NATIONALIZATION OF FOREIGN-OWNED PROPERTY: THE SPECIFIC ISSUE OF COMPENSATION

TEOFILO S. PILANDO, JR.*

I. INTRODUCTION

Despite the vast quantity of legal literature on the topic of nationalization, the present state of international law as to such, especially on compensation, has remained obscure. As aptly summarized by Justice Harlan in *Banco Nacional de Cuba v. Sabbatino*:[1]

> There are few if any issues in international law today on which opinion seems to be as divided as the limitations on a State's power to appropriate the property of aliens. There is, of course, authority, in international and judicial and arbitral decisions, in the expressions of national governments, and among commentators, for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.
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> The disagreement as to relevant international law standards reflect an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favour state control of a considerable portion of the means of production and those that adhere to a free enterprise system.[2]

The traditional view, still widely held by developed states, calls for full compensation to be paid in a prompt, adequate and effective manner. The opposite view, however, holds that no compensation is legally due on the part of a sovereign state. Nevertheless, a middle view posits that there is a duty to pay but without the further requirement of being prompt, adequate and effective.

The past decades witnessed a wave of nationalization measures. There has been the disintegration of the colonial system, the emergence of socialist

* LL.B., University of the Philippines College of Law, 1985.

1 376 U.S. 398 (1964).

2 *Id.* at 428-429.

governments, and the establishment of large multinational businesses. There, too, has been the growing gap between the developed and developing states. In the light of these and similar realities, compensation for nationalized foreign property has indeed evolved as an issue over which the confrontation between advocates of traditional concepts of international law and those seeking a change in these concepts has become most acute. Studies on the matter would truly be a contribution in the promotion of peaceful settlement of disputes and to the efforts to subject states to the rule of law.

In this connection, this paper intends to examine the rules relevant to the determination of compensation for nationalized foreign property. It wishes to probe into the existing rule of international law that deals with this specific issue. Thereafter, it wishes to study the issue in the light of Philippine experience.

But for a start, a working hypothesis has to be formulated. There should be a frame to begin with. As such, a hypothesis is therefore formulated which argues that the developments in international affairs have resulted in the establishment of the concept of appropriate compensation as the rule in international law governing compensation for nationalized foreign property.

II. PROPERTY AND NATIONALIZATION: A HISTORICAL OVERVIEW

Before delving into the specific issue of compensation, an overview of the concept of property and the right to nationalize would be helpful. For indeed, "[L]egal norms relating to foreign wealth deprivations have been determined, at any given period in history, by the economic, political, and social processes of the time."[3]

Private property is in its classical concept the right to the use, exploitation and disposal of the object owned.[4] Tempered at times by reason of public interest, this right has remained throughout history and reaffirmed by constitutional and international declarations and charters such as by the Magna Carta of 1215, the French Declaration of 1789, the Fifth amendment to the American Constitution of 1789, the two Hague Conventions of 1890 and 1907, the Declarations of the International Law Association of Vienna in 1926 and of Oxford in 1932, the United Nations Bill of Human Rights of 1948, the Pan-American Bill of Human Rights of 1948, and the Protocol of 1952 annexed to the Rome Convention on Human Rights of 1950.[5]

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[3] Dawson and Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?* 30 FORDHAM L. REV. 728 (1962).

[4] Libyan American Oil Company v. The Government of the Libyan Arab Republic [1977] 20 INT'L. LEG. MAT. 46 (1981). [hereinafter cited as the LIAMCO arbitration].

[5] *Ibid.*

Apropos to this classical concept, expropriation of private property has to be for public purpose, without discrimination and subject to prompt, adequate, and effective compensation.[6]

These legal policies concerning compensation, however, were formulated primarily during the period of limited deprivations when private foreign wealth deprivations were never matters of major national policy, but were confined to "isolated takings of amounts of property insignificant to the aggregate of foreign-owned wealth in the depriving State."[7] The State then "played a comparatively negative role, protecting a regime of laissez-faire and assuring the 'sanctity' of private wealth."[8]

By the turn of this century, however, especially after the First World War, new trends in the political and economic sphere emerged drastically altering the classical concept of property. The State came to interfere and participate directly in the national and international economic order.[9] Property came to be considered as having a dominant "social function" and as such subservient to the interest of the community.[10] Taking of private property began to be exercised on a larger scale.[11]

Nationalization was distinguished from individual expropriation acts based on administrative law and public necessity.[12] Nationalization came to be defined as "the transfer to the State, by a legislative act and in the public interest, of property or private rights of a designated character, with a view to their exploitation or control by the State, or their direction to a new objective by the State."[13]

The establishment of communism delivered a major blow to the concept of private property. This ideology has been incompatible with any form of private ownership of the means of production and distribution.[14] Hence, the Soviet Union and later the Eastern European states undertook

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[6] *See* 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-665 (1942).

[7] Dawson and Weston, *supra* note 3, at 729. *See* Rubin, *Nationalization and Compensation — A Comparative Approach*, 17 U. Chi. L. REV. 458, 459 (1950). The International Law Commission refers to limited deprivations as "acts of expropriation stricto sensu." Fourth Report on International Responsibility, U.N. Doc. No. A/CN 4/119, at 27 (1959).

[8] Dawson and Weston, *ibid.* at 729. *See* ELLSWORTH, THE INTERNATIONAL ECONOMY 156-175 (1959).

[9] *See* Dawson, *supra* at 730.

[10] American Declaration of Human Rights Adopted by the Ninth International Conference of American States (1948); Annexed Protocol to the International Covenant on Human Rights; A number of South American Constitutions refer expressly to the "social function" and "social obligations" attaching to private property; KATZAROV, THE THEORY OF NATIONALISATION 284-303 (1964).

[11] Dawson and Weston, *supra*, note 3 at 731; Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 243, 256 (1941).

[12] LIAMCO arbitration, *supra*, note 4 at 48.

[13] *Id.* at 49.

[14] *See* Seidl-Hohenvedern, *Communist Theories on Confiscation and Expropriation* 7 AM. J. COMP. L. 541, 546 (1958).

extensive nationalization programs, often with partial or no compensation.[15]

New nations have in the meantime been emerging. Prodded by nationalism and by the need to control their own economy, these states resorted to nationalization which encompassed mainly natural resources and public utilities.[16]

Some developed states have also undertaken nationalization schemes. In fact, England and France, which are major capital-exporters themselves, did not adhere too to the rule on prompt, adequate, and effective compensation.[17]

That the international climate has changed considerably is reflected by the United Nations General Assembly resolutions which have consistently affirmed that every state maintains complete right to exercise full sovereignty over its natural resources.[18] They, too, have recognized natio-

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[15] *See* Bystricky, *Notes on Certain Legal Problems Relating to Socialist Nationalization,* VIth Congress, International Association of Democratic Lawyers, Brussels 19 (1956).

[16] LIAMCO arbitration, *supra,* note 4 at 49. Examples are those adopted by Iran in 1951, Egypt in 1956, Indonesia in 1957, Iraq, Ceylon and Cuba in 1961, Algeria from 1963, Syria in 1964, Peru in 1968, Bolivia and Zambia in 1969, Chile in 1970, Libya from 1970, Saudi Arabia in 1972, and Kuwait since 1973.

[17] Dolzer, *New Foundations of Expropriation Law,* 75 AM. J. INT'L L. 582-583 (1981); LIAMCO arbitration, *supra,* note 4 at 49. For instance, the compensation paid by France to Great Britain for expropriated British rights in the French gas and electric industry amounted to only 70% of the value of the rights expropriated, the credit vouchers issued by France being payable in seven annual installments. *See* Schwarzenberger, The *Protection of British Property Abroad,* 5 CURRENT LEG. PROB. 307 (1952). Also, under the British Coal Industry Nationalization Act of 1946, compensation was contingent upon proceedings which took place only after the property had been taken over. Payment was made by way of government stock, the disposal of which was restricted. Whether the procedure guaranteed full compensation is open to doubt. *See* KATZAROV, *supra,* note 10 at 326-328.

[18] The relevant resolutions and the provisions in point are: Resolutions 626 (VII) on the "Right to exploit freely natural wealth and resources" 7 U.N. GAOR 411 (1952) with 36 states in favor, 4 against and 20 abstaining. It provides that a state has the

> [R]ight freely to use and exploit their natural resources whenever deemed desirable by them for their own progress and economic development ...

Resolution 1515 (XV) on "Concerted action for economic development of economically less developed countries." This states that

> [R]ight freely to use and exploit their natural resources whenever natural resources should be respected ...

Resolution 1803 (XVII) or the Declaration on "Permanent sovereignty over natural resources" 17 U.N. GAOR, Supp. (No. 17) 15 (1962) with 87 states in favor, 2 against and 12 abstaining. It declares that

> The right of peoples and nations to permanent sovereignty over their natural resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned.

Resolution 2158 (XXI) on "Permanent sovereignty over natural resources." It reaffirms

> [T]he inalienable right of all countries to exercise permanent sovereignty over their natural resources ....

Resolution 2200 (XXI) or the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. A common paragraph 2 in article 1 states that

nalization as a legitimate and an internationally recognized method to insure the sovereignty of the state upon such resources.[19]

Indeed, it can be said that "the right of a State to nationalize is unquestionable today."[20] The right of a State to nationalize all things belonging to any person within its jurisdiction is an attribute of its sovereignty and supreme power.[21] This right has long been recognized and seldom challenged.[22] It has even been argued that the right involves a unilateral acts which does not require acceptance by anyone, let alone the agreement of the party affected.[23]

> All people may, for their own ends, freely dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence.

Resolution 3171 (XXVIII) on "Permanent soverignty over natural resources" 28 U.N. GAOR, Supp. (No. 30) 52 (1974) with 108 states in favor, 1 against and 16 abstaining. This resolution

> Strongly reaffirms the unalienable rights of States to permanent sovereignty over all their natural resources. . . .

Resolution 3201 (S-VI) or the Declaration on the Establishment of a New International Economic Order, U.N. GAOR 6th Spec. Sess., Supp. 1 (1974) [hereinafter cited as the NIEO Declaration] Adopted without objection, it declared

> Full permanent sovereignty of every State over its natural resources and all economic activities.

Resolution 3202 (S-VI) or the "Programme of action on the establishment of a new international economic order" U.N. GAOR, 6th Spec. Sess., (1974) [hereinafter cited as the NIEO Programme of action]. This resolution calls for "all efforts"

> To defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources.

Resolution 3281 (XXIX) or the Charter of Economic Rights and Duties of States, 29 U.N. GAOR, Supp. (No. 31) 50 (1974) with 120 states in favor, 6 against and 10 abstaining. This Charter provides that

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

[19] The pertinent resolutions and the provisions in point are: Resolution 1803 (XVII) *supra*, note 18. This resolution recognizes

> Nationalization . . . measures in the exercise of [state] sovereignty...

Resolution 3171 (XXVIII), *supra*, note 18. It

> Affirms . . . the principles of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources . . .

NIEO Declaration, *supra*, note 18. It declares that

> [E]ach State is entitled to . . . the right to nationalization . . .' this right being an expression of the full permanent sovereignty of the State.

NIEO Programme of action, *supra*, note 18. It states that

> All efforts should be made ... (b) To ensure that ... the United Nations system meet requests for assistance from developing countries in connection with the operation of nationalized means of production.

Charter on Economic Rights and Duties of States, *supra*, note 18. The Charter states that

> Each State has the right . . . (c) to nationalize . . .

[20] Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Libyan Arab Republic [1977] 17 INT'L. LEG. MAT. 21 (1977) [hereinafter cited as the TOPCI/CALASIATIC arbitration]. *See* Brownlie *Legal Status of Natural Resources*, 162 RESUEIL DES COURS 261 (1979).

[21] LIAMCO arbitration, *supra* note 4, at 50.

[22] Doman, *New Developments in the Field of Nationalization*, 3 N.Y.U.J. INT'L L. & POLITICS 308 (1970).

[23] KATZAROV. *supra* note 10, at 305.

III. COMPENSATION AS THE PRINCIPAL ISSUE IN NATIONALIZATION

A. Compensation as the determinant of legality

It has been a contention that property of aliens may be nationalized only under certain conditions. It has been asserted that the nationalization should be for a public purpose, that there should be no discrimination against the property or its owners, and that compensation should be paid.

State practice and legal opinion, however, have been tilting towards the position that compensation stands as the prime issue. "[I]n the final analysis it is the adequacy of the compensation ... which becomes the principal criterion against which to judge the legality of the seizure."[24]

"[I]t is the general opinion in international theory that the public utility principle is not a necessary requisite for the legality of a nationalization."[25] The public purpose doctrine "has found scant support in practice as a 'rule' of international law whose violation independently engages international responsibility."[26] Even the proponents of the doctrine now concede that "there is little authority in international law establishing any useful criteria by which a State's own determination of public purpose can be questioned."[27]

Discrimination is not per se unlawful.[28] "[N]o unqualified doctrine of nondiscrimination could be constituted part of customary international law without sacrificing important community values."[29] "[W]hether a particular differentiation of aliens and nationals has a reasonable basis in the common interest of the larger community must ... depend not only upon the value primarily at stake in the differentiation but also upon many particular and varying features of the context in which the differentiation is made."[30]

1. *Specific Performance (Restitutio in integrum): A controverted remedy in international law*

The remedy of specific performance is not available for the following reasons. First, it is not recognized by international law, and, second, assuming it is so recognized, it is possible only in exceptional cases.

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[24] GREIG, INTERNATIONAL LAW 578 (1976).

[25] LIAMCO arbitration, *supra*, note 4 at 58.

[26] Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 439 (1981).

[27] *Id.* 440 *citing* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §185, comment B, at 553 (1965).

[28] *Id.* at 445.

[29] *Ibid.; See* Baade, *Permanent Sovereignty over Natural Wealth and Resources*, in ESSAYS ON EXPROPRIATIONS 23-24 (Miller & Stanger eds. 1967).

[30] MCDOUGAL, LASSWELL, & CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 758 (1980).

In *BP Exploration Company (Libya) Limited v. The Government of the Libyan Arab Republic,*[31] the Tribunal held that specific performance is not a remedy provided by international law for the nationalized company.

> The survey of cases and other relevant materials presented above demonstrates that there is no explicit support for the proposition that specific performance, and even less so restitutio in integrum are remedies of public international law available at the option of a party suffering a wrongful breach by a co-contracting party.[32]

In the *LIAMCO arbitration,* it was held that "restitutio in integrum is conditioned by the possibility of performance, and consequently hindered by its impossibility." But inasmuch as "such impossibility is in fact most usual in the international field ... it has been asserted that it is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States."[33]

> Restitutio has thus been considered in international law as against the respect due for the sovereignty of the nationalizing State. This was the view held by the Austrian Supreme Court in a ruling dated 22 December 1965 (O.G.H., Evidenzblatt, 1966).
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> Moreover, it has also been asserted that there is no sufficient authority for the fact that nationalization in breach of a concession is an internationally unlawful act for which the remedy is restitution (V. WHITE, NATIONALISATION OF FOREIGN PROPERTY 86, 163 [1961]).
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> Further restitution presupposes the cancellation of the nationalization measures at issue, and such cancellation violates also the sovereignty of the nationalizing States. Moreover, nationalization is sometimes qualified as an "Act of State," which is immune from control, judicial or otherwise.[34]

In fact, the *TOPCO/CALASIATIC arbitration* itself, which granted specific performance admits that restitutio in integrum is inapplicable "to the extent that restoration of the status quo ante is impossible."[35]

The *TOPCO/CALASIATIC arbitration* used as the genesis of its finding the oft quoted statement from the *Chorzow Factory* case:[36]

> The essential principle contained in the actual notion of an *illegal act*—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the *illegal act* and re-establish the situation which would, in all probability, have existed if that act had not been committed.[37] (emphasis suppled)

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31 53 I.L.R. 297 (1979).

32 *Id.* at 348.

33 LIAMCO arbitration, *supra* note 4, at 63.

34 *Id.* at 63-64.

35 TOPCO/CALASIATIC arbitration, *supra* note 20, at 36.

36 [1928] P.C.I.J. Ser. A, No. 17 at 29 [hereinafter cited as Chorzow Factory case].

37 *Id.* at 47. This case involved the expropriation of an industrial undertaking which was prohibited by the Geneva Convention. *See* 1 O'CONNELL, INTERNATIONAL LAW 660 (1957).

However, it has been argued that in the *Chorzow Factory Case*, the the above-mentioned principle had only the value of an obiter dictum inasmuch as restitution in kind was not formally requested and the impossibility of said remedy had been established by the parties.[38] At any rate, the *TOPCO/CALASIATIC arbitration* admits of restitutio in integrum as a remedy only for illegal acts.[39] But even then, as has been earlier stated, this arbitration case also admits of the inapplicability of the remedy when restoration to the original status is inapplicable.[40] Thus, "reparation in the form of a pecuniary compensation would in practice be much more widely used than restitutio in integrum."[41] Quoting Guggenheim, "in diplomatic and judicial practice it is . . . infrequent to find cases where the arrangement on the content of the reparation leads to 'restitutio in integrum'. In most cases, the victim of the unlawful act must be content either with damages or satisfaction of another kind."[42]

Finally, the decision in the *TOPCO/CALASIATIC* arbitration was "*the first time* in the history of international arbitration relating to economic development contracts, an *arbitral tribunal* held that the injured parties were entitled to restitutio in integrum. . . ."[43] (emphasis supplied). Moreover, the case was not put to rest with Libya complying to the arbitral award but with a settlement reached by Libya and the Companies involved. Therein, Libya agreed to provide the Companies $152 million worth of Libyan crude oil within the next 15 months. The Companies, in turn, agreed to terminate the arbitration proceedings.[44]

IV. PROMPT, ADEQUATE AND EFFECTIVE COMPENSATION: THE TRADITIONAL APPROACH

A. *Promptness, adequacy, and effectiveness determined*[45]

1. Promptness in payment

The amount of compensation should have been fixed before nationalization and paid at the time of effective taking, if not, the nationalizing state should have made proper arrangements with the claimants on that

[38] TOPCO/CALASIATIC arbitration, *supra* note 20, at 32; Doman, *supra* note 22, at 313-314.

[39] TOPO/CALASIATIC arbitration, *id.* at 32, 36.

[40] *Id.* at 36.

[41] *Id* at 35. *See* FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 310-311 (1962).

[42] *Id.* at 35 quoting Guggenheim, *La Validite et la Nullite des Actes Juridiques Internationaux*, 74 RECUEIL DES COURS 191, 239 (1949).

[43] *Id.* at 1.

[44] *Id.* at 2.

[45] Also called the Hull rule or Hull Formula after United States Secretary of State Cordell Hull who clearly articulated this position during the Mexican nationalizations of 1938. *See* 3 HACKWORTH, *supra* note 6.

date.[46] Provisions "for determining compensation must exist at the time of taking. It must include provision for determination within a reasonable time and for payment promptly after determination."[47] Payment in non-marketable, long-term bonds can not therefore be acceptable.[48]

2. Adequacy of payment

Adequate compensation means "the value of the undertaking at the moment of dispossession, plus interest to the day of judgment."[49] It is the "fair purchase price as . . . a going concern."[50] "Under ordinary conditions . . . the amount must be equivalent to the full value of the property taken together with interest to the date of payment."[51] In fact, in an American case, it was held that the concept of adequacy requires full compensation regardless of the host country's capacity to pay.[52]

3. Effectivity of payment

Payment should be in a "hard" currency, or at least in the most stable available currency.[53] To be effective, compensation should be in a medium of exchange of maximum value to the deprived alien, preferably in his own legal currency.[54]

> (1) Compensation, to be in effectively realizable form . . . must be in the form of cash. If not in the currency of the state of which the alien was a national at the time of the taking, the cash paid must be convertible into such currency and withdrawable, either before or after conversion. to the territory of the state of the alien's nationality. . . .
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> (2) Such conversion and withdrawal may be delayed to the minimum extent necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of the taking state.[55]

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[46] Norwegian Shipowners' case (U.S. v. Norway) 1 R. Int'l Arb. Awards 309 (1922) [hereinafter cited as Norwegian Shipowners' case].

[47] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §189 comment (1965).

[48] WESLEY, *Establishing Minimum Compensation Criteria for Use in Expropriation Disputes,* 25 VAND. L. REV. 942 (1972). Thus, an offer by the Guatemalan Government to make "[p]ayment in bonds maturing in 25 years, with interest at 3 percent per annum, and of uncertain market value . . ." was rejected by the United States. So was the payment through bonds "made for a period of 20 years, with annual interest of no more than four and one-half (4.50%) percent" under the Cuban Agrarian Reform Law of May 17, 1959. 8 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1166-1169 (1967).

[49] Chorzow Factory case, *supra,* note 36.

[50] Lena Goldfields arbitration (U.K. v. U.S.S.R.) [1930], 36 CORNELL L. Q. 3 as cited in Wesley, *supra,* note 48 at 943.

[51] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §188 (1965).

[52] Monongahela Navigation Co. v. United States 148 U.S. 312, 345 (1893) cited in Wesley, *supra,* note 48 at 943.

[53] The Wimbledon [1923] P.C.I.J., Ser. A, No. 1, at 32. The terms "hard" or "stable" refer to currencies in which a relatively high degree of confidence aids in resisting exchange rate changes resulting from wide swings in the flow of capital transactions. *See* MADDEN AND NADLER, THE INTERNATIONAL MONETARY MARKETS 37-38 (1968).

[54] Dawson and Weston, *supra* note 3, at 738.

[55] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §190 (1965).

B. *The rule as not having been sustained by international law*

The practice of the past decades falls short of confirming this rule of prompt, adequate and effective compensation.

Courts have held that compensation be merely paid "as quickly as possible,"[56] within a "reasonable time"[57] or "in due time."[58] Although many state constitutions require "prior" or "prompt" payment, at least as many, reflecting international practice, do not mention "prompt" or expressly accept deferred payment on certain situations.[59] Promptness seems not to have been rigidly defined. It has been made to depend upon a number of factors such as the length of time involved, the size and value of the nationalized installation in relation to the resources of the nationalizing state,[60] the purpose of the taking,[61] etc.

The record indicates that full fair market value is rarely achieved. Most expropriations were negotiated settlements wherein compensation has been below fair market value or the amount or criteria in reaching a figure have not been reported.[62] If full market value had been strictly required, states would have, in many cases, been unable to pay making the right to nationalize illusory. The economic and social reforms generally sought by these nationalizations would never have materialized.[63]

Securing effective compensation has itself been plagued by complexities. If there is, indeed, a prevailing thought on currency media, it is maybe only the minimum rule that the deprivor state need only to make payment in the deprivor's local currency, whether convertible or not.[64] This bare requirement, however, is a recognition of foreign exchange shortages in both developed and developing economies.[65] The problem aggravates during nationalization as the availability of hard currency worsens due to the expenses incurred by the takings and by the implementation of the reforms planned.[66] Payments made in interest-bearing bonds redeemable

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56 Goldenberg v. Germany [1928] 3 REV. DROIT INT'L 559 (1929).
57 Portugal v. Germany [1930] ANN. DIG. INT'L L. 150-151 (1929-1930).
58 Norwegian Shipowners' case, *supra*, note 46 at 307.
59 Garcia Amador, *Fourth Report on International Responsibility*, U.N. Doc. No. A/CN 4/119, at 56 (1959) cited in Dawson and Weston, *supra*, note 7 at 736.
60 *See* WHITEMAN, *supra*, note 48 at 1164; FRIEDMANN, LISSITZYN, PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW 813 (1969).
61 HARVARD DRAFT CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS Art. 10, par. 4 (1961).
62 Wesley, *supra*, note 48 at 943. *See* U.S. DEP'T OF STATE, RESEARCH STUDY: NATIONALIZATION, EXPROPRIATION, AND OTHER TAKINGS OF UNITED STATES AND CERTAIN FOREIGN PROPERTY SINCE 1960, 39-40 (1971).
63 *See* Dolzer, *supra*, note 17 at 573-577.
64 Metzger, *Property in International Law*, 50 VA. L. REV. 594, 603-607 (1964).
65 Wesley, *supra*, note 48 at 944.
66 *See* Dawson and Weston, *supra*, note 3 at 737.

after a certain number of years have thus been the assertion of many states.[67]

True, a considerable number of investment treaties with provisions similar to the Hull rule are in existence. Nonetheless, there is hardly any evidence that their content is declaratory of international law. First, there is the question of whether these treaties have been adhered to on the basis of a truly free consent on the part of the developing states. Secondly, many of said treaties are ad hoc bilateral in character and their initial vigorous implementation has gradually waned.[68]

V. NO COMPENSATION: THE OPPOSITE VIEW

A. *Absence of any obligation to pay compensation*

The social function of property has gained wide emphasis in the last decades. Communist states especially have called for the abolition of private property and its restoration to the community. Concomitant to this would be the taking of private property without compensation.

The Soviet nationalization of 1917 for instance, had the character of a global liquidation of all private business and property. Barring contrary treaty obligations, the Soviet Union is of the assertion that nationalization measures fall inclusively within the internal competence of the nationalizing state.[69] Its Constitution of 1936 declared as State property, belonging to the people as a whole, the land, the sub-soil, the waters, forests, factories, coal and mineral mines, railways, land and air transport, banks, postal and telegraph services, the great agricultural undertakings organized by the State as well as local authority undertakings and the great mass of urban dwellings and industrial centers, without reserving any obligation to compensate the private owner.[70]

Many other state constitutions recognize this taking of property without compensation. Illustrative of this feature are the constitutions of Bul-

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[67] Dolzer, *supra,* note 17 at 565; *See* Wesley, *supra,* note 48 at 957-958. For instance, the nationalization laws of the United Arab Republic provide for repayment in 4% government bonds payable over 15 years.

[68] Dolzer, *supra* at 565-568. Dolzer also advances the view that such treaties signify that the countries concerned do not view the Hull rule as undesirable *per se.* It may be inferred that these countries assume that the rule should apply only under conditions of mutually intensified cooperation, conditions which are not secured by the general norms of present customary international law. *See* Francioni, *Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity,* 24 INT'L & COMP. L. Q. 264 (1975).

[69] Francioni, *id.* at 266. *See* WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW, 61-62, 115-116 (1959); Seidl-Hohenveldern, *supra,* note 14 at 546.

[70] KATZAROV, *supra,* note 10 at 325, 326. *See* U.S.S.R. CONST. OF 1936, art. VI; WORTLEY, *supra* at 115-116.

garia,[71] Burma,[72] Chile,[73] Columbia,[74] Czechoslovakia,[75] West Germany,[76] Yugoslavia.[77]

B. *The rule as not also having been sustained by international law*

The position that there is no obligation to pay compensation has not also been confirmed by international law. Even the states that espouse the view have themselves shown conflicting manifestations. Compensation treaties have been concluded even between communist states as regards their mutual nationalizations.[78]

The Soviet Union, after the Second World War, tacitly recognized the obligation to make payments for nationalized foreign private property.[79] Thus, it settled the claims of Canadian interests in Finnish nickel mines ceded to it.[80] It also agreed to pay some compensation to Canada and to the United Kingdom.[81]

Eastern European states, on the other hand, have paid partial indemnification to the United Kingdom, France and the United States on the basis of global settlements signed after the war.[82] Said States acknowledged the duty to pay some compensation to deprived aliens. All the nationalization laws explicitly provided for compensation in money, bonds, or other form of wealth.[83]

Indeed, uncompensated expropriations of alien property in non-war situations have had no place in the postwar period.[84]

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[71] Art. X sec. 5: "Compensation will be fixed by the nationalization statute."

[72] Art. XXIII sec. 4: "[L]aw shall prescribe in which cases and to what extent the owner shall be compensated."

[73] Art. X sec. 10 par. 2: "[I]ndemnification, as may be agreed on, or as may be fixed by a corresponding judicial sentence, shall be paid to the owner in advance."

[74] Art. XXXIX secs. 3-4: "[T]he lawmaker, for reasons of equity, may determine the cases in which there is to be no occasion for indemnification ..."

[75] Art. IX sec. 2: "[C]ompensation, to the extent that the law does not stipulate or will not stipulate in the future that there is to be no compensation."

[76] Art. XXIII: "[C]ompensation for losses suffered, unless the law determines otherwise."

[77] Art. XVIII sec. 5: "[T]he statute will determine to what extent compensation is to be given to the owner."

[78] Doman, *supra*, note 22 at 315. *See* Agreement Concerning the Settlement of Outstanding Property Questions between Czechoslovakia and Yugoslavia. Feb. 11, 1956 [1961] 397 U.N.T.S. 135-164.

[79] GRZYBOWSKY, SOVIET PUBLIC INTERNATIONAL LAW 509-510 (1970) cited in Doman, *supra*, note 22 at 314.

[80] *Ibid.*

[81] Francioni, *supra*, note 68 at 268. *See* FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 22 (1953). The agreement with the United Kingdom and Canada was for the taking of the nickel mines of Petsamo.

[82] Francioni, *supra*, at 268-269.

[83] Dawson and Weston, *supra*, note 3 at 742.

[84] Dolzer, *supra*, note 17 at 560. For a summary of the practice until 1959, *see* 2 Y. B. INT'L L. COMM'N 1-36 (1959).

VI. APPROPRIATE COMPENSATION AS THE RULE SUSTAINED BY INTERNATIONAL LAW

A. *The present status of the law*

As discussed, neither prompt, adequate and effective compensation nor non-payment of any compensation represent the present status of the law. The prevailing practice lies somewhere between these rules. An intermediate position would always be reached by the parties to a nationalization. A consideration of various factors would always determine in the end the compensation finally paid. As has been noted:

> Those who expressly state or intimate ... that under customary international law, a State is not obliged to pay any compensation whatsoever ... would, like those indiscriminately favoring the orthodox view, frustrate comprehensive factual inquiries which seek the maximum accomodation of the interests and expectations of the claimants as well as the restoration of economic and political intercourse.[85]

Explaining this intermediate position reflected by state practice and legal opinion is the rule of appropriate compensation. Relevant laws especially the municipal law, and pertinent circumstances are taken into account in the ascertainment of compensation. Explicitly declared by U.N. General Assembly resolutions,[86] the rule has been asserted by a vast majority of states[87] and has found support in a wide array of legal writings.[88]

Nevertheless, it should be understood that the resort to relevant laws and pertinent circumstances in the determination of compensation due could possibly yield the equivalent of prompt, adequate and effective compensation as the appropriate compensation or to no compensation at all. As expressed in *Banco Nacional de Cuba v. Chase Manhattan Bank*:[89]

> It may well be the consensus of nations that full compensation need not be paid "in all circumstances" ... and that requiring an expropriating state to pay "appropriate compensation" ... would come closest to reflecting what international law requires. But the adoption of an "appropriate compensation" requirement would not exclude the possibility that in some cases full compensation would be appropriate.[90]

Examining closely past nationalization measures, it is this rule of appropriate compensation which best reflects the practice of states of finally paying a compensation although they had initially called for prompt, adequate and effective compensation or had at the onset refused to pay

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[85] Dawson and Weston, *supra*, note 3 at 753.

[86] The resolutions in point would be discussed in the succeeding pages.

[87] This is, for instance, manifested by the votes cast for the adoption of said U.N. resolutions.

[88] For instance, *see* Jimenez de Arechaga, *State Responsibility for the Nationalization of Foreign-Owned Property*. 11 N.Y.U. J. INT'L & POLITICS 184 (1978); Brownlie, *supra*, note 20 at 268.

[89] 658 F 2d 875.

[90] *Ibid.*

any compensation. Couched in other terms, the settlements provided in the end compensations which in deeper analysis took account of surrounding circumstances including relevant laws.

In the fairly recent case of *American Independent Oil Company v. Kuwait*,[91] for instance, this rule of appropriate compensation was expressly applied. The Arbitration Tribunal stated that, "compensation is better carried out by means of an inquiry into all the circumstances relevant to the particular case."[92]

B. *Resolutions of the United Nations as expressive of appropriate compensation*

U.N. General Assembly resolutions specifically refer to appropriate compensation. Resolution 1803 (XVII) on "Permanent sovereignty over natural resources" declares that:

> 4. [T]he owner shall be paid *appropriate compensation*, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication. (emphasis supplied)

Resolution 3171 (XXVIII), also on "Permanent sovereignty over natural resources," goes further and affirms that "each State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute 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 States" or Resolution 3281 (XXIX) thereafter proclaims that:

> (c) [*A*]*ppropriate compensation should* be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. (emphasis supplied)

As declared, appropriate compensation takes into account only the laws of the nationalizing State and the circumstances it considers pertinent. Resolution 1803 (XIVV) though makes specific mention of international law as a governing factor in the determination of appropriate compensation. But as discussed in the preceding pages, there is no existing rule in

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[91] [1982] 21 INT'L. LEG. MAT. 976 (1982) [hereinafter cited as AMINOIL *arbitration*].

[92] *Id.* at 1033.

international law requiring prompt, adequate and effective compensation.[93] Reference to international law would not therefore make any substantial difference. But even if it does, a reference to international law was not anymore made by subsequent resolutions.

1. *Said resolutions as embodiments of international law*

These resolutions confirm a tacit agreement among states as to the law on the matter.[94] They constitute state practice, and corroborate other evidence as to the existence of customary rules, or invest state practice with the element of opinio juris sive necessitatis.[95] Their "persistent recitation... indicates that they embody a view of the community which has some continuity."[96] It may also be argued that these resolutions derive their law-making character "not from the formal powers of the General Assembly but from the reasonableness of expectation that states which have collectively expressed the view that the law requires certain conduct will act in accordance with that expression."[97]

Thus, in the *TOPCO/CALASIATIC arbitration,* it was held that Res. 1803 (XVII) "reflect[s] the state of customary law existing in this field."[98] The Tribunal noted that the majority (87 to 2 with 12 abstentions) voted for this text, not only "States of the Third World, but also several Western developed countries with market economies, including the most important one, the United States. The principles stated in this Resolution were therefore assented to by a great many States representing not all geographical areas but also all economic systems."[99]

a. *The Charter of Economic Rights and Duties of States as an authentic interpretation of the U.N. Charter*

The Charter of the United Nations is a constitutional document which is to be construed in the light of the changing needs of international society.[100] Being also a treaty,[101] subsequent agreements between the parties

[93] For a discussion, *see supra,* pp. 302-303.

[94] *See* Tunkin, *The Legal Nature of the United Nations,* 119 RECUEIL DES COURS 47 (1966).

[95] *See* ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966).

[96] *See* Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions,* 63 AM. J. INT'L L. 453 (1969).

[97] *Id.* at 477.

[98] TOPCO/CALASIATIC arbitration, *supra,* note 20 at 30. *See* LIAMCO arbitration, *supra,* note 4 at 53; AMINOIL arbitration, *supra,* note 91 at 1032.

[99] TOPCO/CALASIATIC arbitration, *supra* at 28.

[100] FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 145 (1970); Schacter, *Book Review,* 60 YALE L. J. 189, 193 (1951).

[101] AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 242 (1970); MCNAIR, THE LAW OF TREATIES 259 (1961); LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 159 (1950).

regarding its interpretation should be taken into account.[102] "The coordinated wills of the Member States cannot be said to have been exhausted in one single expression in the conclusion of the (U.N.) Charter as a treaty. Rather such collective expression continues as a process throughout the lifetime of that constituent instrument."[103]

Chapter IX of the U.N. Charter on "International Economic and Social Cooperation" cannot be applied except through the NIEO Declaration[104] and Programme of Action[105] and the Charter of Economic Rights and Duties of States.[106] The whole United Nations system operates within the framework of the New International Economic Order as defined by these three documents.[107]

The fact that the particular interpretation ultimately adopted was not the one the objecting state had hoped for cannot be a basis for considering the state free from the effect of the interpretation.[108]

b. *The Charter of Economic Rights and Duties of States as a general agreement among U.N. Member-States*

The Charter was intended to place its articulated principles on "a firm legal footing."[109] It was "to enunciate authentic economic rights and duties of States . . . as rights and duties of a juridical nature."[110] "[T]he extensive debates in the General Assembly have made clear that legal—and not only political—views were discussed . . . [which] is confirmed rather than contradicted by the wording proposed and adopted in the Charter."[111] Its provisions are framed by such weighty preambular imagery as to at least imply binding legal effect.[112] Thus, its preamble declares that, "The General Assembly. . . . Solemnly adopts the present Charter. . . ."

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[102] Vienna Convention on the Law of Treaties, Art. 31(3), U.N. Doc. A/CONF. 39/27 (1969). This convention applies to the U.N. Charter by virtue of article 5 of the same Convention which states that "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."

[103] Magallona, *Some Remarks on the Legal Character of United Nations General Assembly Resolutions*, 5 PHIL. Y.B. INT'L L. 91 (1976).

[104] Res. 3201 (S-VI), *supra*, note 18.

[105] Res. 3202 (S-VI), *supra*, note 18.

[106] Magallona, *supra*, note 103 at 90.

[107] *Ibid.*

[108] Bleicher, *supra*, note 96 at 449.

[109] Address by President Luis Echevarria Alvarez of Mexico who proposed the Charter at the United Nations Conference on Trade and Development (UNCTAD 3) at Santiago in 1972. UNCTAD Proceedings, 3d Sess., UN Doc. TD/180, Vol. 1A. pt. 1 at 184, 186 (1972).

[110] Remarks of Ambassador Castañeda of Mexico, the Chairman of the Working Group established by the UNCTAD in May, 1972 to prepare a Draft Charter of Economic Rights and Duties of States, in the Report of the first session of the Working Group, UN Doc. TD/B/AC 12/1 (March 6, 1973).

[111] Dolzer, *supra*, note 17 at 563; Jimenez de Arechaga, *supra*, note 88 at 184; Brownlie, *supra*, note 20 at 268.

[112] *See* Weston, *supra*, note 26 at 451.

The Charter is regarded by a large majority of U.N. members "as a codification and development of legal norms for the development of international relations on a just and equitable basis."[113] Together with the NIEO Declaration and Programme of Action with which it shares similar basic principles, they are clearly intended to be normative in character and will almost certainly rapidly attain status and significance for international law.[114] "Even if one were inclined to characterize these views as future-oriented, the number of states subscribing to them would in fact draw this 'future' immediately into the present."[115]

The Charter was adopted by a vote of 120 in favor to 6 against with 10 abstentions.[116] Article 2, paragraph 2(c), the specific provision on nationalization and compensation, though, in a separate vote called for the purpose, received 104 votes in favor to 16 against with 6 abstentions.[117]

Indeed, it could also be argued that the Charter is an expression of the community's belief that the conduct prescribed therein is required by customary law.[118] A clear majority voted for the Charter and the specific article. With a consensus of at least 104 states, it would be difficult to argue otherwise.[119] In fact, abstentions can even be treated as acquiescence in the obligation specified. Any real objection could have been expressed by a negative vote which was equally available to the abstaining state.[120] Moreover, a state that cast a negative vote might still be bound if the interpretation was a reasonable choice from among various rational alternatives or if the state had by its previous acts accepted the custom.[121] It has also been stated that the requirement of unanimity for a legally authoritative resolution has been replaced by the more flexible condition "generally accepted."[122]

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113 White, *The New International Economic Order*, 24 INT'L COM. L.Q. 544 (1975).

114 *Id.* at 543.

115 Dolzer, *supra,* note 17 at 563.

116 Belgium, Denmark, Federal Republic of Germany, Luxemburg, the United Kingdom, and the United States voted against the Resolution while Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain abstained. The Maldive Islands and South Africa were unrepresented.

117 Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Ireland, Italy, Japan, Luxemburg, the Netherlands, Norway, Spain, Sweden, United Kingdom, and the United States voted against the specific provision with Australia, Barbados, Finland, Israel, New Zealand and Portugal abstaining.

118 *See* Bleicher, *supra,* note 96 at 449-451, 457.

119 *See* White, *supra,* note 113 at 547.

120 *See* Bleicher, *supra,* note 96 at 449, 451; WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 157-165 (1964).

121 *See* Bleicher, *supra* at 449; Fisheries case (United Kingdom v. Norway) [1951] I.C.J. 138-139.

122 *See* TUNKIN, THEORY OF INTERNATIONAL LAW 165, 170, 172 (Butler, trans. 1974).

In fact, during the discussion of the draft Charter, an amendment was proposed by 14 developed nations[123] calling for the redrafting of Article 2. The proposal stated the right to nationalize in the following terms:

> Each State has the right: ... (d) to nationalise, expropriate or requisition foreign property for a public purpose, provided that *just compensation* in the light of all relevant circumstances be paid. (emphasis supplied)

This part of the amendment, however, was defeated by a vote of 19 in favor to 87 against with 11 abstaining.[124] This shows how article 2, par. 2(c) succinctly conveys the general agreement of U.N. member-states. "[T]here can be little doubt that Article 2, paragraph 2(c) is regarded by many States as an emergent principle, a statement of presently applicable rules."[125] "[T]here is cogent support for the view that the votes cast for Article 2(2)(c) of the Charter reflect opinions about the present state of the law. . . ."[126]

C. *Relevant factors in the ascertainment of appropriate compensation*

Inasmuch as appropriate compensation is determined by taking into account various factors, to say, relevant laws and pertinent circumstances, there arises the need for the specification of these circumstances, of these matters that guide, directly or indirectly, present practice and legal opinion. Of course, it would be difficult to list all the factors that should be taken into consideration. What should be considered and how should these affect the final compensation depends on the peculiarities of each specific case. Nevertheless, an elaboration of the significant factors would be a helpful instrument in the determination of appropriate compensation.

1. *The compensatory obligation and the nationalizing state*

The expediency and social necessity of the nationalization and the nationalizing state's material capacity to meet the expenses incurred by its act are of import.[127] Specifically, the earning capacity of the nationalizing state, its export base, the availability of foreign exchange, the amount of industry affected, the claimants involved both local and foreign should be taken into consideration.[128] Compensation may therefore vary according to the magnitude of the nationalization measures and the amount of obligations owed by the nationalizing state.[129]

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123 Australia, Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Japan, Luxemburg, the Netherlands, United Kingdom and the United States.

124 White, *supra,* note 113 at 546-547.

125 Brownlie, *supra,* note 111 at 268.

126 Dolzer, *supra,* note 17 at 565.

127 KATZAROV, *supra,* note 10 at 355-356.

128 Wesley, *supra,* note 48 at 972-973.

129 Dolzer, *supra,* note 17 at 583.

That compensation will be influenced by the fiscal condition of the host state is illustrated by the Marcona negotiations where the American negotiators "came prepared to seek a package consistent with the requirements of the economy of the host country as well as those of the company."[130]

Modern arrangements manifests an inclination favorable to the aims of the developing states. New concepts of profit sharing, technology clauses, local personnel involvement, etc. are supported by general efforts to promote the interests of the developing states on the international level.[131]

2. *The compensatory obligation and the foreign claimant*

The nature of investment, the activities of the foreign claimant in the host country and their consequences, and the original expectations of the investor when he decided to invest are material considerations.

True, some of the most serious developmental problems have their genesis in clearly nondevelopmental-oriented policies of the governments concerned.[132] Nonetheless, there do exist manifestly nondevelopmental investments which require unusually high amounts of capital, involve highly inappropriate technology or close capital and distribution markets to domestic competitors.[133] In considering the expectations of the investor it should be kept in mind that reliance upon structures that reinforce underdevelopment does not deserve protection under modern international law.[134]

VII. COMPENSATION IN PHILIPPINE SETTING

A. *Philippine Law*

1. *Adequacy*

Philippine law uses the term just compensation. Under both the 1935 and 1973 Constitution, it has been so declared that, "Private property shall not be taken for public use without just compensation."[135]

"The State may, in the interest of national welfare or defense...., upon payment of just compensation, transfer to public ownership utilities

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130 *Id.* at 582-583; Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 490 (1977).

131 Dolzer, *supra*, note 17 at 585.

132 *Id.* at 586.

133 *Ibid.*

134 *Id.* at 587.

135 CONST. art. IV, sec. 2; CONST. (1935), art. 111, sec. 1 par. (2). Presidential Decree No. 1789 (1981) otherwise known as the Omnibus Investments Code and the previous Investment Incentives Act or Republic Act No. 5186 (1967) state:

> There shall be no expropriation by the government of the property represented by investments or of the property of enterprises except for public use or in the interest of national welfare and defense and upon payment of just compensation.
>
> There shall be no requisition of the property represented by the investment or of the property of enterprises, except in the event of War

and other private enterprises to be operated by the Government."[136] "The National Assembly may authorize, upon payment of just compensation, the expropriation of private lands to be subdivided into small lots and conveyed at cost to deserving citizens."[137]

In *J.M. Tuason and Co. v. Land Tenure Administration*,[138] the Philippine Supreme Court gave the meaning of just compensation as follows:

> It is well-settled that just compensation means the equivalent for the value of the property at the time of its taking. Anything beyond that is more, and anything short of that is less, than just compensation. It means a fair and full equivalent for the loss sustained, which is the measure of the indemnity, not whatever gain would accrue to the expropriating entity. The *market value* of the land taken is the just compensation to which the owner of condemned property is entitled, the market value being that *sum of money which a person desirous, but not compelled to buy, and an owner, willing but not compelled to sell, would agree on as a price* to be given and received for such property. There must be a consideration then of all the facts which make it commercially valuable. The question is what would be obtained for it on the market from parties who want to buy and would give full value. Testimonies as to real estate transactions in the vicinity are admissible. It must be shown that the property as to use must be of similar character to the one sought to be condemned. The transactions must likewise be coeval as to time. To the market value must be added the consequential damages, if any, minus the consequential benefits. The assessed value of real property while constituting prima facie evidence of its value in case of condemnation proceedings is not conclusive.[139] (emphasis supplied)

Just compensation would therefore mean the market value of the property. Market value, on the other hand, has been defined by the Philippine Supreme Court in a variety of ways. It is the:

> [P]rice fixed by the buyer and seller in the open market in the usual and ordinary course of legal trade and competition; the price and value of the article established or shown by sale, public or private, in the ordinary way of business; the fair value of property as between one who desires to purchase and one who desires to sell; the current price; the general or ordinary price for which property may be sold in that locality.[140]

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or national emergency and only for the duration thereof. (Sec. 42, pars. d, e and Sec. 4, pars. d, e respectively).

[136] CONST. art. XIV, sec. 6; CONST. (1935), art. XIII, sec. 6.

[137] CONST. art. XIV, sec. 15; CONST. (1935), art. XII, sec. 4.

[138] G.R. No. 21064, February 18, 1970, 31 SCRA 413.

[139] *Id.* at 431-432; *cf.* Alfonso v. Pasay City, 106 PHIL. 1017 (1960); Municipal Gov't of Sagay v. Jison, 104 PHIL. 1026 (1958); Republic v. Garcellano, 103 PHIL. 231 (1958); Republic v. Lara, 96 PHIL. 170 (1954); Province of Tayabas v. Perez, 66 PHIL. 467, 469 (1938); City of Manila v. Corrales, 32 PHIL. 85, 92, 98 (1915); Manila Railroad Co. v. Velasquez, 32 PHIL. 286, 313-314 (1915); City of Manila v. Estrada, 25 PHIL. 208, 215, 234 (1913); Manila Railroad Co. v. Fabie, 17 PHIL. 206, 208 (1910).

[140] 1 BERNAS, CONSTITUTIONAL RIGHTS AND DUTIES 57 (1974) citing *Manila Railroad Co. v. Fabie; City of Manila v. Estrada; City of Manila v. Corrales;* and *Manila Railroad Co. v. Velasquez.*

Presidential Decrees issued in the seventies, however, gave new features to this concept of market value. Presidential Decree No. 42[141] authorized the plaintiff in eminent domain proceedings to take possession of the property involved upon depositing the assessed value for purposes of taxation. Presidential Decree No. 76[142] thereafter required all persons owning or administering real property and improvements thereon to file a sworn statement declaring the true value of their property which shall be the current and fair market value. "Current and fair market value" was understood to mean the "price at which a willing seller would sell and a willing buyer would buy neither being under abnormal pressure." "For purposes of just compensation in cases of private property acquired by the government for public use, the basis shall be the current and fair market value declared by the owner or administrator, or such market value as determined by the assessor, whichever is lower."[143]

The Real Property Tax Code[144] provided substantively the same basis for payment of just compensation. So did Presidential Decree No. 794[145] that was subsequently issued amending section 92 of the Real Property Tax Code. Presidential Decree Nos. 1224[146] and 1259[147] are similar except that these decrees deleted the word "market" which described the value determined by the owner or administrator. Presidential Decree No. 1533,[148]

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141 Pres. Decree No. 42 (1972).

142 Pres. Decree No. 76 (1972).

143 Sec. 1, par. 3.

144 Pres. Decree No. 464 (1974). Sec. 92 provides that:

> In determining just compensation when private property is acquired by the government for public use, the basis shall be the market value declared by the owner or administrator or anyone having legal interest in the property, or such *market value* as determined by the assessor, whichever is lower. (emphasis supplied)

145 Pres. Decree No. 794 (1975). This Decree states that:

> Sec. 92. Basis for payment of just compensation in expropriation proceedings. In determining such compensation when private property is acquired by the government for public use, the same shall not exceed the *market value* declared by the owner or administrator or anyone having legal interest in the property, or such *market value* as determined by the assessor, whichever is lower. (emphasis supplied)

146 Pres. Decree No. 1224 (1977). Paragraph 2 declares that:

> 2. In the determination of just compensation for such private lands and improvements to be expropriated, the Government shall choose between the *value* of the real property and the improvements thereon as declared by the owner or administrator thereof from time to time or the *market value* as may be determined by the city or provincial assessor whichever is lower. (emphasis supplied)

147 Pres. Decree No. 1259 (1977). Sec. 2 amending paragraph 2 of Pres. Decree No. 1224 provides that:

> In the determination of just compensation for such private lands and improvements to be expropriated, the Government shall choose between the *value* of the real property and improvements thereon as declared by the owner or administrator thereof or the *market value* determined by the city or provincial assessor whichever is lower, *at the time of the filing of the expropriation complaint.* (emphasis supplied)

148 Pres. Decree No. 1533 (1978). This Decree states:

> Section 1. In determining just compensation for private property acquired through eminent domain proceedings, the compensation to be

however, went further. It also deleted the word "market" that described the value determined by the assessor.

Moreover, Presidential Decree No. 1533 further provides that said value should have been ascertained prior to the recommendation/decision by the appropriate government office to acquire the property. This is a qualification to the provision introduced by Presidential Decree No. 1259 which utilized the time of filing of the expropriation complaint as the point of determination. With this innovation by Presidential Decree No. 1533, the proprietor/administrator or assessor would therefore be given less opportunity to adjust the value of the property to reflect its full value.[149]

The validity of these decrees was upheld by the Philippine Supreme Court in *National Housing Authority v. Reyes.*[150] It was herein stated that, "The courts should recognize that the rule introduced by P.D. No. 76 and reiterated in subsequent decrees does not upset the established concepts of justice or the constitutional provision on just compensation for, precisely, the owner is allowed to make his own valuation of his property."[151]

2. *Promptness*

Statutes prior to the 1935 Constitution require previous payment as a prerequisite to deprivation of property.[152] There were instances provided, however, where immediate possession could be given before the amount had been fully settled.[153]

Nonetheless, at present, the right to enter into immediate possession of the property even before the final ascertainment and payment of just compensation is given to any plaintiff.[154]

Under Presidential Decree No. 1517 proclaiming urban land reform in the Philippines, upon filing of the petition for expropriation and the deposit in the Philippine National Bank of the amount equivalent to 10% of the declared assessment value in 1975, the Government shall immediately have possession, control and disposition of the real property and

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paid shall not exceed the *value* declared by the owner or administrator or anyone having legal interest in the property or determined by the assessor, pursuant to the Real Property Tax Code, whichever value is lower, *prior to the recommendation or decision of the appropriate Government office to acquire the property.* (emphasis supplied)

149 *Ibid.*

150 G.R. No. 49439, June 29, 1983, 123 SCRA 245.

151 *Id.* at 251.

152 BERNAS, *supra,* note 140 at 57-59; CIVIL CODE (1889), sec. 249; CODE OF CIVIL PROCEDURE (1901), sec. 247.

153 BERNAS, *supra* at 58; Act No. 2826 (1919) sec. 2; Act No. 1592 (1906) sec. 1.

154 BERNAS, *supra* at 59; RULES OF COURT, Rule 67, sec. 2.

the improvements thereon with the power of demolition, if necessary, even pending resolution of the issues that may be raised before the courts.[155]

Previous cases, nevertheless, point out that it is not the mere filing of the condemnation proceedings which suspends the condemnee's dominical rights but the deposit of the amount summarily determined by the court.[156]

3. *Effectiveness*

Another question arises whether compensation should be in cash. The New Rules of Court speaks of "amount"[157] and "sum or sums"[158] to be paid as compensation. However, the Agricultural Land Reform Code[159] provides for a compensation only twenty percentum of which is in cash. The remaining balance is in six-percent, tax-free redeemable bonds unless the landowner desires to be paid in shares of stock issued by the Land Bank.[160]

Under Presidential Decree No. 27 emancipating tenants from the bondage of the soil, the total cost, including interest at six percent, was made payable in fifteen equal annual amortizations guaranteed with shares of stock in government-owned and government-controlled corporations. Also under this decree, the value of the lands transferred to the tenant-farmer was made equivalent to two and one-half (2 1/2) times the harvest of three normal crop years immediately preceding the promulgation of the Decree.[161]

The Omnibus Investments Code[162] and the earlier Investment Incentives Act[163] both provide that "foreign investors or enterprises shall have the right to remit sums received as compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate at the time of remittance."[164] Likewise, "payments received as compensation for the requisitioned property may be remitted in the currency in which the investment was originally made and at the

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155 Pres. Decree No. 1517 (1978), sec. 7.

156 Tuason v. Court of Appeals G.R. No. 18128, December 26, 1961, 3 SCRA 696 (1961); *cf.* Cautico v. Court of Appeals, G.R. Nos. 20141-42, October 31, 1962, 6 SCRA 595 (1962); J.M. Tuason Co. v. Cabildo, G.R. No. 17168, October 31, 1962, 6 SCRA 477 (1962); Familara v. J.M. Tuason & Co., G.R. No. 31814, January 31, 1973, 49 SCRA 338, 341 (1973).

157 RULES OF COURT, Rule 67, sec. 10.

158 RULES OF COURT, Rule 67, sec. 9.

159 Rep. Act No. 3844 (1963).

160 Sec. 80 as amended by Rep. Act No. 6389 (1971), sec. 20. The amendment increased the cash precentage in the compensation from ten (10) to twenty (20) percentum.

161 Pres. Decree No. 27 (1972).

162 Pres. Decree No. 1789 (1981).

163 Rep. Act No. 5186 (1967).

164 Pres. Decree No. 1789 (1981), art. 42, par. d; Rep. Act No.. 5186 (1967), sec. 4, par. d.

exchange rate prevailing at the time of remittance."[165] These provisions, however, are explicity made subject to section 74 of the Central Bank Act,[166] which provides for the temporary suspension or restriction of sales of foreign exchange by the Central Bank. All transactions in gold and foreign exchange may be subjected to license by the Central Bank, and any foreign exchange thereafter obtained may be required to be delivered to the Cenral Bank at the effective exchange rates.

B. *Philippine Treaties and International Agreements*

The Philippines has been a supporter of the U.N. resolutions on permanent sovereignty over natural resources. It has been a staunch advocate to the NIEO resolutions and to the Charter on Economic Rights and Duties of States. A member of the UNCTAD Group of 77, the Philippines has been privy to the formation of a new international economic order.

The Philippines, however, has also been a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[167] This Convention provides for the establishment of an international center for the settlement of investment disputes (ICSID) which has been criticized to be linked to the interests of developed states. The Philippines too entered into bilateral treaties with some specific developed states for the protection of foreign investments. An example would be that entered into with the United Kingdom.[168]

C. *Obserations*

It seems that Philippine state practice as regards compensation for property taken reflects a gradual shift rom the classical view to the present position which places emphasis on the social and economic necessities of the state. Particularly, there has been an increasing reliance on national laws and policies.

Though the term "just compensation" was retained by the 1973 Constitution, the concept of market value to which it has been equated has undergone a change. In fact, it even seems that just compensation is not anymore equated with market value. Compensation is presently deemed just so long as it is either the value declared by the owner/administrator or that determined by the assessor, whichever is lower.

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165 Pres. Decree No. 1789 (1981), art. 42, par. e; Rep. Act No. 5186 (1967), sec. 4, par. e.

166 Rep. Act No. 265 (1948).

167 This Convention was signed by the Philippines on September 26, 1978 and ratified on October 17. The country's Instrument of Ratification was deposited with the IBRD on November 17, 1978 and it became a party on December 17 of the same year.

168 AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE PROMOTION AND PROTECTION OF INVESTMENTS. Dec. 3, 1980. This was signed in London and entered into force on January 3, 1981.

The valuation schemes under the land reform laws bolster this proposition that Philippine state practice has moved towards giving stress to social and economic policies of the state. The right to immediate possession of the property prior to the payment of compensation is given. Payments in installment and in forms other than cash is allowed.

Likewise, the Central Bank Act provides for the temporary suspension or restriction of sales of foreign exchange. All transactions in gold and foreign exchange may be subjected to license, and any foreign exchange thereafter obtained may be required to be delivered to the Central Bank at the effective exchange rates.

Treaties and international documents entered into by the Philippines manifest the same trend. The Philippines has been a consistent advocate to the U.N. resolutions recognizing the right of states to permanent sovereignty over their natural resources and the right of states to nationalize. It has been a party to the efforts for the establishment of a new international economic order.

It cannot though be ignored that the Philippines has also been a signatory to the ICSID and to some bilateral agreements which in effect provide full protection to foreign investment. In evaluating this latter group of agreements, however, it should be firmly kept in mind that property protection clauses by no means constitute the only object of these agreements. These agreements provide for a closer general form of cooperation, for the industrial state involved to promote the interests of the developing state in a manner that definitely goes beyond a noncontractual type of cooperation.[169]

A contradiction cannot be observed between the conduct of the Philippines in voting for the abovementioned U.N. resolution and in concluding treaties with property protection clauses. The apparent contradiction can be explained in the light of special benefits that developing countries enjoy under such treaties. From a policy viewpoint, such treaties signify that the countries concerned do not view the Hull rule as undesirable per se. Said countries assume that the Hull rule should apply only under conditions of mutually intensified cooperation and that these conditions are not secured by the general norms of present customary international law.[170]

VIII. CONCLUSION

Compensation for nationalized foreign property has been an obscure issue in international law. Various and conflicting arguments have been raised advocating different positions. The foregoing is an attempt to in-

[169] *See* Dolzer, *supra*, note 17 at 565-566.
[170] *See id.* at 567.

dicate the broad directions in which the arguments have been moving. The legal principles likely to govern the present and future law have also been outlined.

The various schemes of compensation manifest a change that reflects the growing emphasis of societal relations to property law. The recognition of the social function of property and the right of the state to nationalize has greatly influenced these modes of compensation. The traditional requirements of prompt, adequate and effective compensation has been changed to one that requires the consideration of all relevant laws, especially the municipal law, and pertinent circumstances. Expressed as "appropriate compensation," this best explains the intermediate position adopted by states that may have even initially argued for prompt, adequate and effective compensation or for the absence at all of any obligation to pay compensation.

The same trend is indicated by Philippine state practice. The new Philippine Constitution mentions of the regulation of private property and of just compensation. The meaning of just compensation, however, has changed from strict market value to that value disclosed by the owner/administrator or that determined by the assessor. Immediate possession of the property even before payment of compensation is allowed and such payments may not be in cash.

Treaties and international agreements entered into by the Philippines likewise show the same trend. The country has been a supporter of U.N. resolutions on appropriate compensation. That it has been a signatory to the ICSID and to some agreements requiring full protection to foreign investments cannot be deemed contradictory practice.