

New Directions in the Protection of American-Owned Property Abroad

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II. INTERNATIONAL INVESTMENT LAW

A. Promotion and Protection of Foreign Investment

NEW DIRECTIONS IN THE PROTECTION OF AMERICAN-OWNED PROPERTY ABROAD

*Don C. Piper**

I. INTRODUCTION

Since the end of World War II, there has been a substantial increase in investment abroad by American firms. This investment situation significantly indicates a departure from past emphasis on portfolio investment to an emphasis on direct investment by United States firms. Such investment usually entails visible U.S. ownership, management and recovery of profits. Table I indicates the recent growth in the value of U.S. direct investment since 1966.

Table I. U.S. Direct Investment Abroad
(Millions of Dollars)

	1966	1970	1976
Developed States	35,290	51,819	101,150
Developing States	13,866	19,192	29,050
International and Unallocated	2,635	4,469	7,044
Total	51,791	75,480	137,244

Source: Whichard, *U.S. Direct Investment Abroad in 1976*, 57 SURVEY OF CURRENT BUS. 42 (1977).

The dramatic increase in U.S. direct investment is further evident when one considers that in 1929 the value of U.S. direct investment abroad was only \$7.4 billion and it remained below \$8 billion until the mid-1940s.¹ In

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1. S. ROBBINS & R. STOBAUGH, *MONEY IN THE MULTINATIONAL ENTERPRISE* 7 (1973).

addition, by 1966, the number of U.S. firms operating affiliates abroad was 23,282 as compared with 7,417 operating affiliates in 1950.²

Because of the substantial value of U.S. direct investment abroad,³ the efforts of the U.S. government to protect American-owned property from uncompensated takeovers by host governments are an important issue of public policy, both foreign and domestic. Indeed, the State Department considers one of its tasks to be the protection of U.S. property interests abroad in accordance with the rules of international law as one of its primary duties.⁴ Therefore, it is instructive to examine the extent to which American property abroad is protected by the customary rules of international law and by bilateral treaty provisions against uncompensated governmental takeovers.⁵ It is also appropriate to consider what new directions the United States might pursue in seeking to maintain an effective legal regime that will offer an adequate standard of property protection for American investors and, at the same time, be compatible with the economic and political realities found in the Third World. To accomplish this, the adequacy of existing rules and the relative value of property protected by each international legal regime will be considered.

II. LEGAL PROTECTION FOR AMERICAN-OWNED PROPERTY ABROAD

A. *Customary Rules of International Law*

In the absence of specific treaty provisions relating to nationalization and the payment of compensation, the customary rules of international law provide the basic international legal standard for treatment of

2. *Multinational Corporations and World Development* 143, U.N. Doc. ST/ECA/190(1973).

3. The value of U.S. net capital outflows, adjusted earnings, receipts of income, capital expenditures and gross product also indicate the extent of U.S. direct business interests abroad. See Whichard, *U.S. Direct Investment Abroad in 1976*, 57 SURVEY OF CURRENT BUS. 42-43 (1977); Lupo, *Capital Expenditures by Majority-Owned Foreign Affiliates of U.S. Companies, 1977 and 1978*, 57 SURVEY OF CURRENT BUS. 27 (1977); Howenstine, *Gross Product of Foreign Affiliates of U.S. Companies*, 57 SURVEY OF CURRENT BUS. 17, 26 (1977).

4. See Dept. of State Press Release No. 630, Dec. 30, 1975, in 15 INT'L LEGAL MATS. 186 (1976).

5. It should be clear that when reference is made to U.S. property or American property, it is a shortened reference to property owned by U.S. nationals or corporations. No reference to U.S. government-owned property is intended. Although this author employs traditional terms in this context such as "governmental takeover" or "nationalization," Dawson and Weston's term "wealth deprivation" is also helpful. See Dawson & Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 FORDHAM L. REV. 727 (1962).

American property interests by a host government.⁶ The international legal rules traditionally articulated by the Western states are, however, coming increasingly under attack. In the future, these rules may not be reliably effective in promoting a regularized pattern of state behavior with regard to large-scale governmental takeovers which is responsive to and productive for the interests of both creditor and debtor states. This author does not suggest that international law is no longer relevant to the issue; rather, it is suggested that new international legal rules regarding governmental nationalizations may be emerging. The task for international lawyers is to examine contemporary state practice to ascertain rules *de lege ferenda* and to encourage appropriate formulations for these new legal norms that would appear to enjoy broad support.

In order to understand why the traditional rules of customary international law are presently in question, the basic standards asserted to be appropriate in the general matter of a state's responsibility towards aliens should be outlined. One standard — the national treatment or nondiscriminatory standard — maintains that a state must accord to aliens the same standard of treatment that it accords to its own nationals with regard to the protection of life and property. An alien is entitled to that level of treatment which local nationals receive and is not entitled to any form of preferential treatment based upon alienage or upon any standard of international law.⁷ As a general rule, this standard has been articulated by the developing, capital-importing states.

The other standard — the minimum standard of international justice — modifies the national-treatment standard. Providing initially that aliens cannot be discriminated against, national treatment of aliens cannot fall below the minimum standard of justice prescribed for the treatment of aliens by international law, regardless of the standard treatment received by nationals. Aliens consequently may be entitled to preferential treatment if such preferential treatment is necessary to meet the minimum standard. As one definition, the 1926 U.S.-Mexican claims tribunal suggested that the minimum standard represents behavior which an objective and impartial person would recognize as appropriate and reasonable in a specific situation, reflecting the "ordinary standards of civilization."⁸

6. At the present time, many states may reject this view, but this author believes that the weight of evidence is still persuasively in support of the relevance of international law to the matter at issue.

7. For a brief discussion of national treatment, see R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 6-9 (1960).

8. Roberts Claim (U.S. v. Mexico), Opinions of the Commissioners 100, 105 (1927).

On its face, the national-treatment standard would appear to be clear, unambiguous and trouble-free in its implementation. It would appear to assure that aliens will not be discriminated against to their disadvantage and to protect host governments against demands for preferential treatment in favor of aliens.⁹ In recent years, however, the standard has been interpreted selectively by developed and developing states to fit particular concerns and national policies. The developing states interpret the standard to mean only that foreign enterprises may not seek preferential treatment from host governments. A recent statement of this interpretation is article 2, section 2(a) of the Charter of Economic Rights and Duties of States which declares, *inter alia*, "No state shall be compelled to grant preferential treatment to foreign enterprises."¹⁰ It is obvious that such a partial interpretation of national treatment coupled with assertions of the rights of national sovereignty could be used to justify discriminatory treatment by Third World states against foreign firms.

In contrast, the developed states emphasize the protection that national treatment provides in preventing discrimination against foreign firms in favor of national firms. This interpretation is set forth in the 1976 OECD (Organization for Economic Cooperation and Development) Declaration on International Investment and Multinational Enterprises which declares that member countries will apply to foreign-controlled enterprises "treatment under their laws, regulations, and administrative practices consistent with international law and no less favorable than that accorded in like situations to domestic enterprises (hereinafter referred to as 'national treatment')."¹¹

There are also problems involved in the use of the minimum standard as a guide to state behavior. Primarily, there is no consensus among the members of the international community regarding the behavior required by the standard. The general acceptance of a minimum standard by

9. In *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 867 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1963) the Court of Appeals speculated that "perhaps international law is not violated when equal treatment is accorded aliens and natives regardless of the quality of the treatment or the motives behind the treatment" Because the Court found that the Cuban government had obviously discriminated against Americans, it did not need to answer its own question about national treatment.

10. G.A. Res. 3281 (XXIX)(1974). The Calvo doctrine — asserting that aliens doing business in a country are entitled only to nondiscriminatory treatment — has been frequently asserted by Latin American States as an expression of this view that aliens are not entitled to preferential treatment. *See, e.g.*, art. 9 of the Montevideo Convention on the Rights and Duties of States (1933).

11. *See* 15 INT'L LEGAL MATS. 967-80 (1976) for the text of the declaration.

tribunals¹² may be beneficial in resolving specific claims within a precise context of events, but the standard has not facilitated the efforts of state authorities to formulate a comprehensive policy for the treatment of aliens that would have broad support.¹³ In addition, the assertion of a minimum standard by a Western developed state against a non-Western developing state may easily be misunderstood as an attempt to perpetuate a preferential economic position or as a manifestation of a colonial-imperialist mentality wherein Third World states are considered to be backward and derelict in comparison with modern states.

Notwithstanding these problems, the developed states still consider the minimum standard to be valid under existing international law.¹⁴ This is evident in the reference to "international law" in the OECD Declaration quoted above. The combination in the Declaration of national treatment and the minimum standard of international law establishes a set of principles that together serves to preclude discriminatory treatment of alien firms in favor of national firms and, at the same time, to retain the international legal base to support the principle of compensation for alien property in the event of a governmental takeover.

Despite disagreement over the applicable general standard for a state's responsibility for the treatment of aliens, there seems to be agreement that the discriminatory and arbitrary taking of alien-owned property and the refusal or failure of the taking state to offer compensation to the owners represents a violation of customary rules of international law. Within this context, a taking of property would be discriminatory if property of a similar type and in a like situation, but

12. Tribunals, such as the Permanent Court of Arbitration in the Norwegian Shipping Claims case and some of the decisions of the 1926 U.S.-Mexican claims tribunal, support the applicability of the minimum standard as the appropriate rule of international law. For a useful review of the judicial opinions on the matter, see RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §505-06 (1965). See also A. ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* (1949); Doman, *Postwar Nationalization of a Foreign Property in Europe*, 48 COLUM. L. REV. 1132-36 (1948); Borchard, *The Minimum Standard of the Treatment of Aliens*, 38 MICH. L. REV. 445 (1940).

13. As an example, one may cite the inability of the International Law Commission to formulate an agreed upon draft of the substantive international legal rules regarding a state's responsibility for treatment of aliens, the so-called "primary" rules. Instead the ILC has focused on secondary principles, *i.e.*, a state's responsibility for internationally wrongful acts. See *Report of the International Law Commission on the Work of its 28th Session*, U.N. GAOR, Supp. (No. 10) U.N. Doc. A/31/10, at 162-64 (1976).

14. See, *e.g.*, the U.S. assertion of a minimum standard in correspondence with the Guatemalan government (July 28, 1952). 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1021-22 (1967).

belonging to local nationals or nationals of a third state, was not taken by the local state. This assessment of existing international law is supported by the decision of the Court of International Justice in the *Oscar Chinn* case¹⁵ and by the U.S. district and circuit courts in *Banco Nacional de Cuba v. Sabbatino*.¹⁶ A discriminatory taking of property is apparently contrary to both the standard of national treatment and the minimum standard, and is a justifiable basis for an international legal claim. Whether the discriminatory act alone is sufficient to constitute a violation of international law is debatable, but certainly the combination of discriminatory and arbitrary action and the failure to pay compensation is persuasive as a violation of customary international law.¹⁷

The more difficult and controversial area of customary international law relates to the taking of property where the acting state does not arbitrarily discriminate against aliens but accords national treatment to them. Specifically, the question at issue is whether in non-discriminatory circumstances and in accordance with a national treatment standard, a state may decline to offer compensation to alien property holders because, as a matter of public policy, it does not offer compensation either to nationals or aliens, especially in cases where the state is undertaking a broad program of social and economic reform.

If customary international law adhered solely to the national treatment standard, a state would be able to resist any claim based upon international law for compensation for alien owners that would entail preferential treatment. An example of this interpretation is the statement of the Mexican government in 1938 in the dispute with the United States over agrarian land holdings. That government asserted that:

[T]here is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land.¹⁸

15. [1934] P.C.I.J., ser. A/B, No. 63; See also G. WHITE, NATIONALIZATION OF FOREIGN PROPERTY 5, 119-21 (1961).

16. 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1963).

17. Brownlie argues that discriminatory takings "being aimed at persons of particular racial groups or nationals of particular states" are illegal *per se* and that the failure to provide compensation is merely an additional legality. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 523-24 (2d ed. 1973).

18. THE LAW OF NATIONS 558 (2d ed. H. Briggs 1952).

It is thus easy to understand why this interpretation of the rules of international law would appeal to developing states seeking to recover national ownership of local resources and economic activities.

The contrary view asserts that, notwithstanding the public policy that a state may pursue with regard to its own nationals, it is required by the rules of customary international law and the minimum standard of international justice to offer compensation to aliens for the takeover of private property.¹⁹ This was the rule set forth by the United States in the dispute with Mexico:

We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires [refusal to pay compensation]. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rules of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify the universally accepted principle of international law, based as it is upon reason, equity, and justice²⁰

A reading of the literature suggests that the majority of American authorities support the minimum standard as the appropriate standard of international law and that this standard requires the payment of compensation to aliens in the event of a governmental takeover of property. Nicholas Doman asserts: "Therefore it would not be amiss to say that the principle of a minimum international standard of equitable

19. For a useful review of some decisions by arbitral tribunals that uphold the requirement of the payment of compensation, see Doman, *supra* note 12, at 1132-36.

20. Briggs, *supra* note 18 at 557.

A more recent statement of the requirements of the minimum standard relating to the taking of alien-owned property, as set forth by the developed states, is the OECD Draft Convention on the Protection of Foreign Property. Article 3 provides:

No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless . . . the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto.

The draft was approved by the OECD Council on October 12, 1967, as embodying "recognized principles relating to the protection of foreign property, combined with rules to render more effective the application of these principles." 7 INT'L LEGAL MATS. 117 (1968).

compensation is the prevailing rule of international law today [1948] and not the principle of equality of treatment between foreigners and nationals."²¹ Other scholars have also concluded that this rule is the relevant rule of international law, although there is some divergence of opinion over the mode of compensation and the criteria for valuation required of developing states in the event of large-scale nationalization programs as a part of a social and economic reform program.²²

Those who contend that aliens are entitled to compensation under the rules of customary international law have also maintained that this rule is accepted by both developed and developing states as the applicable rule of international law. Henry Landau is very positive in this regard, although he also notes that there is disagreement as to the determination of the amount of compensation.²³ A study by the U.S. State Department of takings of American and other foreign-owned property also concluded that compensation is usually paid although there may be disagreement over the amount.

Although some compensation for nationalized or expropriated property is generally offered — and is often required under the laws of LDC [less developed countries] governments — payments may not be considered adequate by the former owners who expect fair market value. Recently LDCs have tended to base their offers on depreciated book value and to spread payments out over fairly long periods, say 15 to 30 years. Often, however, other factors may influence the conclusion of an agreement, for example, related agreements with governments for repatriation of profits, management contracts, etc.²⁴

21. Doman, *supra* note 12, at 1136.

22. The literature on the subject is extensive. Useful sources are M. WHITEMAN, *supra* note 14, at 1085; and Dawson & Weston, *supra* note 5. For a discussion of the valuation of compensation, see p. 328 *infra*.

23. Landau, *Compensation Upon the Taking of an Alien's Property*, 12 AM. BUS. L. J. 31, 34 (1974). The Committee on International Law of the Association of the Bar of the City of New York also supports this view. "An examination of treaty-obligations of capital-importing countries and of their internal laws inviting and encouraging foreign investment leads to the conclusion that compensation for expropriated property is the generally accepted practice and is in the national interests of states engaged in importing capital." 22 *Record of N.Y.C.B.A.* 195, 198 (1967). See also Murphy, *Limitations Upon the Power of a State to Determine the Amount of Compensation Payable to an Alien Upon Nationalization*, in 3 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 45, 52 (R. Lillich ed. 1975).

24. U.S. State Department, *Report on Nationalization, Expropriation and Other Takings of U.S. and Certain Foreign Property Since 1960*, 11 INT'L LEGAL MATS. 86 (1972).

Notwithstanding this apparent support for an international legal rule requiring the payment of compensation to alien property owners, one must acknowledge that not all observers conclude that recent practice supports the rule of compensation. Charles Brower states that:

In recent years, however, the developing countries of the world have moved toward consolidation of national sovereignty over natural resources and have sought increasingly to limit, if not eliminate, the principle of full compensation for expropriated alien property.

. . . .

. . . Concurrent with these efforts to promulgate new principles of international law, a number of developing nations have in fact nationalized substantial foreign-owned enterprises within their borders, with payment of little or no compensation. Taken together, these developments tend to suggest not only that traditional international law regarding the payment of compensation upon expropriation is being undermined but, further, that a new rule of international law may be emerging to the effect that payment of compensation is not required at all.²⁵

It must also be recognized that the traditional minimum standard rule and the related principle of compensation were formulated prior to the recent period wherein host governments, as a matter of national policy, now acquire national control over economic activities through large-scale nationalization activities. Consequently, it is arguable whether international legal rules formulated to apply to limited governmental expropriations are relevant to large-scale nationalizations. Although most Western scholars support the conclusion that the principle of compensation does apply in such instances, they also seem to be persuaded that the traditional rule regarding payment of full compensation which is associated with expropriations may not be applicable to large-scale nationalization, in which case partial compensation may be appropriate under international law.²⁶

25. Brower, *The Future of Foreign Investment — Recent Developments in the International Law of Expropriation and Compensation*, in PRIVATE INVESTORS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 93, 94 (1975). See also Lillich, *The Valuation of Nationalized Property in International Law: Toward a Consensus or More "Rich Chaos"?* in Lillich, *supra* note 23, at 183.

26. See Dawson & Weston, *supra* note 5, at 740-49 for a full discussion of compensation arrangements that represent less than full value. Indeed they conclude:

In assessing the reliability of the traditional customary rules of international law regarding the taking of alien-owned property, one must also consider three resolutions adopted recently by the U.N. General Assembly. These resolutions, 3171 (XXVIII) "Permanent Sovereignty over Natural Resources," 3201 (S-VI) "Declaration on the Establishment of a New International Economic Order," and 3281 (XXIX) "Charter of Economic Rights and Duties of States," contain provisions which suggest that, as a part of the new international economic order demanded by the developing states, governments are free to ignore the rules of international law and employ only national law and policy with regard to the taking of alien-owned property and the possible payment of compensation.²⁷ Moreover, the resolutions suggest that in the event of a dispute

Far from being a "rule" of international law in the extensive deprivation context, the demand for "full" or "prompt, adequate and effective" compensation would appear to be little more than a preference assumed for bargaining purposes — an element of legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy.

Id. at 757. See also Murphy, *supra* note 23, at 52-53; Vicuña, *The International Regulation of Valuation Standards and Processes: A Re-Examination of Third World Perspectives*, in Lillich, *supra* note 23, at 132. For a discussion on partial compensation, see p. 329 *infra*.

27. The three General Assembly Resolutions are: 3171 (XXVIII) Permanent Sovereignty over Natural Resources, para. 3 (1973) which

[a]ffirms that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the 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;

3201 (S-VI) Declaration on the Establishment of a New International Economic Order, art. 4(e)(1974) which declares:

[f]ull permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right;

and 3281 (XXIX) Charter of Economic Rights and Duties of States, art. 2 section 2(c) (1974), addressing the issue of compensation:

To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled

over the payment of compensation between the property owners and the appropriating government the dispute is to be resolved within the local courts rather than in an international tribunal. It would be expected, of course, that the local courts would uphold the applicability of national law over customary rules of international law. Although these resolutions were supported by an overwhelming majority of states in the General Assembly, they were consistently, if not persuasively, opposed by the Western capital-exporting states²⁸ because they violated existing rules of international law and were not constructive in promoting private investment required by the developing states for economic advancement.²⁹

The resolutions are contrary to the provisions of Resolution 1803 (XVII) adopted by the General Assembly a decade earlier. That resolution recognized the right of a state to take alien property for reasons "of public utility, security or the national interest . . ." In the event of a takeover "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."³⁰

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.

28. The comments of the Canadian delegate regarding the Charter of Economic Rights and Duties of States are a candid assessment of the West's disappointment in the provisions regarding the taking of alien-owned property. U.N. GAOR, 29th Sess. Plenary 2315 (1974).

Even among states which like Canada, hold the view that there are principles of customary international law which are relevant to the treatment of foreign investment, there is disagreement about the precise content of these principles. Where the old law is unjust or ineffective, it must be changed to reflect the present economic interdependence of States and the need for development of the developing countries which are the two most important facts of economic life in our generation. It had been the hope of my delegation that this Charter could command the consensus necessary to enable it to contribute to the codification and progressive development of law in this area; unhappily, this is not the case.

29. Resolution 3171 was adopted by a vote of 108-1-16; Resolution 3201 was adopted by "consensus"; and Resolution 3281 was adopted by a vote of 120-6-10.

30. Article 4 of Resolution 1803 provides:

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate

The General Assembly's dramatic change of its nationalization-compensation policy can be explained, in part, as a consequence of the emergence of a large bloc of developing states that now constitute a substantial numerical majority within the General Assembly. Because capitalistic states are no longer dominant in the formulation of international economic policy within the General Assembly³¹ and the newly-dominant states hold different perceptions of the existing international economic system, Western states must expect some efforts by the developing nations to change the existing rules. During the U.N. debates, the Algerian delegate set forth views apparently representative of the views of other developing states. Existing international law, he asserted, was European law which had been imposed upon former colonial states. The new resolutions reflected "progressive international law" which represented the interests of one and all and "which particularly represent[ed] the interests of the developing countries."³²

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.

Even in 1962 a number of developing states objected to the applicability of the existing rules of international law to the nationalization of alien property. The Algerian delegate asserted: "A state which during the colonial period, had been disposed of its property and had seen enterprises set up on its territory without its consent could not be obliged to pay compensation or to comply with international law." U.N. GAOR, 17th Sess., C.2 (851st mtg.) (Agenda Item 39) (1962). The Ethiopian delegate asserted: "The existing provisions of international law on the topic under discussion had been formulated without the participation of the less developed countries and did not adequately meet the needs of those countries for whom the problem of sovereignty was of particular importance." U.N. ESCOR OFF. REC., 32d Sess., (1179th mtg.) (1961).

The American delegate sought to insert the words "prompt, adequate, and effective" between the words "appropriate" and "compensation." Although the delegate withdrew the amendment in a spirit of compromise, he expressed the view that "appropriate compensation" would be interpreted under international law to mean prompt, adequate, and effective compensation. U.N. GAOR, 17th Sess., C.2 (Agenda Item 39) (1962); and *Report of Second Committee*, U.N. GAOR, C.2, U.N. Doc. A/5344 (1962). See also Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A.J. 463 (1963).

31. As Doman indicated "As long as states of the capitalistic economy are more powerful influences in international society and in the formulation of international law the minimum standard of justice as interpreted by them will remain the dominant concept in connection with the problem of compensation for expropriated property." *Supra* note 12, at 1136.

32. U.N. GAOR, 28th Sess. Plenary 2203 (1973).

Because of consistent Western opposition and differing views regarding the General Assembly's capacity to enact legally binding resolutions relating to state behavior outside of the organization, one cannot readily conclude that the resolutions have created a new rule of international law that is binding on all members of the General Assembly.³³ It must be recognized, however, that although the Assembly's authority in this matter is arguable, some states may nevertheless seek to utilize the resolutions as a mantle of General Assembly endorsement and seeming legality to nationalization without compensation and to reject any international legal claim or any use of international legal tribunals.³⁴

33. The literature on the legal status of General Assembly resolutions is useful. See O. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* (1966); J. CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (1969); Bleicher, *The Legal Significance of Recitation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444 (1969); Castles, *Legal Status of U.N. Resolutions*, 3 ADELAIDE L. REV. 115 (1970); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); Higgins, *The Development of International Law by the Political Organs of the United Nations*, AM. SOC'Y INT'L L. PROC. 116 (1965); Higgins, *The United Nations and Lawmaking: the Political Organs*, AM. SOC'Y INT'L L. PROC. 37 (1970); Schwebel, *Law Making in the United Nations*, 4 FED. L. REV. 115 (1970); and Sohn, *The Development of the Charter of the United Nations: the Present State*, in M. BOS, *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 39 (1973). For a specific discussion of the recent resolutions, see Brower and Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law*, 9 INT'L LAW. 295 (1975); Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L LAW. 591 (1975); and the symposium of articles on the *New International Economic Order*, in 16 VA. J. INT'L L. 233 (1976).

34. It is useful to note that the Libyan government in its memorandum of 27 November 1975, objecting to the appointment of a tribunal to arbitrate the nationalization of the oil concession contracts with Texaco Overseas Petroleum Company and California Asiatic Oil Company, utilized the Assembly resolutions to assert the sole applicability of national law. The memorandum declared:

Nationalization is an act related to the sovereignty of the State. This fact has been recognized by the consecutive Resolutions of the United Nations on the sovereignty of States over their natural resources, the last being Resolution No. 3171 of the United Nations General Assembly adopted on December 3, 1973, as well as paragraph (4/E) of Resolution No. 3201 (S. VI) adopted on May 1, 1974. The said Resolutions confirm that every State maintains complete right to exercise full sovereignty over its natural resources and recognize Nationalization as being a legitimate and internationally recognized method to ensure the sovereignty of the State upon such resources. Nationalization, being related to the sovereignty of the State, is not subject to foreign jurisdiction. Provisions of the

Fortunately, from the perspective of the maintenance of a viable international legal order, the legal character of these three resolutions has been denied and the rules of international law in the case of nationalization have been upheld by the sole arbitrator in the cases involving Libyan nationalization of oil concession contracts.³⁵ In these cases the arbitrator declared that General Assembly Resolution 1803 (XVII) represented existing international law rather than the more recent resolutions cited above.

In addition to the controversy over the principle of compensation, there is also disagreement over the type, format and valuation of compensation. The conventional State Department assertion is that American investors are entitled to the payment of "prompt, adequate, and effective" compensation, "usually considered to be an amount representing the market value . . . of the enterprise, calculated as if the expropriation or other governmental act decreasing the value of the business had not occurred and was not threatened."³⁶ A similar position is set forth in article 3 of the OECD draft convention which provides for compensation representing the "genuine value of the property."

As a rule this will correspond to the fair market value of the property without reduction in that value due to the method by which the payment is calculated; to the manner in which it is made; or to any special tax or charges levied on it. Furthermore, the value must remain unaffected by artificial factors such as deterioration due to the prospect of the very seizure which ultimately occurs, similar seizures by the Party concerned or the general conduct of that Party towards property of aliens which makes such seizures likely.

. . . .

. . . To the amount assessed should be added interest from the day of the taking to the day on which compensation is paid. In appropriate

International Law do not permit a dispute with a State to be referred to any Jurisdiction other than its national Jurisdiction. In affirmance of this principle, Resolutions of the General Assembly provide that any dispute related to Nationalization or its consequences should be settled in accordance with provisions of domestic law of the State.

Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic in 17 INT'L LEGAL MATS. 1, 17 (1978).

35. *Id.* at 30. See note 45 *infra*. See also Piper, On Changing or Rejecting the International Legal Order (forthcoming INT'L LAW.).

36. M. WHITEMAN, *supra* note 14, at 1143.

cases, profitability is an element in the computation of the value of the property.³⁷

Opposed to fair market value compensation, some developing states argue that their lack of economic resources justifies the refusal to offer compensation, especially if the nationalization is part of a social and economic reform program. Developing states also argue that compensation to a particular alien owner is neither required nor justified because the owner has engaged in exploitative economic practices during his tenure which have depleted the national wealth far in excess of the value of the seized assets. As a consequence of the possible futility of receiving full compensation, alternative modes of compensation payment have been suggested and, in cases, implemented. A number of scholars have suggested, however, that partial rather than full compensation is an appropriate compromise between an absolute, and likely unrealistic, minimum standard and a rigid application of national treatment, especially in instances of social and economic reform programs.³⁸

Another trend, payment in accordance with depreciated book value rather than fair market value, is identified by the State Department.³⁹ Brower identifies some of the practices currently employed by developing states which suggest that some states employ book value only as the starting point in determining the valuation of property and the payment of compensation. In determining the amount of appropriate compensation, some developing nations have sought to subtract from the book value of the assets deductions for certain activities or services that the former owners should have undertaken or charges for the depletion of national wealth.⁴⁰

It is difficult to obtain a complete picture of the compensation arrangements that have been recently concluded following governmental takeovers. Accordingly, it is also difficult to ascertain whether the trends identified by Brower represent important, but isolated cases, or whether they represent the dominant pattern for the future.

37. See notes and comments on art. 3, in 7 INT'L LEGAL MATS. 127 (1968).

38. See *supra* note 26.

39. Book value is generally used to "refer to the value on the books of account of the owners' equity in an enterprise." Equity is calculated by subtracting total liabilities from total assets. Generally in accordance with principles of accounting, book value is usually less than fair value. It "is not intended to be an equitable basis for settling nationalization claims and should not be used for that purpose." McCosker, *Book Values in Nationalization Settlements*, in 2 VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 36, 51 (R. Lillich ed. 1973). See also the State Dept. study *supra* note 24.

40. Brower, *supra* note 25, at 115.

In this regard the United Nations has identified 875 governmental takeovers in sixty-two states in the period 1960-74. Ten of the sixty-two states are responsible for two-thirds of all of the nationalization cases with each of the ten responsible for at least thirty-one takeovers.⁴¹ Unfortunately, the U.N. data do not indicate what compensation agreements, if any, were concluded in each of the cases. The evidence suggests, however, that the traditional assertion that compensation must be "prompt, adequate, and effective," as defined above, is not universally accepted in principle or in practice, especially in the case of government nationalization programs. Moreover, it appears that the acceptance by creditor states of compensation that is less than the value of initial claims is not unusual.⁴²

As indicated above, this author is skeptical that the rules of customary international law as traditionally asserted by the United States and other developed states are still effective in promoting predictable patterns of state behavior in the event of large-scale nationalization of alien property. This is the result in part of the competing demands and perceptions between the influential and powerful, if not dominant, Western capital-exporting states and the emerging and numerically dominant developing states.⁴³ The former states seek to maintain an appropriate international law standard that assures payment of compensation and that does not preclude the possible use of international legal machinery in the event of a dispute over property taking. The latter states consider the existing rules of customary international law regarding nationalization to be capitalist international law and inappropriate to their interests as independent states. Recent assertions of rights of national sovereignty as part of the new international economic order complicate the task of employing international law with any authoritative assurance. In addition, existing customary rules of international law also appear to be inadequate in providing an effective legal basis for "creeping

41. Permanent Sovereignty Over Natural Resources Report of the Secretary General, U.N. Doc. A/9716 (1974). The ten states are: Algeria, Chile, Egypt, India, Indonesia, Sri Lanka, Sudan, Uganda, United Republic of Tanzania and Zambia.

42. See Dawson & Weston, *supra* note 5, at 733-36, 740-49. See also Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 AM. J. INT'L L. 837 (1975), for a discussion of Congressional opposition to the lump sum agreement negotiated by the United States and Czechoslovakia which only provided for \$20.5 million to cover \$105.0 million in claims.

43. The Court's uncertainty about the status of the contemporary rules of international law appears to be one of the reasons why the Supreme Court invoked the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428-29. See opinion of Mr. Justice Harlan.

expropriation" where aliens are victims of "wealth deprivation" by activities of foreign states that are based upon the police power rather than the power of eminent domain.⁴⁴

The formulation of appropriate customary rules of international law that will respond to the legitimate concern of aliens about indirect takings and at the same time recognize the necessary use of the police power will not be an easy task and may place an additional burden on those seeking to clarify the customary rules of international law. To the extent that the new demands and perceptions are also based upon ideology or are symbolic of developing states' quest for international status and power, reliance on customary rules of international law is even more uncertain.⁴⁵

44. As Weston notes there has been a failure of international law scholars and practitioners to provide anything remotely approaching a systematic appraisal of the many ways in which aliens, not the targets of "confiscation," "expropriation," "nationalization," or "requisition" *stricto sensu*, can be and have been effectively deprived, in whole or in part, of the "use and enjoyment" of their foreign-based wealth by the exercise of so-called police power.

Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation," 16 VA. J. OF INT'L L. 106 (1975). See also Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J. INT'L L. 17 (1978).

45. Unfortunately, these uncertainties continue notwithstanding the favorable award of the sole arbitrator in the Libyan oil nationalization cases. The tribunal did not consider the matter of the mode or valuation of compensation in the event of nationalization because it found that the plaintiffs were entitled to *restitutio in integrum* (restitution to the previous condition). Consequently, the tribunal's opinion does not support the matters that are an important part of the U.S. assertions of the applicable principles of international law. The tribunal affirms the rules of international law that call for the payment of "appropriate compensation," which is the requirement of General Assembly Resolution 1803; it does not support the argument that prompt, adequate and effective compensation is required under international law. In addition, because of the tribunal's silence on the valuation and mode of compensation, the award is not helpful in supporting the assertion that fair market value is the sole basis for valuation under customary rules of international law. Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic, in 17 INT'L LEGAL MATS. 1, 30 (1978). It should be noted that the tribunal's order of restitution was based upon Libyan failure to fulfill the terms of the contracts entered into with the plaintiffs. While recognizing that restitution is an appropriate principle of international law, the tribunal did not establish the principle as applicable in nationalizations wherein no contractual obligation is involved.

B. *Bilateral Treaties as a Source of International Law*

Customary rules of international law do not, however, represent the only international legal standard for the protection of American-owned property. American property interests in some states are protected by appropriate provisions in bilateral treaties of Friendship, Commerce and Navigation (FCN).⁴⁶ Not all of the FCN treaties contain provisions relating to nationalization and compensation but those concluded since the 1920s usually contain such provisions. Although the specific language varies, the FCN treaties provide that the payment of compensation is required in the event of a taking of alien-owned property. For analytical purposes, it is useful to examine three types of treaty provisions.

The Type I provisions are in the older FCN treaties⁴⁷ and generally contain less specific language regarding expropriation and the payment of compensation.⁴⁸ The appropriate provisions set forth that aliens in the territory of another state shall enjoy, with regard to the security of their person and property, "that degree of protection that is required by international law." In addition the treaties provide that "[t]heir property shall not be taken without due process of law and without payment of just compensation." For example, the treaty with Thailand asserts that both "direct or indirect interests in property" shall be protected within the territories of either state. Although it is a recent instrument, this treaty contains the more limited and older language that property will not be taken "without due process of law or without payment of just compensation in accordance with the principles of international law." The relevant principles of international law are not identified, but it is certainly reasonable to assume that they are the same principles set forth in other contemporary treaties.⁴⁹

46. For an authoritative analysis of U.S. FCN treaties, see R. WILSON, *supra* note 7; M. WHITEMAN, *supra* note 14, at 1085-89.

47. Type I
 Austria (1928)
 Finland (1934)
 Honduras (1927)
 Latvia (1928)
 Liberia (1938)
 Norway (1928)
 Thailand (1966)

48. Austria, art. 1, [1928] 5, T.I.A.S. No. 342; Finland, art. I, [1934] 7 T.I.A.S. No. 718; Honduras, art. I, [1927] 8 T.I.A.S. No. 905; Latvia, art. I, [1928] 9 T.I.A.S. No. 531; Liberia, art. I, [1938] 9 T.I.A.S. No. 595; Norway, art. I, [1928] 10 T.I.A.S. No. 481; and Thailand, art. III (2), [1966] 18 U.S.T. 5843.

49. For a discussion of Type II and III treaties, see pp. 333-35 *infra*.

It should be emphasized that the "due process" requirement set forth in the treaties does not refer to due process in a constitutional or domestic law context. Rather, as R. R. Wilson points out, it refers to "due process required by international law since the standard of 'due process of law' whether procedural or substantive of one of the parties is not controlling and does not necessarily reflect international law."⁵⁰ At a minimum, due process under international law would appear to guarantee that alien property may be taken only for public purposes and not in an arbitrary or discriminatory manner. Similarly, due process would also appear to provide that any taking of property would be accompanied by a prompt inventory of the property in order to ascertain its value.

Reference to "just compensation" lacks precision and accordingly could result in quite different assertions as to the methods used in determining the valuation of the property.⁵¹ As for the United States, the phrase is intended to mean the fair market value of the property, but it could just as easily be interpreted to mean the book value of the property.⁵² Another argument asserts that no compensation is just because the alien owners have exploited the national wealth in excess of the value of the property; this interpretation is unlikely, however. As a consequence of the imprecision of the language, disagreements over the method of determining the valuation of the property and charges against the property are possible and would have to be resolved either by negotiation or an appropriate judicial forum.

Type II treaty provisions⁵³ contain language that provides a greater degree of specificity regarding the payment of compensation. Generally these treaties provide that the property shall not be taken without the prompt payment of just and effective compensation.⁵⁴ As previously mentioned, the reference to "just" compensation doesn't foreclose possible disagreement over the method of valuation of the property.

50. R. WILSON, *supra* note 7, at 115.

51. In the negotiations with Poland in the 1920s, the State Department admitted that the word "just" was indefinite but concluded that for the purpose of its use in a treaty there was no objection to its indefiniteness. *Id.* n.84.

52. See previous discussion on property valuation, p. 328 *supra*.

53. Type II

China	(1946)
Ethiopia	(1951)
Ireland	(1950)
Italy	(1948)

54. China, art. VI, [1946] 6 T.I.A.S. No. 761; Ethiopia, art. VIII, [1951] 4 U.S.T. 2134; Ireland, art. VIII, [1950] 1 U.S.T. 785; and Italy, art. V, [1948] 9 T.I.A.S. No. 261.

The treaty with the Republic of China also contains a general reference that persons and property shall enjoy "the full protection and security required by international law." In addition, the treaty specifies that property will not be taken without due process of law. The treaty with Ireland contains similar language and also defines the nature of "effective compensation" to mean that persons "shall be permitted to withdraw from the territories of the other Party the whole or any portion of such compensation and to this end shall be permitted to obtain exchange in the currency of their own country freely at a rate of exchange that is just and reasonable."⁵⁵ As a final example, the treaty with Ethiopia provides that a taking of property must be for public purposes.

Type III treaty provisions⁵⁶ are even more precise and specific with regard to compensation and they provide the most detailed and comprehensive form of treaty protection for American property owners. These treaties stipulate that property shall not be taken except for public purpose,

nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provisions shall have been made at or prior to the time of taking for the determination and payment thereof.⁵⁷

55. It should be noted that the right to currency is limited to the acquisition either of U.S. or Irish currency and does not include a protected right to obtain currency of a third state.

56. Type III

Belgium	(1961)
Denmark	(1951)
France	(1959)
Germany	(1954)
Greece	(1951)
Iran	(1955)
Israel	(1951)
Japan	(1953)
Korea	(1956)
Luxembourg	(1962)
Muscat & Oman	(1958)
Netherlands	(1956)
Nicaragua	(1956)
Pakistan	(1959)
Togo	(1966)

57. Belgium, art. IV, [1961] 14 U.S.T. 1284; Denmark, art. VI, [1951] 12 U.S.T. 908; France, art. IV, [1959] 11 U.S.T. 2398; Germany, art. V, [1954] 7 U.S.T. 1839;

Although the treaty language does not indicate how the "full equivalent of the property" is to be determined, the "fair market value" is clearly the standard employed by the State Department.⁵⁸ The treaties with Israel, Germany, the Netherlands and France omit the reference to "full," declaring that the compensation must represent the equivalent of the property taken.

In addition, the three types of treaties also contain provisions that guarantee property holders not less than national treatment with regard to the taking of property. Some treaties also contain provisions ensuring most-favored-nation treatment as well. The combination of the minimum standard of international justice, by reference to just compensation, with the national treatment standard would appear to guarantee that if there is a discrepancy between the treatment required by the minimum standard and that given to local nationals, the alien will receive the "higher" of the two levels of treatment.⁵⁹

Although several of the treaties refer to protection of "direct and indirect property interests," there are not any provisions relating specifically to indirect takings.⁶⁰ The legal framework for such takings could, however, be covered under requirements of "due process" as well as guarantees of national treatment that would prevent discriminatory treatment. In addition, the treaty provision that "property shall not be taken" rather than use of the words "expropriate" or "nationalize" may be sufficiently broad to cover a deprivation of the use of property by the police power.⁶¹

The recent FCN treaties also contain provisions that assure property owners of the right to secure compensation in the foreign exchange of the

Greece, art. VII, [1951] 5 U.S.T. 1829; Iran, art. IV, [1955] 8 U.S.T. 899; Israel, art. VI, [1951] 5 U.S.T. 550; Japan, art. VI, [1953] 4 U.S.T. 2063; Korea, art. VI, [1956] 8 U.S.T. 2217; Luxembourg, art. IV, [1962] 14 U.S.T. 251; Muscat and Oman, art. IV, [1958] 11 U.S.T. 1835; Netherlands, art. VI, [1956] 8 U.S.T. 2043; Nicaragua, art. VI, [1956] 9 U.S.T. 449; Pakistan, art. VI, [1959] 12 U.S.T. 110; and Togo, art. IV, [1966] 18 U.S.T. 1.

58. See p. 328 *supra*.

59. Treaties with France, Belgium and Luxembourg contain references to national treatment. The treaties that contain references to both national treatment and most-favored-nation treatment are those with Denmark, China, Germany, Greece, Ireland, Israel, Italy, Japan, Korea, the Netherlands, Nicaragua and Pakistan.

60. Ireland (art. IX (7)); Thailand (art. III); Togo (art. IV); Greece (art. VII). The treaty with Italy refers to "substantial interests." See art. V. interests." See art. V.

61. Treaties with Belgium, Luxembourg and Nicaragua use the word "expropriated" rather than "taking."

other treaty party in the event of a governmental takeover or for salaries, interest, dividends, amounts for amortization of loans, depreciation of direct investment and capital transfers. Such provisions would appear to be instrumental in ensuring that compensation is "effective" and thus of use to the property owner.⁶²

Notwithstanding any disagreement that might emerge from the treaty provisions, the FCN treaties, at a minimum, clearly avoid the argument whether compensation is required in principle. Disagreement between the parties, would most likely arise over the method of property valuation. Because many of the recent FCN treaties contain compromise clauses for third party dispute settlement in the event of a disagreement over the interpretation or application of the treaties, such a disagreement could easily be taken to the International Court of Justice or an appropriate judicial body.

The right to initiate international legal action to secure the treatment set forth in the treaties is a right that is available only to the treaty parties and not to the alien owners. This, of course, is not a limitation that pertains solely to nationalization disputes. Unless there are treaty provisions to the contrary, traditionally a state is the only entity that has legal standing to present a claim before an international legal body. Consequently, the American property owner has the burden of persuading the State Department to take up his claim.

This procedural requirement may be set aside, however, for property owners who elect to take advantage of U.S. participation in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.⁶³ This convention permits, but does not guarantee, direct international arbitration of an investment dispute

62. See treaties with Luxembourg (art. XI); Netherlands (art. XII); Korea (art. XII); Japan (art. XII); Israel (art. XII); Iran (art. VII); Greece (art. XV); Belgium (art. X); Ireland (art. XVII); Ethiopia (art. XI); France (art. X); Denmark (art. XII); Nicaragua (art. XII); Pakistan (art. XII); and Togo (art. VIII).

Treaties with China (art. XIX), and Italy (art. XVII), assure most-favored-nation and national treatment regarding financial transactions. The treaty with Germany (art. XII) states that the "movement of investment capital and returns . . . shall not be unnecessarily hampered." Nationals of either party shall have "reasonable facilities for withdrawal of funds earned by them as a result of making or maintaining capital investments . . ."

63. Aug. 25, 1965, 1 U.S.T. 1270. For a discussion of the Convention, see Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUIL DES COURS 404 (1972); Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA. J. INT'L & COMP. L. 343 (1974).

between a contracting state and the alien property owner without the involvement of the property owner's state.⁶⁴ If the property owner elects to utilize the arbitration procedure, the state may not then give him diplomatic protection or bring an international claim unless the contracting state fails to abide by or comply with the arbitral award.⁶⁵

The Convention provides that arbitration may be utilized for "any legal dispute arising directly out of an investment . . ." which would then include disputes relating to governmental takeovers of alien property.⁶⁶ The arbitration process is not automatic, however, since both parties to the dispute must consent to submit the dispute to arbitration which may be accomplished in a variety of ways. Although one would expect a contracting state to submit investment disputes to arbitration, the Convention does not preclude a state from refusing to give its consent to arbitration of a particular nationalization case or from all nationalization cases. In fact, the Convention invites states to indicate in advance if there are certain classes of disputes that are considered unsuitable for arbitration.⁶⁷ Consequently, American property owners cannot assume that property disputes will reach the arbitral tribunal.

For both of the parties to a dispute, the selection of law to be applied by the tribunal is an important consideration. In this regard, article 42 provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

This language makes it possible for the parties to agree to a set of legal principles such as those incorporated in the FCN treaties mentioned above. This would certainly be the case in a dispute between a property

64. In an improvement on rules of customary international law, the Convention on the Settlement of Investment Disputes [hereinafter cited and referred to as the Convention] contains provisions that make it possible, if the parties agree, for secondary foreign affiliates of American firms to be considered as American nationals for purposes of arbitration. In doing so, the Convention overcomes the restrictions on the right of alien corporations to present international claims set forth by the ICJ in the *Barcelona Traction Light and Power Co. Case*, [1970] I.C.J. 3.

65. Convention, arts. 26 and 27. It also permits conciliation if the parties prefer that procedure rather than arbitration.

66. *Id.* art. 25(1).

67. *Id.* art. 25(4).

owner and a FCN state.⁶⁸ If the parties cannot agree on the applicable legal principles, the burden of selecting the appropriate rules of international law falls upon the tribunal.

In discussing article 42, the Secretary-General of the International Centre for the Settlement of Investment Disputes (ICSID), A. Broches, points out that a tribunal is authorized to apply the appropriate rules of international law, not simply those rules of international law applicable as a part of the domestic law of the state party to the dispute. He also concludes that international law is superior to national law.

The Tribunal will first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law. In that case, . . . international law is hierarchically superior to national law . . .⁶⁹

The situations in which international law is likely to be applied are:

1. Where the parties have so agreed;
2. Where the law of the Contracting State party to the dispute calls for the application of international law, including customary international law;
3. Where the subject-matter or issue is directly regulated by international law — for instance a treaty between the State party to the dispute and the State whose national is the other party to the dispute; and, finally,
4. Where the law of the Contracting State party to the dispute, or action taken under that law, violates international law. In this instance, international law operates as a corrective to national law.⁷⁰

In addition, article 42(3) permits the tribunal to decide a dispute *ex aequo et bono* (in justice and fairness) if the parties agree. Broches considers this to be "of particularly great potential significance for the settlement of investment disputes" ⁷¹

Despite a firm indication of the applicability of international law rules, the decision by an American property owner to agree to arbitration

68. In this respect the Convention would permit direct international arbitration of the FCN treaty in a manner that was not envisioned in the treaty itself.

69. Broches, *supra* note 63, at 392.

70. *Id.* at 392-93.

71. *Id.* at 393.

will not be an easy one, in light of the uncertainties about the substance of customary international law mentioned above. Such a decision is especially difficult because consent to arbitration would preclude any diplomatic protection or international claim by the U.S. government. Consequently, although the Convention does offer the opportunity for arbitration of investment disputes, the employment of this opportunity does entail some risk to the property owner. Nonetheless, this agreement may represent a considerable improvement for a property owner in a non-FCN state by providing an option, at the international level, that might not otherwise be available.

C. *Value of Protected American-Owned Property*

In recognition of both the treaty and the customary international law standards, it is productive to ascertain the relative value of American-owned property which would be protected by each standard. The following data compilations reveal that the substantial portion of U.S. direct investment and assets abroad is protected by customary rules of international law rather than by FCN treaties with compensation clauses. This suggests that FCN treaties are not a necessary condition for foreign investment despite their benefits. American firms are apparently willing to rely upon customary rules as the basic foundation of the international legal regime. In addition, firms undoubtedly find that many of the attractive investment states also have favorable economic and political policies which appear to offer a sufficient legal regime such that rules of international law and international legal protection are of secondary interest.⁷²

There is no single measure for which data are available that can readily indicate the value of American-owned property abroad. Conse-

72. It may also be argued, perhaps cynically, that American firms have not been concerned about international legal rules to protect their investments because they prefer to rely upon extralegal or illegal international or local activities to protect their investments. Activities in Chile and allegations of corrupt practices and bribery by multinational firms to local authorities make it difficult to ignore this argument. This is an important problem that is being addressed both at the national and the international level. Evidence of corrupt practices reaffirms the importance of establishing U.S. public policy regarding private investment on a firm legal foundation rather than extralegal or illegal behavior. See U.N. ESCOR, *Report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices on Its First, Second, Third and Resumed Third Sessions 5 July 1977*, U.N. Doc. E/6006(1977). See also Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 73ff(a) and (c) (1976). *Editors Note*: For a general discussion of the Foreign Corrupt Practices Act, see also *infra* p. 351.

quently we must rely upon two measures, for which the Commerce Department does provide data as general indicators of the value of American-owned property and the relative distribution of the property among different countries. Both measures, however, are incomplete since they reflect only the value of property owned by U.S. nationals for business purposes. Data on the value of property held abroad by U.S. nationals for personal use rather than for income production are not available. Moreover the data do not encompass property held abroad by U.S. nationals who are permanent residents abroad and protected by FCN treaties. (This might not be the case for individuals who are dual nationals.) Additionally, property held by religious or charitable organizations, valued relatively small in contrast to the value of income-producing property, is also protected by compensation rules in FCN treaties. This discussion will identify some of the problems associated with these measures.

The first useful measure to employ is the "U.S. direct investment position abroad," for the years 1966 and 1976.⁷³ "The direct investment position measures U.S. parents' net equity in and outstanding loans to their foreign affiliates."⁷⁴ Data for 1966 are employed because that is the year of the U.S. benchmark survey and 1976 figures are the most recent data available. In 1966 18.6 percent of U.S. direct investment was located in FCN states. By 1976 the percentage of direct investment located in FCN states had increased to 26.3 percent. Because no new FCN treaties have been concluded since 1966, FCN states have obviously received a larger portion of U.S. direct investment over the last decade.

Over the decade there has been a very slight increase in the direct investment in FCN developing states. In 1966 direct investment in FCN developing states represented 6.32 percent of the direct investment in developing states. By 1976 that percentage had increased to 6.78 percent. This would suggest that those developing countries with FCN treaties are not ones that provide attractive investment opportunities for U.S. firms. Because of the investment guarantee program of the Overseas Private Investment Corporation,⁷⁵ it would be a mistake to conclude, however, that remaining investment in developing countries is wholly unprotected.

73. Whichard, *supra* note 3, at 45, U.S. Department of Commerce, *Revised Data Series on U.S. Direct Investment Abroad, 1966-1974* (1976); and supplementary data provided by the International Investment Division, Bureau of Economic Analysis, Department of Commerce.

74. *Revised Data Series, supra* note 73, at v.

75. The Overseas Private Investment Corporation (OPIC) insures approved foreign investments against expropriations.

Direct investment in FCN developed countries represented 24.8 percent of the developed state investment in 1966 and 33.8 percent in 1976. Although these data indicate an increase in investment in FCN developed states, the two states with the greatest value of U.S. direct investment (Canada with \$33,927 million and the United Kingdom with \$15,696 million) do not have FCN treaties with the United States. Accordingly, U.S. businesses regard the investment climate and opportunities in these two countries to be very attractive, despite the absence of treaty protection guaranteeing compensation in the event of nationalization.

The second measure that provides a useful indicator of the value of U.S. foreign-owned and treaty-protected property is the "assets of allied foreign affiliates, 1966."⁷⁶ Assets data include cash items and other current assets, trade accounts receivable, inventories, property, and plants and equipment. These data suggest the value of the American-owned assets that are actually located abroad and thus potentially subject to foreign governmental intervention.

There is, however, one important limitation in the use of this measure in determining the specific value of American-owned property. The data are not weighted to indicate the percentage of U.S. ownership. An "allied foreign affiliate" is an affiliate in which the U.S. reporter has at least a 25 percent ownership. (Ownership of the affiliate could be shared with other American firms or with foreign firms.) In addition, the data does not represent assets of foreign affiliates in which U.S. firms may have less than 25 percent ownership interest. Because the data do not indicate the percentage of U.S. ownership but merely that U.S. firms have at least a 25 percent ownership in the affiliates, it is important to recognize that the figures should not be interpreted to mean that approximately one-quarter of the value of American-owned assets is located within any one group, *i.e.*, FCN states.

In conclusion, close scrutiny of the appropriate figures indicate that American businessmen with investments abroad rely on the protection of international law as opposed to FCN treaties. As with the first measure, these data indicate that a relatively small portion (\$1,785 million or 6.0 percent) of the total assets in developing countries is located in FCN states. Assets located in developed FCN states constitute 31.4 percent of the total assets held by allied foreign affiliates. The largest portion of the assets is also located in Canada (\$33,089 million) and the United Kingdom (\$19,598 million).

76. U.S. Department of Commerce, *U.S. Direct Investment Abroad, Final Data* 131, Table I-3 (1975).

III. NEW DIRECTIONS IN THE PROTECTION OF PRIVATE INVESTMENT

As thoroughly discussed above, the existing rules of customary international law are in a state of flux and domestic policies that have been favorable to private investment in the past may be abolished or reversed in the future. For these reasons, it is necessary to consider the international legal principles that will be adequate, in the future, to provide a predictable pattern of behavior, and to contemplate new directions in the protection of private investment.

Traditionally, the U.S. government has demanded that compensation is to be accomplished primarily by a cash payment that reflects the fair market value of the property taken. While the payment of cash has been and will remain an important part of any compensation agreement, a recent compensation settlement reveals, however, that U.S. firms may also be receptive to other types of compensation arrangements that would tend to mitigate reliance on a cash payment as the sole mode of compensation. The recent agreement between the United States and Peru regarding compensation for the nationalization of the Marcona Mining Company suggests that the State Department is prepared to cooperate with developing states to formulate a compensation package which will take into account the host government's economic resources and interest.

In the Marcona settlement the American owners received \$37 million in cash and a four-year sale contract for or at stipulated prices, estimated by the Peruvian government to be worth \$22.44 million.⁷⁷ The Peruvian government estimated the value of the seized property to be \$98.3 million. Possibly, the final settlement may be worth \$62-75 million to Marcona. Although these terms appear to be inconsistent with the usual assertion of payment in accordance with fair market value, the opportunity for a continuing relationship and access to the ore was important to the company and a significant inducement to accept a package arrangement.⁷⁸ According to one of the participants in the United States-Peruvian discussions:

[F]air compensation is most likely to be achieved when the settlement consists not of cash alone but of a combination of cash and a

77. The time of the cash payment was dependent upon negotiations by the Peruvian government with foreign banks for balance of payments assistance. See Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474, 485-87 (1977).

78. In evaluating the final settlement, it is important to keep in mind that the Peruvian government also made a major shift in its traditional assertion of applicable international legal rules. This is so in that the government did not assert the Calvo doctrine position but instead insisted that the U.S. government be an active participant in the settlement negotiations.

continuing relationship . . . which generates foreign exchange, utilizes the foreign company's expertise, and helps to assure continued production of the resource under government management.

. . . .
. . . It is the writer's view that the book value plus continuing relationships approach may offer the United States its best opportunity to maintain adherence to the principle of prompt, adequate, and effective compensation, if political factors permit an economically optimal continuing relationship to be worked out.⁷⁹

In the event of future nationalization actions, there is likely to be a persistent interest in package compensation arrangements that assure continuing associations and access to resources or to markets rather than reliance solely upon a cash payment; both parties involved in a nationalization scheme would benefit. For instance, a continuing arrangement with guaranteed access to resources would certainly be desirable to those firms that are involved in the extractive industries, which represent 26.8 percent of American investment.⁸⁰ On the other hand, a continuing relationship would be productive for the taking state, especially in the manufacturing sectors, because U.S. firms are accessible to American and other foreign Western markets.

A continuing arrangement would also be profitable in the finance and insurance sector because such an arrangement would permit the taking government to attain private Western capital and financial services in the United States. Whether such continuing arrangements can be concluded in the event of nationalization will, of course, depend upon the political willingness of the host government to maintain economic relationships with Western firms, as well as the ability of the host government to offer resources or other economic opportunities that are attractive to the former owners.⁸¹ To formalize this new development, the United States should initiate rules of international law reflecting the continuing arrangement concept of compensation.

In addition to the continuing arrangement, the United States has available several policy alternatives with regard to property protection. Aside from the customary rules of the minimum standard and of fair market value — the utility of which is presently diminishing — one

79. Gantz, *supra* note 77, at 489.

80. *Supra* note 73.

81. See Rogers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 11-14 (1978) for a discussion of the likely difficulties in negotiating any claims settlement with the Castro government because of the limited economic resources or opportunities that Cuba is able to offer.

approach is to revive an interest in negotiating additional FCN treaties with states in which the United States has substantial investments. Although the United States should always be prepared to respond positively to any request to enter into negotiations for an FCN treaty, the treaties will entail extensive and perhaps difficult negotiations. Consequently, there may be little interest in undertaking such an exercise if the basic issue is that of property protection.

A second alternative is to negotiate a series of investment protection agreements similar to those concluded with Germany, Switzerland, the United Kingdom and other European states.⁸² These arrangements, dealing solely with investment protection, would be easier to negotiate than the more complex FCN treaties which comprehend a diversity of subjects. Moreover, the United States should be able to negotiate treaties with those developing states that have already entered into such agreements with the European capital-exporting states.

Another alternative is to forego the use of bilateral treaties as a legal basis for investment protection and to rely instead upon a code of conduct for multinational enterprises. This does not appear, however, to be an attractive or feasible alternative. So long as the United States asserts that the code should be a statement of principles and not legally binding, the code is not likely to provide a standard that will be realistically effective in regulating state behavior.

Additionally, the inability of the developed and developing states within the United Nations Conference on Trade and Development (UNCTAD) to arrive at any consensus on the substance of a code suggests that it is premature to consider the possibility of an effective code.⁸³

A fourth alternative is one of encouraging American firms to move away from direct ownership and operation of foreign affiliates into a pattern of joint ventures with local firms or with the host government itself. Joint ventures have the advantage of moderating American ownership and control and emphasizing local participation, thus serving to reduce the risks of governmental takeover. Although the use of joint ventures may be increasing and thereby reducing the risk of governmental takeover, property protection is still a relevant issue to American investors.

82. Parts of some of these bilateral investment guarantee treaties are conveniently reproduced in International Chamber of Commerce, *Bilateral Treaties for International Investment* (1977).

83. United Nations Commission on Transnational Corporations, *Report of the Intergovernmental Working Group on the Code of Conduct*, E/C.10/31 (4 May 1977).

The alternative which this author finds to be most persuasive is the initiation of a negotiation program to conclude investment guarantee treaties with both developed and developing states. Such treaties should contain provisions that would accord the following types of protection:

1. Assurances that U.S. firms will not be discriminated against in their conditions of operation but will be accorded nondiscriminatory or national treatment. This might be supplemented by a guarantee that American investors will also receive most-favored-nation treatment.

2. Assurances that governmental takeovers, either direct or indirect, will not be arbitrary but will be undertaken for public purposes.

3. Assurances that in the event of governmental takeover the American owners will receive compensation that is just or appropriate in accordance with the rules of international law. It would also be useful to secure guarantees that U.S. investors will receive most-favored-nation treatment with regard to the method of valuation for determining compensation. Such a provision would serve to insure that if a taking government utilizes fair market value for any nationalized property it would be required to use that method of valuation for U.S. property.

4. Protection against the host government's assessing *ex post* arbitrary charges or deductions for depletion of national wealth or excess profits either in retaliation for foreign economic penetration or to reduce the amount of compensation that will be paid to the owners.

5. Assurances that in the event of a dispute between the investor and the taking government over the valuation of compensation either party may take the dispute to the ICSID or to some other appropriate international judicial body.

The treaties incorporating the provisions recommended above would leave unspecified the basis for valuation of compensation. The advantages of leaving the method of valuation and the mode of payment unspecified is that it accords the option to utilize either book value or fair market value, and the opportunity to conclude compensation arrangements similar to the Marcona type.⁸⁴

Those who believe that the United States should vigorously resist any departure from the use of fair market value as the standard of valuation will not be pleased with the above recommendations. Various arguments can be offered in opposition to these suggestions — one being that of the State Department. It maintains that abandonment of the principle of fair market value will make it impossible for American investors to negotiate any settlement that will provide compensation that approaches fair

84. See p. 342 *supra*.

market value and that American investors will suffer substantial losses. It is, however, arguable that fair market value has ever been accepted as a rule of international law which has prevented losses to American investors.⁸⁵ Certainly, it does not, at the present time, appear to be an effective or predictable rule.

Another argument of the U.S. government asserts that even if fair market value is not employed it remains a valuable principle from which the American investor, or the State Department can commence negotiations for a settlement. To abandon the principle would be to weaken unnecessarily the American negotiation position. There may be some merit to this argument, although it is an argument that is not likely to be easily proven or disproven. Finally, it has been suggested that the proposed approach contains ambiguity and lacks the appropriate specificity that should be incorporated into treaty law. In rebuttal, the question should be whether the language is so ambiguous that it introduces unacceptable risks to American investors. Such is not the case. There is no ambiguity with regard to the principle of compensation; existing FCN treaties (Type I), as mentioned above,⁸⁶ contain similar language and there is no evidence that they have been ineffective in protecting American property interests.

Finally it may be argued that the proposed approach would result in an inconsistent pattern of state behavior, contrary to the intention of formulating legal rules to facilitate a pattern of predictable behavior. Of course, there would be variation and differences in the details of individual compensation agreements, but basic agreement would exist with respect to the principle of compensation which would create a predictable pattern of behavior. It would be more useful to have accepted a principle of compensation than to negotiate the details of compensation and thereby run the risk that states would fail to come to agreement at all.

Notwithstanding these possible disadvantages, the treaty program outlined above is productive for the following reasons:

1. The treaty language would appear to be consistent with existing customary rules of international law and with the provisions of General Assembly Resolution 1803 (XVII).⁸⁷ Moreover, the language affirms the priority of international law over domestic law.

2. Treaties with such language will affirm the principle that compensation for governmental takeover is required, avoiding ideological

85. *See supra* note 26.

86. *See supra* note 47.

87. *See supra* p. 325, *supra* note 30.

debate over the principle and making it possible for American investors and the taking state to focus solely on the specifics of implementation. The likelihood of a direct confrontation between the United States and the taking government is also minimized.

3. The language permits the use of fair market value as the basis of valuation, but it does not establish that valuation as the sole standard.

4. The language would appear to be entirely consistent with recent State Department practice and with some FCN treaties.

5. The language is more compatible with economic and political realities in the Third World and would more likely be acceptable in treaty form.

6. The provisions provide for a third-party dispute settlement which also affirms the priority of international law.

The author recognizes that it will not be easy for the State Department to formally set forth a principle other than that of fair market value. Indeed the State Department's note in December, 1975, during the settlement negotiations following the Venezuelan nationalization of American oil properties, is indicative of the importance that is attached to the traditional principle. In that note the Department stated, *inter alia*:⁸⁸

With regard to current or future expropriations of property of contractual interests of U.S. nationals, or arrangements for "participation" in those interests by foreign governments, the Department of State wishes to place on record its view that foreign investors are entitled to the fair market value of their interests. Acceptance by U.S. nationals of less than fair market value does not constitute acceptance of any other standard by the United States Government. As a consequence, the United States Government reserves its rights to maintain international claims for what it regards as adequate compensation under international law for the interest nationalized or transferred.

Despite this clear statement of principle, the State Department apparently has not initiated any action against Venezuela to challenge the settlement accepted by the owners which utilized depreciated book value as the basis for valuation.⁸⁹ Accordingly it is possible to suggest that U.S. policy is in a period of transition wherein the State Department

88. See 15 INT'L LEGAL MATS. 186 (1976).

89. See Rogers, *supra* note 81, at 8-10 for an analysis of the Department discussions as to whether it should undertake a diplomatic effort to compel Venezuela to meet the standard set forth in the note.

still articulates a formal principle but is willing in practice to accept more flexible accommodations. The next task would be to reformulate the principle in sufficiently broad terms such that it can accommodate a variety of acceptable practices and close the apparent gap between principle and practice. Such reformulation and a vigorous treaty program would be a significant step in clarifying rules of international law that will be responsive to the interests of both developed and developing states as well as American investors concerned with the "protection" of property owned abroad.
