been stored in the warehouse prior to the Government sequestration.(32) It must be concluded that this equipment was among the property taken and is therefore included in the above award...
>
> As evidence of the value of the expropriated equipment claimant has submitted materials indicating that the original purchase price of all items stored in the warehouse including the one field laboratory, was US $ 354,924. However there was no evidence regarding the relationship between the price of each item on the date of purchase and the value in the fall of 1980. Because of this gap in the evidence and the difficulties in quantifying the actual amount of damages in this respect with any precision, the Tribunal is justified in estimating such amount. Considering all circumstances, including the age of the equipment, the Tribunal decides that the approximate value of claimant's expropriated property is US $ 100,000 to which amount claimant is now entitled.(33)

---

31 Award, n.24, p.22.

32 Ibid., p.23.

33 Ibid.

C. SEA LAND CASE[34]

Facts:

The Claimant, Sea-land Service Inc. ("Sea-land") is a corporation registered under the laws of Delaware in the United States engaged in the international transportation by water of containerised cargo. The Respondent Ports and Shipping Organization ("PSO") is a governmental agency in Iran, charged with the administration and control of Iranian port facilities.

Sea-land based its claim on two principal alternative legal theories. The first was that PSO breached a contract "the Facility Agreement", entered into by PSO with ILB, an Iranian transportation company, for the provision of a parcel of land at Bandar Abbas for construction of a container terminal and the right to operate it.

Sea-land claimed that ILB was acting as his agent with PSO's knowledge, or it was a third party beneficiary of the contract by the common intention of both parties. Furthermore, Sea-land argued that ILB was acting for PSO when it entered into a second contract with Sea-land the "Preferential Use

---

34 Sea-Land Service, Inc., V. Ports And Shipping Organization, Case No.33, Award No.135-33-1.

Agreement" on April 1977. The second ground was that, having allowed Sea-land to proceed with the construction and operation at a considerable expense, PSO acted to deprive Sea-land of use of its enterprise in such a way as to constitute an "expropriation", giving rise to a right to "compensation" in accordance with the standards prescribed by the 1957 Treaty of Amity, Economic Relations and consular rights between United States of America and Iran, under International Law.

Sea-land argued that at all events PSO should not be unjustly enriched at Sea-land's expense, and that PSO was liable to compensate Sea-land for the value of the enterprise of which it assumed control. Sea-land quantified its losses in its Memorial to at least US 42 million.[35]

Sea-land argued that an "oral" agreement had already been reached with PSO by February 1976 under which Sea-land would construct and operate a container terminal on land made available by PSO in order to minimize the delay between the arrival of Sea-land's container vessel and its unloading. Sea-land contended that ILB had been involved in the discussions; however no formal agency agreement was signed until April 1977. Sea-land stated that ILB formally sub-licensed to Sea-land the rights to use and improve the parcel of land

---

35 Award, n.34, p.3.

allocated in the Facility Agreement by means of a contract referred to as the Preferential Use Agreement. Sea-land further claimed that it could enforce the Facility Agreement against PSO either as principal or at the least as a third party beneficiary for whose benefit it was entered into.[36]

Statement of Defence and Counter Claim:

PSO denied liability on the ground that Sea-land was not entitled to enforce any contract against it, and further contended that there was no "expropriation" or "taking" such as to give rise to a right to compensation and that it did not make use of the facility. PSO, in addition, filed a counter-claim for various revenues and charges allegedly arising out of Sea-land's use and subsequent abandonment of the facility, totalling 1,640,108,835 Rials.[37] PSO denied any contractual relationship between itself and Sea-land which might render it liable for damages. PSO insisted that its only contractual relationship was with ILB which arose out of the Facility Agreement of November 1976 between PSO and ILB which read as follows:

> The following agreement has been agreed upon between Port and Shipping Organization (hereinafter called Organization) on one

---

36 Award, n.34, p.3.

37 Ibid., p.4.

> part and I.L.B. Container Company (hereinafter called Company on the other part.
>
> The Company shall not have the right to receive from the owners of the goods loaded, off-loaded or stored on the premises any sums of money on any account.(38)

PSO contended that ILB represented itself as principal to PSO in the negotiations and in the conclusion of the Facility Agreement.[39] In his affidavit the Managing Director of ILB stated that in the Facility Agreement ILB acted in the capacity of principal but not agent. PSO further stated that it did not see nor did it know the terms of the Proferential Use Agreement. However, it has to be mentioned that in the Preferential Use Agreement Sea-land sought assurance ("security") from ILB for its investment in the improvement of land and ILB gave such "security". PSO contended that it did not acknowledge any such right on the part of Sea-land and its only contractual relations was with ILB.[40]

PSO submitted certain evidences to the Tribunal to establish that ILB applied in its own name using PSO's prescribed form for the allocation of land in Bandar Abbas Port area and thereby undertook to carry out all construction and

---

38 Award, n.34, p.5.

39 Ibid., p.7.

40 Ibid., p.8.

improvement works at its own expense. PSO denied that ILB granted the land as agent for Sea-land and maintained that any work carried out by sea-land at the site was unauthorised and undertaken without PSO's knowledge.[41]

PSO stated in a letter to ILB that it allocated the land to ILB for construction of a container terminal under condition that:

> All modification expenses regarding improvement of platform should be borne by the said company..."
>
> The said platform should not be used as a special private platform.

PSO asserted four counterclaims which could be summerised as follows:

1. 1,600,230,000 Rials for estimated lost revenues for unloading and storage charges that PSO would have earned had Sea-land continued to operate at Bandar Abbas and not left the facility unused after 20 February 1979.[42]

2. 27,931,000 Rials for porterage and storage charges in respect of 19 empty containers left behind by Sea-land at Bandar Abbas.[43]

---

41 Award, n.34, p.8.

42 Ibid., p.12.

43 Ibid., p.12.

3. 5,105,263 Rials in port charges incurred by a transportation company called "Sea-land" at the port of Khorramshahr evidenced by twelve invoices.[44]

4. 6,842,572 Rials in insurance premiums owed to Tehran and Bandar Abbas branches of Iranian Social Security Organization in respect of Sea-Land's employees.[45]

Claim of Expropriation:

Sea-land contended that the local labour office had interfered in the management of Sea-land's enterprise by ordering the dismissal of all of the non-Iranian workforce. The Labour Office was also alleged to have dictated to Sea-land the wages, terms and conditions of employment of its workforce and to have prohibited Sea-land from disciplining or discharging its Iranian employees. The movement of containers on which the business depended was severely disrupted, and Sea-land suspended the service in November 1978. Sea-land stated that by the end of December 1978, the facility was to have been made effectively unworkable, and Sea-land

---

44 Award, n.34, p.12.

45 Ibid., p.13.

chose this as the date from which damages were to be assessed, whether for breach of contract, for "expropriation" of its enterprises or on the basis of unjust enrichment.

In its Memorial Sea-land presented a detailed damages claim in reliance of the principle of "restitutio in integrum" which it claimed was applicable to all of the alternative basis for its claims. The claim based on contract was against PSO, the claim based on expropriation against the government of Iran and the claim based on unjust enrichment against the government of Iran or PSO.

The Tribunal's Decision:

On the issue of agency, the Tribunal stated:

> It was clearly not PSO's intention to enter into contractual relation - atleast insofar as the formal allocation of the land was concerned with Sea-land, but with an approved Iranian entity...(46) The fact that it was within the contemplation not only of Sea-land and ILB but also, as it appears to the Tribunal, of PSO, that sea-land would be using that land to develop a jetty and institute the container service does not entitle it to step into ILB's shoes and enforce the actual licence as against PSO.[47]

With regard to the "Facility Agreement" claimed by Sea-land, the Tribunal held:

> The relief Sea-land now seeks against PSO as third party beneficiary in the present

---

46 Award, n.34, p.15.

47 Ibid., p.16.

> claim extends far beyond PSO's obligations to ILB under the "Facility Agreement".(48) The "Facility Agreement" relates only to the formal allocation of the land and its authorised use. It nowhere deals with such matters as expedited customs clearances, priority berthing and other management related to functions while they form an essential part of Sea-land's claim, go beyond the provisions of the Facility Agreement itself... The Tribunal finds it impossible to construe such a broad interpretation either from the contract itself or from the surrounding circumstances.(49)

With regard to the issue of "expropriation", the Tribunal stated:

> Sealand has made a claim based on the "expropriation" of its rights by the Government of Iran. In so far as any such rights existed the Tribunal concludes that the evidence would be insufficient to justify a finding that any "expropriation" of them occurred...(50) Sea-land bases its claim for expropriation on the assertion that PSO's action in interfering with the operation of the container terminal at Bandar Abbas effectively deprived sea-land of the use of the facility.(51) In the Tribunal's view all this tends to indicate a state of upheaval in PSO's internal management which is consistent with the general picture of disruption which characterised Iran in the months leading up to the success of Revolution. It does not suggest that PSO had embarked upon a policy of deliberate disruption or non-co-operation directed at sea-land in particular.

---

48 Award, n.34, p.17.

49 Ibid.

50 Award, n.34, p.21.

51 Ibid.

On the second allegation of sea-land which related to interference of official or Iranian labour office in February 1979, the Tribunal held:

> It appears that efforts were made to enforce a policy of employment of exclusively local labour... Against the background of continued uncertainty and changes in control, it strikes the Tribunal as virtually impossible to use such acts as the basis of a finding of "expropriation"...(52) A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-land's operation, the effect of which was to deprive Sea-land of the use and benefit of its instrument ... disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation.(53)

As stated above, Sea-land made extensive reference in its pleadings to the Treaty of Amity between Iran and United States which it said laid down the standards which apply to the "taking" of property of each other's nationals and the conduct of business in each other's territory. Sea-land claimed that the Treaty "sets a particularly high standard for protection of the property or enterprises of foreign nationals. On the question the Tribunal held:

> The Tribunal has one fundamental observation to make as to its interpretation in such a

---

52 Award, n.34, p.24.

53 Ibid.

> context as the present. There is nothing in either Article II or Article IV of the Treaty which extends the scope of either State's international responsibility beyond those categories of acts already recognised by international law as giving rise to liability for a "taking". The concept of a "taking" is the same in the Treaty as in international law and, though the treaty might arguably affect the level of compensation payable, it does not relieve a claimant of the burden of establishing the breach of an international obligation.(54)
>
> Accordingly, on the basis of its conclusion with regard to sea-land's assertion of expropriation, the Tribunal does not consider that any benefit can be derived in this case from reliance on the provision of the Treaty.

After going through all evidences and arguments, the Tribunal rejected the counter claim of PSO by stating that:

> It is not possible for the Tribunal to ascertain how much of this figure would represent net profit. Nor is it clear on what basis these figures were compiled. They are used by PSO as the basis of its own counterclaim for lost revenues. (55) However, the Tribunal takes these statements as suggesting that the facility was brought back into active use at-least after November 1980 with two years left of the original period of the Facility Agreement. Thus the Tribunal considers it a reasonable conclusion on the evidence before it that after Sea-land's departure PSO made active use of the facility, either itself or through others.
>
> On this basis it is left to the Tribunal to <u>assess</u> a level of damages corresponding in

---

54 Award, n.34, p.27.

55 Ibid., p.32.

equity with the extent to which PSO was enriched. An appropriate level of compensation for PSO's actual use and benefit of the facility during the relevant period will of necessity, be an "approximation". In view of scanty evidence submitted in respect of such use and benefit, a fair assessment of compensation for Sea-land would seem to be US $ 750,000.(56)

D. TIPPETTS, ABBETT, McCARTY STRATTON CASE (57)

Facts:

The Claimant, Tippetts, Abett, McCarty, Stratton ("TAMS") is a United States engineering and architectural consulting partnership. TAMS and Azia Farman Farmaian and Associates ("AFFA") an Iranian engineering firm, created an equally owned TAMS-AFFA an Iranian entity created for the sole purpose of performing engineering and architectural services on the Tehran International Airport ("TIA") project. This performance was based on a contract entered into on 19 March 1975 by TAMS and AFFA on the one hand and the Civil Aviation Organization ("CAO") on the other. Equal shares of the Iranian Rials 1,000,000 (US $ 15,000) capital were held by each partner and TAMS-AFFA was managed by a four member coordination committee, two members of which were appointed

---

56 Award, n.34, p.32.

57 TIPPETS, ABBETT, McCARTHY, STRATTON, V. Civil Aviation Organization, Case No.7, Award No.141-7-2.

by each partner. Article 6 of the articles of partnership required that any decision by TAMS-AFFA required the consent of atleast one member appointed by TAMS and atleast one member appointed by AFFA. Authority to sign documents creating obligation for TAMS-AFFA was vested in two persons, one appointed by each partner.

Work on the TIA project stopped almost completely during December 1978 - January 1979. Prior to further significant discussions between TAMS-AFFA and the CAO concerning the future of the TIA project the plan and Budget Organization of the Government of Iran on July 1979 appointed a temporary manager for AFFA such appointment was based on the Law for the Protection and Development of Iranian Industry.[58] Because the original shareholder of AFFA was the Farman Farmaian family who had fled from Iran and was one of the fifty one individuals whose enterprises were placed under government management.

During the months of August through November 1979 TAMS representatives in Iran managed the practice of two signatures on checks and they obtained the cooperation of the government - appointed manager in their ultimately successful efforts to be paid some 34 million Iranian Rials owed to them by TAMS-AFFA

---

58 Award, n.57, p.8.

and to obtain permission to convert that sum to dollars for export from Iran to the United States. In December 1979 the last remaining TAMS representative with signature authority left the country.[59]

TAMS claimed that they wrote and telexed TAMS-AFFA in January and February 1980 concerning further work on the TIA project but received no response. Therefore TAMS claimed against the Government of Iran the value of its fifty-percent interest in TAMS-AFFA which it alleged was expropriated by the Government of Iran.[60]

The Respondents denied the jurisdiction of the Tribunal on various grounds and denied any liability to the Claimant on the claims. CAO in its counterclaims alleged that the TAMS performed the contract inadequately and there were certain defects in the performance. They also denied that TAMS-AFFA was expropriated and alleged that its value had by 1979 became negative.

The Tribunal noted the developments of late 1979 and early 1980 particularly the complete absence of answers to letters and telexes and of any communication from TAMS-AFFA

---

59 Award, n.57, p.9.

60 Ibid., p.11.

to the claimant of its property interest in TAMS-AFFA...[61]

In light of these facts the Tribunal concluded that the claimant had been subjected to the "measures affecting property rights" by being deprived of its property interests in TAMS-AFFA since atleast 1 March 1980 and that the Government of Iran is responsible by virtue of its acts and omissions for that "deprivation". The claimant is entitled under international law and general principles of law to compensation for the "full value" of the property of which it was deprived, stated the Tribunal. The Tribunal preferred the term "deprivation" to the term "taking" although they are largely synonymous, because the latter may be understood to mean that the Government had acquired something of value, which is not required.[62]

The Tribunal ruled that a deprevation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefit even where legal title to the property is not effected.

Judgement:

After going through documents and on an analysis of the method of evaluation of the interest in TAMS-AFFA, the

---

61 Award, n.57, p.16.

62 Ibid., p.10.

Tribunal held that:

> "Claimant in the instant case" seeks only the dissolution value of its interest in TAMS-AFFA.... Thus the task of the Tribunal is to make its "best estimate" of the assets and liabilities of TAMS-AFFA as of 1 March 1980....(63)
>
> Under those circumstances the Tribunal can make only a very "rough evaluation" of the assets and liabilities involved which evaluation must take into account the uncertainty of the outcome of any final adjudication of the dispute by a competent court....(64)
>
> On the basis of the foregoing consideration the Tribunal determines the dissolution value of TAMS-AFFA as 1 March 1980 to be Rials, 800,000,000 thus the claimant is entitled to IR. 400,000,000 (approximately US $ 5,000,000) for its fifty per cent interest in TAMS-AFFA.(65)

---

63 Award, n.57, p.12.

64 Ibid., p.16.

65 Ibid.

Chapter - II

INTERNATIONAL LAW ON EXPROPRIATION

Chapter - II

INTERNATIONAL LAW ON EXPROPRIATION

As observed, the Tribunal had referred to some principles of international law in support of its judgements. Among those principles were the principle of "customary international law" on the question of a "taking" of property. The Tribunal held that a "taking" in the circumstances presented in the case was against general principles of international law. In the present submission, the interpretation and justification given by the Tribunal on the principle of international law on taking does not conform to customary international law on the subject.

The Historical Context:

The developing countries,[1] semi-officially organized as the group of 77 (G-77), claim that general principles of international law and the rules relating to the protection of foreign property, traditionally introduced by western developed countries, have lost their legal validity in view of the relevant resolutions of the UN and have given birth to a new doctrine on the subject. This group argues that the customary international law "principles" on the subject

---

1 W.D.Verwey, The Principle of Preferential Treatment For Developing Countries, August 1982, pp.25-35.

had evolved to cater to the needs of 18th and 19th centuries, and that they had no relevance to the contemporary world.

The extensive migration of European and North American peoples and investments to raw materials - producing areas of the world, which accompanied the industrial revolution in the "North" and the colonization of the "South" entitled the promulgation by the "North" of the new rules of international law aimed at protecting those people and their property, as part of the legal system based upon the "general principles of law recognized by civilized nations". The term "civilized" was initially predominantly concerned with connotations of power and politics. But during the second half of the 19th century its value became increasingly measured by industrial development and the capacity to guarantee the protection of life, liberty and property of foreigners.[2] Accordingly, the capital exporting states stipulated that all governments were obliged under international law to observe in this treatment of foreigners and their property an "international minimum standard of civilization".

Alexandrowiz in his book, The Afro-Asian World and the Law of Nations discussed the theory of "international

---

2 Schwarzenberger, "The Standard of Civilization in International Law", 8 Curr.Leg.Probl. (1955), p. 220 cf.

minimum standard of civilization" and stated that the concept of minimum standard was rooted in the relationship between European and Afro-Asian states during 19th century, when most of the Asian and African states were forced to sign "capitulation treaties" which declared Europeans and their property immune from local authority and jurisdiction. In the course of time, these provisions or restricted exercise of territorial sovereignty by local authorities became permanent and irrevocable and eventually "deprived" the territorial sovereignty of an important international function that of protection of life and property of nationals of other states on its territory.

During the "capitulation" period the foreigners and their property were not immune, therefore, in order to protect their property, they entered into certain territorial agreements with the "local" authorities and eventually there was a growth of the doctrine of "protection of foreign property".

This historical background of the so-called rules relating to the protection of "foreignor's property" in customary international law under which certain economic advantages were obtained from poor nations also explains how "international law principles" had helped in paving the road to slavery of many nations, otherwise called the phenomenon of colonialism. The continent of Asia, China and India, were

made the target of imperialist powers. Chinese market with its commercial potentialities was forced open after its defeat in the Anglo-Chinese war of 1839-42 which was provoked by the Chinese demand that the British merchants at Canton surrender the stocks of opium held by them for sale. Five Chinese cities were made "treaty ports" in which the "property of foreigners" (British) were protected and other foreign merchants could freely trade, reside and erect their warehouses. China was also forced to cede Hong Kong to Great Britain and was deprived of control over its own tariff.[3]

The British colonialism in India led to its complete economic control. After the East India Company appeared on the Indian scene the wealth of India started draining in the form of fabulous tributes and gratuities from Indian rulers, in addition to the taxes raised from the people. India was turned into a leading supplier of raw materials for British industries. Concessions for railway construction were given to British firms with guarantees of interest on capital.[4]

In the 17th century the Dutch East India Company, after

---

3 Robert Strauz-Hupe "Imperialism and Colonialism in the Fat East", in The Legacy of Imperialism, (Chaiham College, U.S.A., 1960), pp.50 ff.

4 K.M.Panikkar, Asia and the Western Dominance, (London, 1957), pp. 143 ff.

ousting Portugal from the spice islands, enacted fixed quantities of spices from native Malay chieftains, forced the natives to work for it and thus carried out its ruthless exploitation, vastly enriching Dutch stock-holders. It was decreed that every village must cultivate a thousand trees a family, giving two fifths of the crop to the Government as a tax, and selling the other three fifths to the government. Concessions granted by the Sultan of Malaya to one Mr. Duff involved an area of 3000 sq. miles together with sale of commercial rights of every description.[5] Granting of these concessions was obviously due to economic and political compulsions of the colonial age.

Under a "culture system" introduced in Java by Count Van der Bosch in 1830's one fifth of the native land was set aside to be cultivated for the government. Most of the soil was ultimately claimed as government property. Europeans were allowed by a law of 1870 to appropriate waste lands for a period of seventy-five years (under the law for protection of foreign property); by 1920 a million and a quarter acres in Java were held under this law by 929 companies and Europeans.[6]

---

5 Allen and Donnithrone, Western Enterprise in Indonesia and Malaya (New York, 1957), pp.69, 113-114.

6 Thomas Moon, Imperialism and World Politics (New York, 1927), pp.336-40.

Under the McKinley administration in the 1090's the United States made a sensational debut as an imperialist world power. It acquired the Philippines, Guam, Hawai and Samoa as well as strategic harbours and most productive island groups in a period of two years. The war between Spain and the United States fought to free Cuba, afforded the latter an opportunity to conquer the Philippines. By the Peace Treaty of 10 December 1898, the Philippines was ceded to the United States for which the latter promised to pay twenty million dollars to Spain.

Under the American domination in the Philippines, the United States industrial interests obtained easy access to the Philippine raw materials and opened the Philippine market to American manufactured goods. Under the Philippine Trade Act or the Bell Act of 1946, Americans were given the same rights to exploit, develop and utilize the natural resources of the Philippines as Filipinos enjoyed. This was done in open violation of the Philippines Constitution. The Philippines was thus forced to amend its own constitution and to ratify the Bell Act.

The above history of political domination gave rise to the development of the law relating to protection of foreign property. Political domination forced poor nations to submit themselves, to sign treaties accepting certain conditions dictated by the Great Powers of 18th and 19th

century. Such enforced treaties developed certain principles in customary international law. It was thus that opium trade (property of foreigners in China) was protected; every family had to give two fifth of their crop to foreigners, Philippines was forced to amend its constitution and so on. Later, it will be shown how western lawyers followed these traditions and defended the protection of foreign property under rules born out of such traditions.

Even if one were to agree that the theory of the protection of foreigners' property was a recognized principle in customary international law and that it was very close to the Western legal concept of "civilization",[7] the question still arises whether in the very primitive regions of Asia or Africa did it crystallize into body of legal principles? Where was the "due process of law"? And in case of any infringement of the law or improper implementation of such law within local authorities where was a legal appelant body? The requirement of "due process of law" entails the converse concept of "denial of justice", which subsumes all kinds of procedural improprieties including personal incompetence of members of appelant body (local courts).[8]

---

7 B.V.A.Rolling, International Law in an Expanded World (New York, 1960), pp.50-51.

8 Ko Swan Sik, The Concept of Acquired Right in International Law (Netherland, 1977), p.126.

In our opinion the capitulation treaties can not be a legal basis for the so-called principles governing protection of foreigners' property within the framework of "customary international law". As many doctrines in hand and social sciences lose their validity and relevance with the passage of time and circumstances and new theories take their place international law too has to search for new doctrines, new theoretical bases for the protection of foreign investment. Every legal system, be it national or international, strives to achieve social justice. Protection of "property" cannot thus escape the demands of justice. Property could belong to natural or legal persons. But it is protected by the state (under certain law) and so also its distribution in the interest of "social justice" whereby the beneficiaries are not the individuals but the society.

The law governing state responsibility similarly strives to benefit international society as a whole, even, at times, at the expense of Member States. Therefore whenever questions of nationalisation or expropriation arise it is the responsibility of state to recognize the priorities of the state either in its own society or within international society. There are different views on this issue.[9] In the following pages such

---

9 Rosalyn Higgins, The Development of International Law Through the Political Organs of United Nations (London, 1963), p.56.

views on expropriation and nationalization, also considered by the Tribunal in different cases, will be examined.

The Doctrine:

The second issue which the Tribunal dealt with was expropriation of foreigners' property during the disturbed period of Islamic Revolution in Iran. In different cases the Tribunal blandly interpreted the rules of expropriation, contending that certain properties of foreigners in Iran were expropriated and therefore Iran had to compensate those foreigners on the basis of customary international law.

As seen in the previous part, customary international law so interpreted conforms to the discarded and irrelevant doctrine based on "capitulation treaties". The treaties, it was noted, allegedly gave rise to international custom under which the property of foreigners in the captured territories were protected not by law but by force. Such theory cannot be applicable to the present international legal duties of states and therefore it can not be referred to as either a principle or a generally accepted principle of international law.

If a state takes action which results in the expropriation of property the said act is within the discretion of a sovereign state. The state has the power to expropriate and confiscate. In principle every state is free to organise its own social and economic system. This unrestricted freedom is

the result of the struggle of the people and it falls within the internal jurisdiction of the state. In the words of Garcia Amador,

> Traditionally this right has been regarded as a discretionary power inherent in the sovereignty and jurisdiction which the state exercises over all persons and things in its territory or in the socalled right of "self preservation" which allows it, inter alia, to further the welfare and economic progress of its population.

The sanction behind the government's exercise of such right can be additionally traced to the will and interest of the people. "Public interest" is therefore the determining factor of a lawful exercise of expropriation. Thus the responsibilities of every state include the discharge of sovereignty over property within its jurisdiction. This right has come to be recognized in modern state practice as permanent sovereignty over natural resources.[10] The United Nations General Assembly has repeatedly recognized this right in various resolutions. Article 2 of the Declaration on the Establishment of a New International Economic Order, and Charter of Economic Rights and Duties of States adopted by General Assembly in 1974, also reiterated this right.

---

10 A.A.Fatours in Friedmann and Pugh, Legal Aspect of Foreign Investment (London, 1953), pp.780-81.

The right of expropriation has been recognized on a right of the state since long ago. Mann in his authoritative article[11] points out that since about 13th century it had been accepted that expropriation presupposed the existence of a "just cause". Wagner also is of the opinion that:

> The right of expropriation is the right of the state to seize a specific object of property without the consent of the owner in order to employ it in a manner demanded by the public interest; or to limit the property right of the proprietor in order to place a servitude (easement) upon it, or to take the use of it in the public interest.[12]

Von Ihering is also of the same opinion that expropriation contains the solution of the task of reconciling the interest of society with those of individuals. It makes property an institution fit to survive. Without the condition of expropriation property could become a curse of society.[13] Richard Ely goes even further and considers that expropriation is part and parcel of the evolution of law and one reason why it is not better treated in the law books is because the idea of the evolution of law has so slowly made its way among legal

---

11 Outline of a History of Expropriation, Law Quarterly Review (London), vol.75 (1959), p.188.

12 Quoted in Richard T. Ely, Property and Contact in Their Relation to the Distribution of Wealth, (New York, 1914), vol.2, p.492.

13 Quoted in Ely, Ibid., p.496.

authorities that many of them have not yet fully grasped it.[14]

Friedmann also belongs to the same school of international lawyers which believes that expropriation is the procedure by which a state in time of peace and for reasons of public utility appropriates a private property right, and places it at the disposal of its public.

Public purpose, direct or indirect, as the basis of expropriation is common to all kinds of taking such as "expropriation", "nationalization", "regulation", and even "confiscation". This dissertation does not enter into the semantics of terminology but seeks to emphasise the point that "taking" in whatsoever manner is the right of the state and it is not against general principles of international law. According to Rosalyn Higgins, "during the inter-war period many legal authorities argued that a state could only take the property of aliens for reasons of "true public necessity"; but later it came to be recognized that it is the taking government which judges the public purpose or utility of a particular wealth deprivation.

Two observations can be made with certainty. First, even in its most moderate form, the public "utility" or public

---

14 Ely, n.12, p.496.

"interest" requirement implies that the taking of foreign property must be in the "public" (socio-economic) interest, and that taking for purely individual or pronounced minority (ruling class) interests is considered prohibited. Secondly, the public utility pursued must be of a "economic", not of a purely or even predominently "political" nature.[15]

Latin American state practice has given a definite push to the evolution of the doctrine of state responsibility which clearly recognizes certain principles, among which are (a) the principle of absolute equality before the law between nationals and foreigners (b) the exclusive subjection of foreigners and their property to the laws and juridical regimes of the state in which they reside or invest; and (c) strict abstention from interference by other governments, notably the governments of the states of which the foreigners are nationals in disputes arising over the treatment of foreigners or their property. These principles which were known as the "Calvo doctrine" has been incorporated in numerous Latin American constitutions, treaties, and investment contracts. Thus the constitution of Peru provides:

> Commercial companies, national or foreign, are subject without restrictions. In the laws of the Republic. In every state contract

---

15 Wil. D. Verwey and Nico J. Schrijver, The Taking of Foreign Property Under International Law (Groningen, 1984) p.13.

> with foreigners, or in the concessions which grant them in the latter's favour, it must be expressly stated that they will submit to the laws and courts of the Republic and renounce all diplomatic claims.(16)

United Nations Resolution And the Question of Expropriation

Besides lawyers and scholars the United Nations General Assembly has also recognized the fact that each state has the right to expropriate foreign properties as part of its right of sovereignty. Apart from the two most important ones, namely GA Res - 1803 (XVII) and 3281 (XXIX), some eighteen other resolutions reiterate this right.[17]

There are certain points in the said UN resolutions which deserve consideration: (1) the principle of economic self-determination of states, nations, and peoples (2) the right of nations to (economic) development; and above all (3) the principle of (permanent) sovereignty of states, nations, and peoples over their natural wealth and resources (and

---

16 Constitution of the Republic of Doru 1939, Art.17.

17 The relevant resolutions are: GA Res.523(VI), 626(VII), 824(IX), 837(IX), 1314(XIII), 1515(XV), 1803(XVII), 2158(XXI), 2386(XXIII), 2542(XXV), 2626(XXV), 2692(XXV), 3016(XXVII), 3041(XXVII), 3171(XXVIII), 3175(XXVIII), 3185(XXVIII), 3201(S-VI), 3202(S-VI) and 3281(XXIX).

other economic activities). Economic self-determination has been expressed, accordingly, as the subject-matter of a basic principle and subsequently as a basic right of states in 'UN resolutions. The realization of political independence was considered to depend on the achievement of economic self-determination.

One of the most important documents of the UN in respect of economic self-determination is the resolution passed by General Assembly (in 1951) which stated:[18]

> That the under-developed countries have the right to determine freely the use of their natural resources and that they must utilize such resources in order to be in better position to further the realization of their plans of economic development in accordance with their national interests.

After about thirty years a link was established between the principle/right of <u>economic self determination</u> and the <u>development process.</u> This link became relevant by the subsequent recognition of "development" as the subject-matter of a right of individuals and nations, when the Assembly, at the initiative of the UN Commission on Human Rights, stated that:

> the right of "development" is a "human right" and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations.

---

18 GA Res.523.

In a resolution adopted on 15 October 1980 the General Assembly requested the United Nations Institute for Training and Research (UNITAR) to prepare a list of the existing and evolving principles and norms of international law relating to the new international economic order. This list is contained in a report of the Secretary-General which was submitted in December 1981. One of the topics included in this list was "industrialisation". This topic has been further classified to include the following:

1. Full permanent sovereignty of every state over its natural wealth and resources;

2. Treatment of foreign enterprises, including Transnational Corporations; and

3. Right of states to expropriate, nationalise or otherwise transfer ownership or control of property in their territory, with payment of appropriate compensation.

The Brandt Commission report which has a chapter entitled "Transnational Corporation Investment and Sharing of Technology" also explicitly recognizes that sovereign states have the right to nationalise investments, including foreign investments.

On the basis of the above legal developments one should reject the Tribunal's view on expropriation, nationalisation or taking of foreigners' property. As observed, the Tribunal's opinion that "expropriation" or nationalisation or a taking was against the general principles of international law was inaccurate. It runs counter to the overwhelming opinion of lawyers and relevant UN resolutions.

It is easily seen that UN resolutions depart from the Western approach of minimum standard of civilization and recognize the fact that each state has sovereignty over its wealth and natural resources. Many western lawyers, like the UN resolutions, have come to recognize the fact that neither "expropriation" nor "nationalization" are against international law, and that nationalization or expropriation of foreigners' property is within the sovereignty of states and every state has the right to control its wealth and its natural resources. Expropriation or nationalisation or taking of foreigners' property are within the jurisdiction of state sovereignty and it is not an unlawful act, provided that such expropriation or nationalisation is done through a proper legislative action for public purpose, is non-discriminatory and is followed by some compensation.

How expropriation or nationalisation is a sovereign prerogative will be pursued in the next chapter. Admittedly, one can not see the problem in isolation. A gamut of principles are involved in the consideration of the problem of expropriation and in determining the responsibility of states for injuries to aliens, such as permanent sovereignty over natural resources, public interest, human rights, and diplomatic protection. All these principles are intertwined and present knotty problems. That was the brunt of this chapter.

Chapter - III

COMPENSATION

Chapter-III

COMPENSATION

As observed, the principle of sovereignty ensures for every state the right to expropriate foreigners' property, provided such expropriation is effected under the state law. Since the territorial jurisdiction of a state entitles it to transfer ownership rights in favour of the state, it follows that through such an act the state can create certain obligations on itself in order to enjoy the right of ownership over the property taken. Without any exception, under every municipal law when a title of ownership is transferred from one legal or natural person to another certain obligations can be undertaken by both of them in relation to third parties. In the case of expropriation, the third party under consideration is the society, whereas for the owner of the property taken it is the shareholders or his family members. Here is the point of conflict in international law and municipal law. Under municipal law even in the most primitive societies, the right of ownership can be transfered only on a certain consideration. The stand of the developing countries on the issues of expropriation/compensation could be understood only if this legal nuance is appreciated. The developed world believes that the expropriating state is obliged to pay compensation, which, in other words, means that no ownership transfer could be effected without consideration.

When slavery was abolished in the United States as a result of civil war no compensation was paid to nationals or foreigners, in respect of previously existing property rights over slaves. Similarly in 1789 the French decrees abolished the feudal system without indemnity. Giving these examples, Seymour Rubin observes that the principle that the interest of the community or the state in a new economic or social order may justify the taking or abolition of private property rights without compensation is one of possibly wide and certainly important application in the modern world.[1] Non-payment of compensation is sometimes justified on the following grounds: (1) when it would be inequitable in circumstances of the case to pay any compensation, (2) in view of the non-existence of any customary rule of international law obliging payment of compensation or (3) lack of treaty obligation to pay compensation.

Christie[2] states that between 1960 to 1974 some eight hundred and seventy-five (875) take overs or nationalizations took place in sixty-two countries affecting nine hundred and forty-five investors. Nationalization on this scale of foreign

---

1 S.J.Rubin, Private Foreign Investment : Legal and Economic Realities (Baltimore, 1956), p.37.

2 What constitutes a Taking of property under International Law, British Yearbook of International Law, vol.38 (1962), p.316.

enterprises or property once again reaffirm the sovereign right of states to nationalise or expropriate foreign property. It also indicates an economic unstability in the world and in the relation between developing nations and developed nations. What are the causes of such nationalisation by poor nations.

The industrially advanced nations have a common faith in economics and identical values, interests and institutions. They also have a common goal of attaining safety of foreign investments made by them in the colonies and under-developed countries. This made it necessary to spread a European standard of civilization which eventually gave birth to an international law of "civilized" nations. As mentioned earlier, during the colonial period many nations had no voice in the development of the principles of international law which were founded entirely on the needs of European business civilization The colonial powers did not hesitate to use force to exact 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. In this way the seeds of state responsibility towards aliens were sown. The doctrine of responsibility of states was a legal instrument to serve and protect the interests of Western business operations.

Secondly, during 1960 to 1974 many new states of Asia,

and Africa emerged. These new states almost during the last sixty years have been demanding an equitable distribution of wealth. This demand, coupled with the political demand of self determination, has been the consequence of social unrest in their societies. National political parties had no option but to demand socio-political equality on the international level. When these states were admitted in international organizations the first demand of the people from their Governments was the right to nationalise foreign property.

Thirdly, the voting structure of the international financial institutions is patently unjust, in which out of the one hundred and twenty-seven members, one hundred and eight have less than one percent of votes, and seventy-five have less than one-half of one percent, while the richest countries have sixty-three percent of the total voting strength and the poor countries taken together only twenty-five percent. This unhappy situation needed to be rectified. There are also problems for the establishment of the common fund to facilitate buffer stocks of selected commodities, elimination of restrictive trade practices and questions concerning the code of conduct on transfer of technology to the poor countries, code of conduct on multinational corporations. These problems are responsible for the social unrest in international society. The traditional formula is unrealistic not only because the standards it lays down are incapable of achievement in a great many situations

but also because it does not correspond to the needs of newly independent developing states which represent more than two thirds of the world's populations. It is obvious that the classic formula fails to protect the economic interests of these countries and does not help them achieve economic independence.

It is against this socio-economic setting that the question of compensation for expropriated property needs to be examined.

The word "compensation" is derived from the Latin ND verb "compensare" and according to Murray's New English Dictionary it is defined as "counter-balance, rendering of an equivalent requital, recompense."[3] It is widely recognized that a state can expropriate alien property as a matter of sovereign right. However, this right generally can be exercised only subject to payment of compensation. There is controversy on the quantum of compensation payable. Under international law there is no generally accepted formula for the payment or non-payment of compensation. In the absence of such acceptable formula, the concepts of expropriation, nationalisation, or depreviation etc. continue to agitate international lawyers. In fact the New International Economic Order, Charter

---

3 C.C.Hyde, "Compensation for Expropriation" American Journal of International Law, vol.33 (1939), p.110.

of Economic Rights and Duties of States, Diplomatic protection of Aliens, the local remedies rule, the Calvo clause, denial of justice and many other formulae have rendered the question of payment of compensation extremely complex. Payment of compensation to aliens for expropriation of their property is supported on the basis of the theory of "vested rights" "unjust enrichment", "abuse of right", "good faith" and "international minimum standard of treatment of aliens". Judge Levi Carneiro in his dissenting opinion in the Anglo-Iranian Oil Co. case gave the following interesting reason for payment of compensation when any property is expropriated:

> Where damage has been suffered by a member of the community in the interest of latter it would be unjust that, that member alone should bear the full burden of the sacrifice.[4]

However, one need not share the view of Judge Corneiro because the expropriating government acts in its capacity of a guardian of the state to protect the rights and economic well-being of its citizens.

One of the doctrines advanced to defend payment of compensation is the doctrine of acquired rights. According to this doctrine, a state must respect the rights of aliens which

---

4 ICJ Reports 1952, p.162.

were "lawfully" acquired by them under the municipal law. This doctrine as the basis of compensation has come to be seriously challenged in recent years. Arechaga, a member of the sub-committee on state responsibility set up by the International Law Commission, is of the opinion that the principle of acquired rights did not enjoy the degree of generality required to constitute a rule of international law.[5] Under this doctrine foreign investors claim that: (i) certain rights have been created in favour of a foreigner under some agreement or treaty therefore their investment should be protected. (ii) Certain rights available to a foreigner under the municipal law of the concerned state at a time he enters into that state need not be universal. (iii) Rights acquired under predecessor state cannot be changed by the successor state. An important element of this doctrine is normally misunderstood or forgotten by the champions of this doctrine. Categories (ii) and (iii) are governed by municipal law; and the state which provides residence permits or business permits in its territory is in the position to enforce its sovereignty by law. A foreigner who is subject to such law is aware of all these factors and when permission to

---

5 Yearbook of International Law Commission, (New York, 1963), vol.i, p.241.

enter or to reside in the territory is granted to him, he knows the limitations or restrictions existing or that can arise restricting his business or residence. Here presence of treaties of amity or existence of certain clauses in the law protecting foreigner's investment cannot change such awareness. Thus when a foreigner pays social security tax or insures his investment against social or political risk he is aware of his action and consequences of his business. It is this awareness of the political, social and economic conditions in the host country that impel most business firms to insure their investment by insurance companies. Under such insurance agreements there are certain clauses in which nationalisation or acts of host government in the exercise of its sovereign authority is stipulated. Thus Feigel asserts that the maxim of vested rights has no binding force on the legislator.[6] Professor R.P.Anand[7] has discussed in detail the practices used by the colonial powers in obtaining privileges for themselves by questionable means. We shall study different modes of such questionable means, by which the role of municipal law has not been treated properly.

---

6 Isi. Feighel, Nationalization (Copenhagen, 1957), p.154.

7 R.P.Anand, New States and International Law (New Delhi, 1972).

Among these is the theory of adequate, prompt and effective compensation. This theory was evolved during nineteenth century and was accepted in the inter-war period. Early reference to the formula is contained in Secretary of State Hull's note of 22 August 1938 to the Mexican Government.[8] While recognizing the right of a sovereign state to expropriate property for public purposes, the note emphasized that the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The adequate prompt and effective compensation formula which apparently appears to be simple, has given rise to endless controversy. This formula continues to be relied upon largely by the developed countries of the West. The three elements of this formula may be considered individually in some detail.

The term "adequate" has been used in practice interchangeably with "full", "just", "fair", "appropriate" and "reasonable" compensation. According to international juridical practice "full" compensation is the market value of the expropriated property.[9] According to a draft convention

---

8 M. Whiteman, Digest of International Law, vol.8 (Washington, D.C., 1967), p.1160.

9 G.Schwarzenberger, Foreign Investment and International Law (London, 1969), p.10.

prepared at its thirty seventh session of the International Law Association, expropriation was admissible only if compensation was paid "before" the time of dispossession and was full and complete.[10] Article III of the Abe Shawcross Draft Convention calls for payment of just and effective compensation. To be just, compensation must be determined at or prior to the time of deprivation of the property and represent its genuine value.[11] Article 25, of the Economic Agreement of Bogata, signed at the Ninth International Conference of American States (1948) provides:

> Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner.[12]

Article 10(2a) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) envisages just compensation in terms of the fair market value of the property, if no fair market exists. Section 187 of the Restatement of the Law by American Law Institute defines just compensation as (a) adequate in amount (b) paid with reasonable promptness and (c) paid in

---

10 G.Schwarzenberger, n.9, p.11.

11 International American Conference, Second Supplement 1945-1954, p.170.

12 Ibid., p.55.

a form that is effectively realisable by the alien, to the fullest extent that the circumstances permit.[13]

The debate on the draft resolution of the Commission on Permanent Sovereignty over Natural Wealth and Resources threws interesting light on the question of compensation. Paragraph 4 of Resolution 1803 (XVII) adopted by the General Assembly on 14 December 1962 provides that in cases of nationalisation, 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 the controversy, the national jurisdiction of the State taking such measures shall be exhausted."

It is interesting to note that during the debate the term "appropriate compensation" came to be interpreted differently by different groups of states. Afghanistan and the United Arab Republic favoured another expression "adequate compensation when and where appropriate".[14] The representative of the United States of America stated that in the context

---

13 American Law Institute, Restatement of the Law, Second, Foreign Relation Law of the United States (St.Paul, 1965), p.563.

14 UN Doc.A/AC.97/L.7(1962).

of paragraph 4 of the draft, "appropriate compensation could only mean prompt, adequate and effective compensation".[15]

The General Assembly resolution referred to above attracted comments from several publicists. For instance Metzger expressed the following view:[16]

> After the 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 things as "prompt, adequate and effective compensation", this could hardly be convincing in view of the negotiating and voting history of the resolution.

It became quite apparent in the above debate that the developing countries wanted modification of the traditional international law in the light of their financial situation and difficulties which they considered were not of their own making. The developing countries have constantly emphasized that insistence on strict compliance with the orthodox standards of compensation would thwart their efforts to carry out badly needed social and economic reforms. A large

---

15 UN Doc. A/C.2/ SR.859, p.11.

16 S.D.Metzger, "Private Foreign Investment and International Organization" (Boston, 1966) vol.22, pp.296-297.

number of lumpsum agreements arrived at on the basis of partial compensation indicate the emergence of realistic trends consistent with changing conditions. A number of lawyers have expressed support for the view that the ability of an expropriating state to pay should be taken into consideration. Dawson and Weston observe as follows:

> To assert as do some that states lacking sufficient gold resources, foreign exchange, or other financial resources should not undertake social and economic reforms is both unrealistic and patronizing.(17)

In certain judicial and arbitral cases such terms as "in due time", "as quickly as possible" and "a reasonable period" have been used to indicate the deferred time of payment of compensation. These terms do not necessarily mean immediate payment of compensation nor that it is necessary "in equity". According to Schwarzenberger prompt compensation means compensation after reasonable interval of discussions on all relevant aspects of the expropriation including the market value of the property concerned.

Rosalyn Higgins observes that the requirement of promptness is imprecise and has to be interpreted in the light of the facts. She points out that international

---

17 Weston and Dawson, Fordran Law Review, vol.30, (1961-1962), p.730.

tribunals have declined to interpret it to mean prior to or before the actual act of expropriation.[18]

Weston asserts that customary international law has never required anything like "prompt" compensation. Practice of states is also not uniform or consistent on this question. Solutions have considerably varied depending upon the circumstances of each case.[19] Thus the Special Rapporteur of the International Law Commission on State Responsibility 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 expropriating state's resources and actual capacity to pay. Even in the case of "partial" compensation, very few states have in practice been in a sufficiently strong economic and financial position to be able to pay the agreed compensation immediately in full.

France and Great Britain paid compensation in the form of bonds, redeemable over a number of years when those countries nationalized banks, airlines, insurance companies, transportation and steel industries. This formula was

---

18 Quoted in F.A.Mann, "Outlines of a History of Expropriation", Law Quarterly Review, vol.75(1959), p.195.

19 B.H.Weston, "Prompt, Adequate and Effective : A Universal Standard of Compensation", Fardham Law Review, vol.30, (1961-1962).

accepted by the affected states, such as Switzerland, the United States of America and Belgium.[20]

Article 3 of the Treaty between the Swiss Confederation and the Tunisian Republic concerning the protection and encouragement of capital investment concluded in 1961 specifically provides for the payment of an effective and adequate indemnity, which must be fixed at the time of expropriation, nationalisation or dispossession, and will be paid over without unjustified delay to the entitled party. The amount of such indemnity will be transferred in a reasonable time.[21]

During the last twenty years different methods of compensation were adopted by a number of countries, illustrations of which were:

Under Ugandan Decree No.27 the compensation payable was spread over such period as the Minister shall determine, having regard to the period within which the said assets may generate sufficient income to offset the amount of compensation payable. In this case until the Minister had notified

---

20 Yearbook of International Law Commission, vol.2, 1963, p.238.

21 International Legal Materials, vol.3, p.524.

his decision, appeal to the High Court could not be made. At least theoretically it was quite possible that the Minister might take very long to give his decision or might not give any decision at all in which case compensation would become illusory.

In an agreement signed on 11 May 1979 between the People's Republic of China and the United States, it was agreed that the amount of $ 80.5 million shall be paid as full and final settlement of the claims of the United States and its nationals which included claims arising from nationalisation, expropriation and other takings. The agreement envisaged $ 30 million to be paid in October 1979 and the balance in five annual instalments.

Article 7 of the Libyan Law nationalising the interests of British Petroleum Co. (Libya) in the oil concession, envisaged a Committee to determine compensation but did not lay down any time limit for establishing such a committee.

A Burmese Notification No.277 regarding the payment of compensation for national and foreign owned enterprises nationalized under the Business Nationalization Law of 1963, and the Socialist Economic System Establishment Law of 1965 was issued on 7 December 1973, after ten years of the nationalization. The Notification provides for the following mode of compensation:

(1) Compensation not exceeding kyats 10,000 will be paid in a lumpsum.

(2) A sum of K. 10,000 will be paid as the first instalment in respect of compensation exceeding K. 10,000.

(3) The balance will be given in the form of Government Security Bonds, of which five percent of the balance of K. 10,000 whichever is more, will be encashable every year after payment of the first instalment.

(4) These Government Security Bonds will be issued on the day the first instalment is paid.

(5) Such Government Security Bonds will not bear any interest.[22]

A question is often raised whether title to the property passes immediately upon expropriation. Further, if compensation on an instalment basis is considered permissible, at what point does title pass to the expropriating state? According to the Sohn-Baxter Draft Convention title passed at the time a reasonable portion of compensation was paid and bonds were tendered for the remainder bearing a reasonable rate of interest.

But the above view is not acceptable any more. Typical of the reasons given for refusing to interfere in

---

22 The Working People's Daily, Rangoon, 7 December 1973.

such cases was given by the Breman Court of Appeals:

> In showing proper respect for foreign Acts of state, new tensions between nations will be avoided and the economic adjustment will be better achieved from state to state and through mutual assistance between the states than through intensive interference of national courts on a large scale.(23)

Yet another question relating to non-payment of compensation within a reasonable time is whether any interest is payable till compensation has been paid, and if so, the point of time when such interest starts accruing to the affected party, that is the date on which property was expropriated or the date when compensation was assessed. On this issue there is no consistent practice nor an established principle of international law.

The Sohn-Baxter Draft Convention under Article 10(4c) provides that bonds equal in fair market value to the remainder of the compensation and bearing a reasonable rate of interest are to be given to the alien. The practice of the Foreign Claims Settlement Commission of the United States is to compensate the claimant in terms of interest" for the loss of the use of the compensation he was entitled

---

1 American Journal of International Law (New York), vol.54, 1960, p.314.

to receive on the date the property was taken from the date of taking to the date of payment", by the nationalizing government.[24]

The Mexican-United States Settlement on expropriation of oil by Mexico provided 3 percent interest on the compensation.[25] Compensation agreements between Sri Lanka and Caltex, ESSO and Shell signed in 1965, provided that:

> As from the date of the signature of this Agreement simple interest on the unpaid balance of the instalments shall accrue at the rate of three percentum per annum and shall become due and payable on the dates the instalment payments are due.(26)

However, in the recent past in a number of cases no interest was paid. Thus the United Arab Republic did not pay any interest on the compensation it gave to Shell Co. of U.K. nationalised by the former on 25 March 1964.[27]

The Burmese example has already been given where the government security bonds did not bear any interest. Article 1 of the Supreme Decree setting terms for indemnity

---

24 R.B.Lillich, The Valuation of Nationalized Property in International Law, vol.1, p.100.

25 Gillian White, Nationalisation of Foreign Property, 1961, p.12.

26 International Legal Material, vol.4, 1965, p.1076.

27 Africa Research Bulletin, 15 June 1966, p.563.

for nationalisation of the Bolvian Gulf Oil Company by Bolivia specifically states that the deferred payment shall not earn any interest. A preambular paragraph of this Decree also mentions that the payment of interest on the amount of the indemnification is detrimental for the economy of the state.[28]

Article 4 of the recent agreement on the settlement of claims between the United States and Hungary contemplates lumpsum payment in instalments but there is no mention of any interest to be paid.[29] Similarly Article 8 of Venezuela's Natural Gas Nationalization Act of 1971 makes provision for compensation, payment of which cannot be deferred beyond ten years, but it is silent on payment of interest.[30]

The above examples indicates that there is no general rule on payment of interest in cases of deferred payment of compensation.

By effective compensation is meant compensation which could be readily used by the alien to his benefit. Thus, payment of compensation in the currency of the

---

28 Supreme Decree No.09381 of 10 Sept. 1970. International Legal Material, vol.10, 1971, p.183.

29 International Legal Materials, vol.12, 1973, p.407.

30 International Legal Materials, vol.11, 1972, p.181.

expropriating state is not considered effective if the claimant has no possibility of investing it there. According to Schwarzenberger, what is effective compensation depends on the uses the claimant desires to make of the compensation granted.[31] This definition is not correct where the claimant can make use of it even if it is not necessarily according to his choice. According to Kronfol "effectiveness" usually refers to the precise form of indemnity and especially to the possibility of its immediate utilization by the recipient.

Thus, it would be seen that the question of "effective" compensation is largely related to the currency in which such compensation is paid. Compensation may be paid in (a) nationalising state's currency (b) currency of the state of claimant; and (c) convertible currency of a third state. According to Foigel since compensation is aimed at ensuring that claimant's financial position remains unaffected by the nationalisation, the payment ought to be made in the currency of the state in which the nationalised property was situated at the time of nationalisation.[32] Another opinion is that

---

31 Schwarzenberger, n.9,p.11.

32 Foigel, n.6, p.122.

where investment is possible in the nationalizing state in conditions comparable to investment elsewhere, it is suggested by Amerasighe that payment may be made in the currency of the nationalising or expropriating state or in securities.[33]

The objecting opinion in this regard is that just as an alien cannot remove his investment whenever he pleases, he can not repatriate compensation received by him. He can only remit the interest on his compensation on the analogy of profits on investment.[34] In order to sum up this discussion one may point out the opinion of Rosalyn Higgins which is that "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.

Many expropriating states have problems of foreign exchange particularly during political and social upheavals when foreign currency is needed to establish basic industries or effect agriculture reforms, etc. In order to save the expropriating state from payment difficulties, particularly relating to foreign exchange, it is not uncommon to link

---

33. Amerasinghe, State Responsibility for Injuries to Aliens, (Oxford, 1969), p.162.

34. Ibid., p.162.

compensation agreements with trade agreements. Thus, by an agreement of 1948 France agreed to accept specified quantities of Polish coal over a number of years in lieu of compensation.[35] An agreement of 25 November 1977 between Trunco/Calasiatic and Libya provided for payment of compensation for nationalization of oil concessions in the form of crude oil worth $ 152 million.[36] Commenting on agreements providing for compensation in kind Gillian White states:

> These agreements are exceptional and are undoubtedly the result of particular circumstances and considerations of expediency rather than considerations of international law. However, there is nothing in international law to prevent states from entering into such agreements. It does not stipulate that compensation should always be in the form of money.(37)

Having discussed the different aspects of the Western formula of adequate, prompt and effective it is to be noted here that, this traditional formula is unrealistic not only because the standards it lays down are incapable of achievement in a great many situations but also because it does not correspond to the needs of newly independent

---

35 Dawson and Weston, International Law: National Tribunals and the Rights of Aliens (New York, 1971), pp.205-206.

36 American Journal of International Law, vol.75, (1981), p.546.

37 White, Nationalisation of Foreign Property (London, 1961), p.206.

developing states which represent more than two-thirds of world population.[38] It is obvious that the classical formula fails to protect the economic interests of these countries and does not help them achieve economic independence. The main targets of the expropriation measures are usually concessions and investments which were obtained by offering certain undue considerations or privileges or those obtained under duress, coercion or ignorance of governments. Such contracts, agreements, treaties and concessions donot deserve protection under international law. However, the cases of expropriation of post-independence investments may be expected to receive better treatment by the host states because investments are made with the free will of the newly independent states.

---

38 American Journal of International Law, vol.59 (1965), p.69.

Chapter - IV

RECENT DEVELOPMENTS

Chapter - IV

RECENT DEVELOPMENTS

S.C.Jain in his book[1] has elaborately discussed the developments in regard to expropriation/compensation within the framework of "North-South Dialogue". According to Jain Resolution 1803 (XVII) which was adapted by the United Nations General Assembly in 1962 and which provoked considerable discussion, the problem of compensation for nationalization has again figured in a big way in the United Nations Conference on Trade and Development (UNCTAD) and the General Assembly in the context of permanent sovereignty of states over their natural resources, as well as in the context of the new international economic order.

At the twelfth session of the UNCTAD Trade and Development Board, held in 1972, Chile drew attention to the fact that the Kennecot copper company, an American Corporation nationalized by it, had asked a French court in Paris to block payment to a Chilean state organisation called "Codelco" for copper shipped to French buyers.[2] The representative of Chile pointed out that the Kennecot

---

1 S.C.Jain, Nationalisation of Foreign Property, (New Delhi, 1983), pp.140-146.

2 UNCTAD Trade and Development Board Official Records Twelfth Sess., p.35. TD/B/SR.317.

Copper Company had petitioned to a court in a country with different legal principles regarding nationalization and compensation and that court had granted a provisional order. He described these actions as flagrant violations of both international law and the principles of non-intervention and self-determination of peoples as setforth in the Charter of United Nations. Chile was supported by eight Latin American countries which declared that "expropriation" and subsequent nationalization of natural resources are acts of undeniable sovereignty within the exclusive competence and subject to the sole decision of the state in which the resources are situated, in confirmity with its national Constitution, laws and regulations.[3] Thereafter, eleven Latin American countries submitted a draft resolution[4] reaffirming in its preambular paragraphs the sovereignty of every country to dispose of its natural resources for the benefit of its development in confirmity with the principles of the Charter of the United Nations, with the recommendations of the General Assembly,[5] and UNCTAD in accordance with the

---

3 UNCTAD Doc. TD/B/SR.330, p.108.

4 Ibid., TD/B/L.299.

5 General Assembly Resolution 523(VI), 626(VII), 1515(XV), 1803(XVII) and 2158(XXI). Subsequently, The General Assembly adopted unanimously Resolution 3016(XXVII) of 18 December 1972 on the same subject.

relevant provisions of the international development strategy[6] and the Covenants of Human Rights.[7]

The representative of Ghana, speaking on behalf of the African countries members of the Board, referred to the Organization of African Unity (OAU) resolution 245(XVII) which had reaffirmed that the exploitation of natural resources in each country should always be conducted in accordance with its national laws and regulations.

The representative of the United States of America, on the other hand, stated that the purpose of the draft resolution appeared to be to eliminate all standards of compensation applicable in cases of expropriation.[8] He and a few others expressed the view that the draft resolution departed from paragraph 4 of resolution 1803 (XVII). This was disputed by the sponsors of the draft resolution. However, to accomodate the view point of those who saw a conflict between the proposed draft resolution and Resolution 1803,

---

6 UNCTAD Conf., 1st Sess., General Principle III (E/CONF.46/141, vol.1, annex A.1.1) and UNCTAD Conf. 3rd Sess., Res.46, operative para 1, Principle 11 (TD/111/Misc.3).

7 Article 1 of International Covenant on Economic, Social and Cultural Rights as well as International Covenant on Civil and Political Rights. Both these Covenants entered into force on 3 January 1976 and 23 March 1976 respectively.

8 Note 168 UNCTAD Doc. SD/B/SR. 335, p.243.

the sponsors agreed to add at the end of the operative paragraph 2 the words "without prejudice to what is set forth in General Assembly resolution 1803(XVII)." Castaneda of Mexico explained the concepts contained in paragraph 2 of the draft resolution, viz. (1) the sovereign power of states to adopt measures of expropriation or nationalization, (2) the right of each state to fix the amount of compensation and the procedure for such measures of expropriation, and (3) where the question of compensation gave rise to a controversy. The national jurisdiction of the state taking the measures had to be exhausted. Recourse to foreign courts could be had only in exceptional circumstances by agreement between the parties as laid down in Resolution 1803(XVII). He claimed that all the above concepts were implicit in the latter resolution.[9] After very long discussion among the member states, paragraph 2 of the resolution concerning the sovereign rights of states freely to dispose of their natural resources was finally adopted by the Trade and Development Board by thirty-nine votes to eighteen with seven abstentions, it states that:

> In the application of the principle, such measures of nationalization as states may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each

---

9 UNCTAD Doc. TD/B/SR.334.

> state to fix the amount of compensation and the procedure for these measures and any dispute which may arise in that connection falls within the sole jurisdiction of its Courts, without prejudice to what is setforth in General Assembly resolution 1803(XVII).(10)

One year later on 17 December 1973, the General Assembly on the recommendation of the Second Committee, adopted resolution 3171(XXVIII) on the same subject. By operative paragraph 3 of the resolution, the General Assembly affirmed that:

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

The Charter of Economic Rights and Duties of State adopted by the United Nation General Assembly on 12 December 1974 is yet another development in the evolution of norms concerning nationalisation or expropriation of alien property. The idea of drawing up such a Charter originated in an address of the President of Mexico, at the ninety-second plenary meeting of the Third session of UNCTAD held

---

10 Res. 88 (XII) on Permanent Sovereignty over Natural Resources, 19 October 1972, UNCTAD Doc. TD/B/421.

at Santiago, Chile, suggesting that international economy should be placed on a firm "legal footing" through a formulation of a Charter of Economic Rights and Duties of States which would define and protect the economic rights of all countries. The representatives of the developing countries, supporting this idea, also expressed the view that the principles had to be converted into internationally binding legal instruments in order to make it possible for the States concerned to invoke their rights. They said that the Charter should be a counterpart in the economic field of the Universal Declaration of Human Rights and the International Covenants on Human Rights. At the same session Resolution 45-III was adopted constituting a working group composed of forty members, to draw up a text of draft Charter.

The working group on the Charter of Economic Rights and Duties of States held four sessions. It was at the third session held at Geneva in 1974 that the process of negotiations on conflicting proposals began. The negotiations continued at the fourth session held at Mexico City in the summer of 1974 and in a consultative group consisting of the representatives of the United States and Canada on the one hand, and the representatives of India, Egypt, and Jamaica, on the other.[11] One category of questions before

---

11 UNCTAD Doc. TD/B(XIV), p.4.

the working group related to the principle of permanent sovereignty over natural resources, the question of foreign investment, nationalisations or expropriation, and the question of limitation of activities of transnational corporations. On all these questions the working group had four alternatives before it.

1. Alternative one represented the basic position of the group of 77.
2. Alternative two was drawn up by Ambassador Brillantes of Philippines in his capacity as Chairman of one of the sub-groups which according to him combined common elements of positions held by various groups.
3. Alternative three was proposed by Australia and Canada as a compromise solution.
4. Alternative four represented the views of group mainly consisting of developed countries (Japan, U.S.A. and Canada and EEC countries).

Alternative 4 contained the traditional prompt adequate, and effective compensation formula which, according to Group B represented an applicable rule of international law subject to which alone a state could nationalise or expropriate natural resources on grounds of "public utility", security or the national interest. It further recognized that all states have the right, subject to the

relevant norms of international law, to regulate foreign investments within their jurisdiction. It required equitable and non-discriminatory treatment of transnational corporations.

Alternative 3 recognised the right of every state to permanent sovereignty over its natural wealth and resources and jurisdiction over foreign persons and property within its territory. It also recognised the inalienable right of every state fully and freely to dispose of those resources "subject to fulfilment in good faith of its international obligation". It made provision for just compensation in case of nationalisation or expropriation of foreign investment and provided for recourse to national jurisdiction in case of controversy over compensation. Alternative 4 did not speak of recourse to national jurisdiction. Alternative 3 made no reference to applicable rules of international law or the requirement of public utility etc. but emphasized respect for "international obligations". The difference in the two approaches was explained by the representative of Canada in the Second Committee of the United Nations General Assembly. He said that the words "international obligations" were used in place of "international law" so as to permit both groups of states to maintain their position.[12] No reference was

---

12 General Assembly Official Records Twenty-ninth sess., A/C.2/SR.1649, p.446.

made to "international law" since it was recognised by him that there was disagreement regarding what principles of customary international law were relevant to the treatment of foreign investment.[13]

Alternative 1 provided for the right of full permanent sovereignty of states over their wealth and natural resources including the right to nationalisation. In the event of nationalisation it provided for the payment of compensation as appropriate in accordance with the domestic law of the nationalising state. Any question of compensation was to be settled by tribunals of such a state. It further provided that no state would demand privileged treatment for its nationals investing abroad.

The category of principles referred to above were finally incorporated in Article 2 of the Charter of Economic Rights and Duties of States which reads as follows:

1. Every state has and shall freely exercise full permanent sovereignty including possession, use and disposal over all its wealth, natural resources and economic activities.

2. Each state has the right:

   (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws

---

13 Ibid., para 48, p.446.

and regulations and in conformity with its national objective and priorities.

(b) No state shall be compelled to grant special treatment to foreign investment.

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

At the request of the Swedish delegation separate votes were taken in the Second Committee on each of the above paragraphs.[14] Paragraph 2(c) of Article 2 secured less number of votes as compared to other paragraphs. The reasons are not difficult to understand. The following are the reasons which do not carry with them any legal objectives but there are certain considerations involved as far as the strategic position and considerations of developing countries

---

14 UN Doc. A/C. 2/SR 1668, p.439, para 20, Art.2, Para 1.

are concerned.

1. Developing countries were afraid that it might discourage foreign investment to attract which some countries had made special provisions by legislations.

2. Developing countries did not wish to give any impression that they were unwilling to respect the obligations which they might have undertaken in connection with foreign investment.

3. Some of the oil-rich countries are already making investments abroad and some would be doing so in near future.

4. These groups of developing countries might have been anxious to safeguard their investments although they could not come out openly against certain provisions of Article 2 of the Charter. It was in 11 February 1976 in Paris that nineteen countries of the Third World and industrialized partners, oil producing countries, most of which have themselves nationalised western oil interests, sought guarantees from the Western countries for their own investments there against non-discriminatory treatment, confiscation of investments and guarantee of appropriate compensation in case of nationalisation.[15]

5. According to estimates of the United States treasury the oil-rich nations might invest $ 64.87 billion in the United States and other Western countries.[16]

---

15 Economic Times (New Delhi) 29 January 1976, p.8.

16 Ibid.

> While we know that the total investment of United States up to 1976 was about $ 29 billion in all the developing countries. That means even today investments of oil-rich countries are about thirty (30%) more than U.S. investments in all the developing countries.

It may, however, be noted that the dialogue or as it may be called "confrontation" between North and South on the above issues has not yet come to an end. There is every possibility that these question will come up again for a discussion and considerations in connection with an item entitled "Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order". A draft resolution was introduced by the Philippines[17] in the Second Committee of the General Assembly at its thirtieth session in connection with agenda item 12 (reports of the Economic and Social Council) which was later approved by it.

At the thirty-first session of the General Assembly a Philippines Working Paper was also circulated in the form of a Draft Convention on the Principles and Norms of International Economic Development Law. Article 7, paragraph 1(c)

---

17 UN Doc. A/C. 2/L. 1474/Rev. 1(1975) and UN Doc. A/31/172(1976); UN Doc. A/10467 (1975), pp.33-34.

of this convention provides that each state has the right:

> to nationalize or expropriate or transfer ownership of foreign owned 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 fair, equitable, and relevant under the circumstances. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by it 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.[18]

In the thirty third session the representative of United States made the following interesting statement:

> Our positions with regard to a New International Economic Order are well known and are unchanged. The concept is a political and economic one in a very early stage of evolution. It is thus premature, in our view, to speak of "legal aspects" in this context.[19]

---

18 UN Doc. A/C. 6/31/1. 7(1976).

19 UN Doc. A/33 PV.86(1979), p.46.

Chapter - V

CONCLUSIONS

Chapter - V

CONCLUSIONS

The traditional principles of international law relating to the protection of foreign property have lost their legal validity in the contemporary world. These principles were introduced by Western developed countries only for the protection of their own properties in the host countries. Furthermore, these principles were based on "capitulation treaties" which made Europeans and their property immune from local jurisdiction. They were created to ensure certain economic advantages in favour of the rich and powerful countries.

It was also observed that most of the newly independent states had demanded the nullification of this principle at the United Nations through the officially organized group of 77. The United Nations General Assembly under various resolutions had recognized the right of states to nationalise or expropriate foreign property. Nationalization or expropriation is recognized as a "right", accruing to every nation under the general right of self determination, and very recently under the right for "development", besides the hallowed principle of permanent sovereignty of states over their natural wealth and resources.

The right of a state to expropriate foreign property can be squarely based on the principle of territorial jurisdiction, under which every state is entitled to exercise its power of nationalisation or expropriation and insist upon the exhaustion of local remedies. This right of the state is, additionally, exercised in the interest of its people or what is known as the "public interest".

The above principles and their bases are generally recognized, but what is disputed by the developing and developed countries is the obligation to pay compensation. In this connection, it must be noted that there are certain cases in which even United States did not pay compensation after its civil war for previously existing property rights over slaves. France also did not pay compensation to feudal lords when French decrees abolished the feudal system. In both cases the expropriation was for the benefit of the society. Debates on the issue of compensation ignore history.

The developed countries are of the opinion that compensation should be prompt, adequate and effective. Developing countries take the position that compensation should be "appropriate". Any division among this group can be attributed to some pragmatic considerations. Some developing states have investment in oil industries in foreign countries. The amount they have invested is about thirty percent more

than the investments of United States in the developing countries. This group of developing states do not share the view with the rest of the developing countries on the question of compensation. There is a second group among the developing countries, which is keen to attract foreign investments, for the development of their societies. This group is unwilling to create uncertainty among investors or scare foreign capital away. Thus even among developing countries one can note shades of emphasis, but none toes the Western line of prompt, effective and adequate formula line.

Since all international law is not codified the norms enunciated by international courts acquire tremendous importance. These decisions in the long run create norms which become generally accepted by states and scholars. Since nationalisation or expropriation is a new phenomena of recent origin a generally accepted doctrine has not yet emerged that can satisfy the needs of all concerned parties. Thus the responsibility of international tribunals to adopt a position which meets the requirements of developing countries and also protect the interests of investors is accentuated. The Iran-U.S. Claims Tribunal seems to have missed the opportunity to contribute to the development of international law in this regard. If one were to re-examine its rulings in the four cases of expropriation decided by the Tribunal, this judgement becomes inevitable.

In the case of AIG v. BIMEH[1] the Tribunal in evaluating the value of the share of the claimant held that:

> The appropriate method was to value the company as a going concern taking into account not only the net book value of its assets but also such elements as goodwill and likely future profitability...

The Tribunal further ruled that:

> neither the effect of the very act of nationalisation should be taken into account nor the effect of events that occurred subsequent to the nationalisation, but rather the valuation should be made on the basis of fair market value of the shares -- in Iran-America at the date of nationalisation ...

In order to determine the value within these limits to which value the compensation should be related it was held:

> The Tribunal will therefore have to make an approximation of that value, taking into account all relevant circumstances in the case ....

In the DAMES and MOORE v. ATOMIC ENERGY[2] judgement the Tribunal's holding could be underlined with the

---

1 American International Group, Inc. and American Insurance Company v. BIMEH Markazi Iran, Case No.2, Award No.93-2-3.

2 Dames & Moore v. The Atomic Energy Organization or Iran, Case No.54, Award No.97-54-3. Emphasis ours.

following excerpts:

> As evidence of the value of the expropriated equipment claimant has submitted material indicating that the original purchase price of all items stored in the warehouse including the one field laboratory was $ 354,924. However, there is no evidence regarding the relationship between the price of each item on the date of purchase and the value in the fall of 1980. Because of this gap in the evidence and difficulties in quantifying the actual amount of damages in this respect with any precision, the Tribunal is justified in estimating such amount. Considering all circumstances, including the age of the equipments the Tribunal decides that approximate value of claimant's expropriated property is US....

In SEA-LAND v. PSO[3] the Tribunal held that:

> On this basis it is left to the Tribunal to assess a level of damages corresponding in equity with the extent to which PSO was enriched. An appropriate level of compensation for PSO's actual use and benefit of the facility during the relevant period will of necessity, be an approximation. In view of scanty evidence submitted in respect of such use and benefit, a fair assessment of compensation for sea-land would seem to be US....

In TIPPETTS, ABBETT v. CAO[4] case the Tribunal held that:

> Claimant in the instant case seeks only the dissolution value of the interest in TAMS-AFFA...

---

3 Sea-Land Service Inc. v. Ports and Shipping Organization. Case No.33, Award No.135-33-1. Emphasis Ours.

4 Tippetts, Abbett McCarthy, Stratton, v. Civil Aviation Organization. Case No.7, Award No.141-7-2. Emphasis ours.

> Thus the task of the Tribunal is to make its best estimate of the assets and liabilities of TAMS-AFFA as of 1 March 1980...
>
> The Tribunal can make only a very rough evaluation of the assets and liabilities involved which evaluation must take with account the uncertainty of the outcome of any final adjudication of the disputes by a competent court ...

The methods of evaluating payment of compensation applied by the Tribunal was thus one of "approximation". There is no norm of approximation under international law for the payment of compensation. Therefore one should be wary of this theory in the future.

There are certain other rulings in these awards which are contradictory to each other. In the AIG case the insurance company was considered as a "going concern" and compensation awarded on the basis of "fair market value" of an insurance company for the shares of which there was no active market. To compound the error, factors such as future profitability were also taken into consideration by the Tribunal.

However in the SEA-LAND case when PSO claimed for the loss of revenues over unloading and storage charges as it had continued its operation at Bandar-Abas, the Tribunal held:

> It is not possible for the Tribunal to ascertain how much of this figure would represent net profit...

Needless to say that calculation of daily operation of unloaded cargos with the help of statistics available at any port including the port of Bandar-Abas could have been an easy task.

The approximation method of determining market value of expropriated property adopted by the Tribunal runs counter to certain recognized and generally accepted methods adopted by other international tribunals. It is quite true that in all valuation, judicial or other, there must be room for individual interpretations and inclinations of judges, which being more or less subjective are difficult to reduce to reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity.[5] The valuation of property whether real or personal involves a process of analysis and synthesis tempered by the judgement which arises from experience.

In order to arrive at an estimate of market value the appraiser may use one or more of three appraisal

---

5 Lord Hobhouse in the Secretary of State of Foreign Affairs v. Charles Worth, Pilling and Co. (1901).

methods, namely: (a) the comparative, or market data approach, (b) the income investment, or economic approach, and (c) the cost, or contractor's approach. These three methods are practical applications of three corresponding economic theories.[6]

(a) In the comparative method, a direct comparison is made between the subject property and other statistical information particularly the sale prices of comparable properties. The open market data approach results in an estimate of the exchange value of the subject property and is based on the economic theory that the value of property is the price for which it would sell in a theoretically free market where the principle of supply and demand operates.

(b) In the income, investment, or economic approach an indirect comparison is made between the subject property and other comparable properties or investment opportunities. The income actually, or hypothetically, derived from the subject property is compared with the income derived from comparable properties or other types of investment. Then the income stream from the subject

---

6 The Law of Expropriation and Compensation Eric C. Todd (Toronto, 1976), pp.150-151.

property is capitalized at a rate derived from an analysis of the real estate investment market. The resultant capitalization is deemed to be the value of the subject. The income approach is based on the economic theory that the value of property is determined by the amount of the future earnings which it will yield.

(c) In the cost approach, sometimes known as the contractor's or quantity survey method, an estimate is made of the current cost of reproducing the existing improvements with those of equal functional utility. The reproduction or replacement cost of the improvements is added to the estimated market value of the property determined by one or both of the comparative or income approaches. The resultant product is the value of the subject property. The cost approach is based on the economic theory that value equals the cost of production or property.

The Tribunal ignored all these economic theories of evaluating property taken. There are other errors which compound the Tribunal's evaluation of property taken, such as interest. The maximum amount of interest paid by the government of Mexico in its famous expropriation cases was only 3 percent. In other cases interest was not calculated in agreements, or atleast the nationalized state did not consider to pay any interest on the nationalized property.

However the Tribunal awarded 10 to 12 percent interest in favour of American companies. These developments in international arbitration, do not promote faith in the future of international law, but only add to the misconceptions about the legal character of international arbitration for the peaceful settlement of disputes.

BIBLIOGRAPHY

SELECT BIBLIOGRAPHY

Primary Sources

Iranian Assets Litigation Reporter.

Award for Expropriation (January-July 1984).
Award Nos.93-2-3, 135-33-1, 97-54-3, 141-7-2.

IRAN-UNITED STATES CLAIMS TRIBUNALS REPORTS

Volume 1 Grotius Publications Limited
(Cambridge, 1983).

International Court of Justice Reports of Judgements, Advisory Opinion and Orders, 1952, 1980, 1981, 1982, 1983.

United Nations Documents

A/C.2/SR.439, 1961.
A/C.2/SR.446, 1961.
A/C.2/SR.859, 1962.
A/C.97/L.7, 1962.
E/CONF/46/141.vol.1,'64.
TD/B/L.229, 1972.
TD/B/L.317, 1972.
TD/B/L.330, 1972.
TD/B/SR.334, 1972.
TD/B/SR.335, 1972.
TD/III/Misc.3, 1972.
TD/XIV/Misc.8, 1974.
A/C.2/L,1474/Rev.1 '75.
A/10467, 1975.
A/31/172, 1976.
A/C.6/31/1.7, 1976.
A/33 PV.86, 1979.

General Assembly Resolutions

523(VI) 12 January 1952.
626(VII)21 December 1952.
824(IX) 11 December 1954.
1515(XV)15 December 1960.
1803(XVII) 14 December'62.
2158(XXI) 25 December '66.
2386(XXIII)19 December'68.
2626(XXV) 24 October 1970.
2692(XXV) 11 December1970.
3016(XXVII)18 December'72.
3171(XXVIII)17 December73.
3201(S-VI) 1 May 1974.

Yearbook of International Law Commission, vol.i,1963.

Secondary Sources

Books:

Allen and Dannithrone, Western Enterprise in Indonesia, (London, 1969).

Amersighe, C.F., State Responsibility for Injuries to Aliens (Oxford, 1967).

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

Baran, Paul, Political Economy of Growth (New Delhi,1958).

Brierly, J.L., The Law of Nations (Oxford, 1959).

Brownlie, Ian, Principle of Public International Law (Oxford, 1979).

Dawson, F.G. and I.L.Head, International Law National Tribunals and the Right of Aliens (New York, 1971).

Ely, R.T., Property and Contract in their Relation to Distribution of Wealth (New York, 1914).

Falk, Richard, Role of the Domestic Courts in International Legal Order (Syracuse Univ. P., 1964).

Fatouros, A.A., Government Guarantees to Foreign Investor (New York, 1962).

Foighel, Isi, Nationalization (Copenhagen, 1957).

Freeman, A.V., The International Responsibility of States for Denial of Justice (London, 1938).

Friedmann, W.G., Legal Aspects of Foreign Investment (London, 1959).

Garcia-Amador, Sohn, L.B., and Baxter, R.R., Recent Codification of the Law of State Responsibility for Injuries to Aliens (Leiden, 1974).

Higgins, Rosalyn, The Development of International Law Through the Political Organs of the United Nations (London, 1963).

_____, Conflict of Interest (London, 1965).

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

Kronfol, Z.A., Protection of Foreign Investment : A Study of International Law (Leiden, 1972).

Lillich, R.B., International Claims : Their Adjudication by National Commissions (New York, 1962).

_____, The Protection of Foreign Investment Six Procedural Studies (New York, 1965).

Lillich, R.B., The Valuation of Nationalized Property in International Law (Charlottesville, 1972), vol.1.

_____, The Valuation of Nationalized Property in International Law (Charlottesville, 1973), vol.2.

Metzger, Stanley, D., International Law, Trade and Finance, Realities and Prospects (New York, 1962).

_____, Private Foreign Investment and International Organization (New York, 1967), vol.2.

Moon, Thomas, Imperialism and World Politics (New York, 1972).

Moore, J.B., Digest of International Law (Washington, 1966), vol.6.

Panikkar, K.M., Asia and Western Dominance (London, 1957).

Roling, N.S., and Ronning C.N., International Law in the Western Hemisphere (The Hague, 1974).

Rubin, S.J., Private Foreign Investment : Legal and Economic Realities (Baltimore, 1956).

Schwarzeenberger, G., Foreign Investment and International Law (London, 1969).

_____, The Standard of Civilization (London, 1971).

Strauz, Hupe, R., Imperialism and Colonion (London,1967).

Todd, Eric. C., The Law of Expropriation (Toronto, 1976), pp.150-151.

Verwey, W.D., The Principle of Preferential Treatment for Developing Countries (London, 1982).

Verwey and Schrigver, The Taking of Foreign Property Under International Law (Croningen, 1984).

Whiter, Gillian, Nationalization of Foreign Property (London, 1961).

Whiteman, M., Digest of International Law (Washington, D.C., 1967) vol.8.

Periodicals and Newspapers

African Research Bulletin (October, 1966).

American Journal of Comparative Law, vol.29 (1981).

American Journal of International Law, vol.54, 1960; vol.58, 1962; vol.75, 1965.

Constitution of Republic of Peru, 1937.

Economic Times (New Delhi)

International Legal Material (Washington), vol.3, 1965; vol.4, 1966; vol.10, 1971, vol.11, 1972 and vol.12, 1973.

The Working Paper Daily (Rangan December, 1973).
