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The Present Status of Compensation by Foreign States for the Taking of Alien-Owned Property

Mark K. Neville, Jr.

THE PRESENT STATUS OF COMPENSATION BY FOREIGN STATES FOR THE TAKING OF ALIEN-OWNED PROPERTY

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TABLE OF CONTENTS

I. INTRODUCTION

Perhaps no other exercise of the prerogatives of national sovereignty during the past two decades has proven so divisive to the community of nations or created quite as much uncertainty in international commerce as the taking of an alien investor's property by host States. Certainly these takings have contributed mightily to the intensity of the confrontation between the Third World and the developed nations. As a result of these confrontations the line has been clearly drawn between the industrialized nations and those developing countries of the Third World that subscribe to the precepts of the New International Economic Order, an emotional appeal for redistribution of the World's wealth.[1] Both

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* A.B., Fordham; M.A., U.C.L.A.; J.D., U. of San Francisco; LL.M. (Int'l Legal Studies), N.Y.U. Mr. Neville practices law in New York City.

1. The Declaration on the Establishment of a New International Economic Order, G. A. Res. 3201, 21 U.N. GAOR (Agenda Item 7), U.N. Doc. A/RES/3201 (S-VI) (1974). Paragraph 4 of this Resolution declaims that

> [t]he new international economic order should be founded on full respect for the following principles:
>
> . . . .
>
> (e) Full permanent sovereignty of every State over its natural re-

groups of nations advance well-defined and contrasting arguments in support of their positions on taking of property, the law governing such takings, and the terms and conditions of compensation. This article will discuss the current status under international law of these conflicting views.

II. THE NATURE OF THE TAKING

The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens "Draft Convention" in Art. 10(3) recognizes that a foreign government's imposition of exorbitant taxes or confiscatory licensing fees should be deemed a "taking" just as the taking of title to property.[2] The explanatory note to the Harvard Draft Convention states that a State may employ an infinite variety of indirect takings, for example: blocking a factory entrance under guise of maintaining order; setting prohibi-

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> sources 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.

Moreover, the Program of Action on the Establishment of a New International Economic Order declares that all efforts should be made to take measures for the recovery, exploitation, development, marketing, and distribution of natural resources, particularly of developing countries. 21 U.N. GAOR, Supp. (No. 6) 3, U.N. Doc. A/RES/3202 (S-VI) (1974). For the United States reaction to the Declaration, see the excerpted statement of then-Ambassador Scali, *reprinted in* 1974 DIG. U.S. PRAC. INT'L L. at 490. *See also* Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States,* 9 INT'L LAW. 591 (1975).

2. Article 10(3) provides: (a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A "taking of the use of property" includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

Draft Convention, *reprinted in* Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens,* 55 AM. J. INT'L L. 545, 553 (1961)[hereinafter Sohn and Baxter].

tive wage levels; denying entry visas for essential personnel; or restrictive customs, foreign exchange or export regulations.[3]

It has long been recognized in academic quarters that developing countries risk alienating direct foreign investment necessary to develop their natural resources by resorting to "constructive takings."[4] In a recent arbitration proceeding[5] involving the Overseas Private Investment Corporation ("OPIC"),[6] the United States Government rejected the argument that imposition of a levy upon a mining concessionaire in violation of an investment agreement was a taking of property. This dispute arose between the investor, Revere Copper and Brass, and its host State, the Republic of Jamaica; it discloses OPIC's current attitudes toward creeping expropriation. It is also useful as a case study of the *modus operandi* of developing country intent on increasing its share of gain from an extant concession.

III. The Law Governing Disputes Arising from a "Taking"

One of the most perplexing questions posed by expropriation cases is the threshold inquiry: which law governs the propriety of taking and determines the measure of compensation to be paid. The two possible sources of legal standards, municipal law or international law, often dictate widely differing results. An early decision supporting the position that a State's municipal law was to be applied to disputes arising from contracts between foreign investors and their host States was rendered by the Permanent Court of International Justice in the *Serbian Loans Case.* The Court held that: "Any contract which is not a contract between States in their capacity as subjects of international law, is based

3. Sohn & Baxter, *supra* note 2 at 559.

4. Gardner, *International Measures for the Promotion and Protection of Foreign Investment,* 1959 Proc. Am. Soc'y Int'l L. 255, 262. *See also* Weston, *"Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation,"* 16 Va. J. Int'l L. 103 (1975); Christie, *What Constitutes A Taking of Property Under International Law?,* 38 Brit. Y.B. Int'l L. 307 (1962).

5. Revere Copper & Brass, Inc. v. O.P.I.C., 17 Int'l Legal Mat. 1321 (1978) (Haight & Wetzel, Arbs.).

6. OPIC is the semi-autonomous U.S. Government agency which provides investment insurance to United States corporations against the risk of inconvertibility of profits or expropriation. 22 U.S.C. §§ 2191-2200 (1976). *See* Meron, *OPIC Investment Insurance Is Alive and Well,* 73 Am. J. Int'l L. 104 (1979); Meron, Investment Insurance in International Law 111-18 (1976).

on the municipal law of some country."[7] Despite the general applicability of a municipal body of law implied by this language, an exception has been created for long-term economic development agreement which allows private concessionaires to contract for the right to develop or extract a State's natural resources without subjecting the agreement to the dangers of subsequent reinterpretation under municipal law. The limits of this exception were explored in the *Revere Copper* arbitration. Developing countries generally take the position that the municipal law of the taking state must govern any controversies that arise. They rely on Article 2(c) of the United Nations' "Charter of Economic Rights and Duties of States," which states:

> In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.[8]

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7. Payment of Certain Serbian Loans Issued in France, [1929] P.C.I.J., ser. A., No. 20.

8. G.A. Res. 3281, Article 2(c), 29 U.N. GAOR Supp. (No. 31) 50, 52 U.N. Doc. A/9631 (1974).

The U.N. Economic and Social Council's Commission on Transnational Corporations expressed this view earlier in its Report on the Second Session, 61 U.N. ECOSOC Supp. (No. 5), U.N. Doc. E/5782 (E/C.10/16) (1976) [hereinafter cited as ECOSOC Report]. Annex IV to the ECOSOC Report contains a paper submitted by Argentina, Barbados, Brazil, Colombia, Ecuador, Jamaica, Mexico, Peru, Trinidad, Tobago, and Venezuela. The first point made in the ECOSOC Report is that *"[t]he transnational corporations shall be subject to the laws and regulations of the host country and, in the case of litigation, they should be subject to the exclusive jurisdiction of the courts of the country in which they operate."* ECOSOC Report, Annex IV at 9 (emphasis in original). Moreover, these countries would deny any effect to contractual arbitration or choice of forum clauses, as is very positively noted:

> 3. A natural consequence of the subjection of foreign enterprises to national legislation is the existence of an exclusive competence on the part of the courts of the host country to hear any case or litigation that arises from the application of this legislation. On occasion, the foreign enterprise presumes to escape the jurisdiction of the host State by means of private agreements in which it is stipulated that any controversy that may arise concerning the activities of the enterprise shall be resolved by the courts of the country of origin or of a Third State, or that they will be submitted to international arbitration. *These types of agreements are not acceptable and, in more than one case, are considered nullified of all right by na-*

IV. Case Study: Revere Copper Arbitration

In 1967, Revere Copper and Brass entered into an investment agreement with the Republic of Jamaica. Under this agreement, Revere was granted a 25-year bauxite mining concession in exchange for a promise to construct an alumina plant. The agreement also provided that no further taxes, burdens, or other levies should be imposed except as expressly provided for in the agreement.

After concluding the agreement, the Jamaican government enacted certain measures designed to accomplish four policy objectives: (1) increase revenues from bauxite mining and alumina production; (2) recover bauxite ore leased to the mining companies; (3) reacquire all lands owned by such companies; and (4) obtain national majority ownership and control of the bauxite industry.[9] In January 1974, Prime Minister Michael Manley declared that "[t]he Government of Jamaica cannot be bound by [existing mineral extraction contracts] any longer. For Jamaica to survive we must negotiate new contracts and new benefits for our things sold abroad."[10] At a later conference with Revere and other producers, the Jamaican government made it clear that it sought to achieve 51 percent local equity participation rather than nationalization of the industry. It also announced a plan to impose a production levy of some $14 (Jamaica) per long dry ton of bauxite mined. Depletion allowances were to be discontinued retroactively and OPIC insurance premiums would no longer be allowed as a deductible expense.

The Jamaican parliament enacted a statute in June 1974[11]

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tional laws ECOSOC Report, Annex IV, at 11. (emphasis added)

None of the South American nations have adopted the [Washington] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Aug. 27, 1965 17 U.S.T. 1270, T.I.A.S. No. 6090, a further sign that some nations still refuse to arbitrate their disputes. *But see* Norberg, *Inter-American Commercial Arbitration Revisited,* 7 Law. Americas 275 (1975).

Presumably, choice of law clauses would also be considered nullities. *See* United Nations Conference on Trade and Development ["UNCTAD"] Resolution on Permanent Sovereignty Over Natural Resources, Res. 88 (XII), *reprinted in* 11 Int'l Legal Mat. 1474, 1475 (1972) (adopted by a vote of 39-2, with 23 abstentions).

9. Policy of the Jamaican Bauxite Commission, *id. supra* note 5 at 1324-25.

10. *Id.* at 1325.

11. Bauxite (Production Levy) Act, 1974 *cited in id.* at 1327.

which imposed a tax on bauxite based on an average realized price for the commodity on the world market. The Bauxite Production Levy Act put a floor under bauxite tax receipts by prescribing a minimum amount of bauxite each aluminum producer was required to produce. Failure to produce the minimum amounts established by these quotas penalized the producer because taxes were assessed on the basis of the minimum quota.[12] The parliament simultaneously amended the Mining Law of Jamaica empowering the government to establish minimum bauxite extraction quotas and to increase royalties paid by the extractors.

After losing approximately $1.5 to $2.0 million dollars in each of the first four months of 1975, Revere shut down its plant on August 19,1975. The company instituted local legal proceedings against the Government of Jamaica in 1976, claiming that the bauxite levy was a breach of the 1967 agreement and seeking injunctive relief. The Supreme Court of Jamaica denied the claim.[13]

Revere entered into a contract of guaranty for its Jamaican operations with the United States Department of State's Agency for International Development (AID) in 1970. This contract was subsequently assumed by OPIC. In pertinent part, the OPIC contract provided for:

> 1.15 Expropriatory Action. The term "Expropriatory Action" means any action which is taken, authorized, ratified or condoned by the Government of the Project Country, commencing during the Guaranty Period, with or without compensation therefore, and which for a period of one year directly results in preventing:
>
> (b) the Investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as shareholder or as creditor, as the case may be, acquired as a result of the Investment; provided, however, that rights acquired solely as a result of any undertaking or agreement with the Government of the Project Country shall not be considered fundamental rights merely because they are acquired from such undertaking or agreement; or
>
> (c) the Investor from disposing of the Securities or any rights accruing therefrom; or
>
> (d) the Foreign Enterprise from exercising effective control over

12. The arbitrators noted that the Supreme Court of Jamaica had held that the bauxite levy was applicable only during any *calendar year* which Revere had produced bauxite. *Id.* Under the new law, Revere had to pay bauxite levies for the entire calendar year 1975, even though its plant was shut down in August 1975.

13. *Id.* at 1329.

the use or disposition of a substantial portion of its property or from constructing the Project or operating the same.

Excluded is any action resulting from:

(1) any law, decree, regulation, or administrative action of the Government of the Project Country which is not by its express terms for the purpose of nationalization, confiscation, or expropriation (including but not limited to intervention, condemnation, or other taking), is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate generally accepted international law principles.[14]

Section 1.15 concluded:

The abrogation, impairment, repudiation or breach by the Government of the Project Country of any undertaking, agreement or contract relating to the Project shall be considered an Expropriatory Action only if it constitutes Expropriatory Action in accordance with the criteria set forth in this section.[15]

In April 1976, Revere submitted an "Application for Compensation" to OPIC alleging expropriation by the government of Jamaica. The company contended that Jamaica had violated both the 1967 Agreement and generally accepted principles of international law. It further argued that the exclusions of Section 1.15 of the OPIC contract were inapplicable not only because Jamaica's conduct violated international norms but also because Revere was prevented "from exercising effective control over the use or disposition of a substantial portion of its property."[16] In December 1976, a panel appointed by the American Arbitration Association heard the case. In this hearing, OPIC, contested the position that Revere should be reimbursed for the alleged "expropriation" of company assets by the Jamaican government of a Project Country, argued that Jamaica had neither taken nor deprived Revere of control over the bauxite investments or project.[17] OPIC

14. *Id.* at 1322.
15. *Id.* at 1322.
16. *Id.* at 1329.
17. AID had taken the same position in a similar case. Valentine Petroleum and Chemical Corp. v. Agency for Int'l Development, *reprinted in* 9 INT'L LEGAL MAT. 889 (1971)(DeVries, Rogers, Seres, Arbs.). Counsel for AID urged that Valentine, the U.S. investor, had not exhausted his local remedies. This position is particularly strained, since the facts show that Valentine had been placed under arrest by an armed military squad and escorted to an outbound plane.

maintained that the levy could be passed on to Revere's customers as a cost of production, and rejected Revere's claim that Jamaica had abrogated the 1967 agreement. The arbitral tribunal rejected OPIC's narrow interpretation of the term "expropriation" and the *Revere Copper* case also raised the issue of whether international law or Jamaica's municipal law governed the agreement. The arbitral tribunal rejected OPIC's position and found that Jamaican law was not the only law governing the agreement: "[W]e accept Jamaican law for all ordinary purposes of the Agreement, but we do not consider that its applicability for some purposes precludes the application of principles of public international law which govern the responsibility of States for injuries to aliens."[18] The arbitral tribunal stated that, traditionally, international law would require the application of municipal law to breach of contract questions.[19] While regarding long-term economic development agreements as sui generis expressions of contract, the arbitral panel distinguished them from typical contracts governed by municipal law. The rationale given by the Revere tribunal for this exception was that long-term economic development agreements,

> while not made between governments and therefore wholly international, are basically international in that they are entered into as part of a contemporary international process of economic development.
>
> [T]he 1967 Agreement falls within this category of a long term development agreement and. . .principles of public international law apply to it insofar as the government party is concerned. . . . The question of breach by such party cannot be determined solely by municipal law. . . . [I]t would be contrary to well established principles of international law to leave the question of State responsibility to the alien party to the determination by that State as to what it lawfully could or could not do. Parliamentary supremacy and State sovereignty cannot . . . be the decisive criteria where the contract involved is international in nature and falls within the category of a long term economic development agreement.[20]

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18. Revere Copper & Brass, Inc. v. O.P.I.C., 17 INT'L LEGAL MAT. 1321, 1331 (1978) (Haight & Wetzel, Arbs.).

19. *Id.* citing C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURY TO ALIENS (1967).

20. *Id.* at 1331-32.

The arbitral tribunal in *Revere Copper* buttressed its opinion by citations to decisions by earlier international arbitral tribunals, including two important cases involving oil exploration and development rights in the Middle East.[21]

The provisions in the 1967 agreement stipulating that there would be no further taxes and that investments would be secure are commonly referred to as "stabilization clauses." Such clauses are usually found in long-term economic development contracts. The *Revere Copper* arbitral tribunal considered this to be an important factor in its determination that the Revere Copper agreement was an international contract governed by international law as to breach. Thus, the *Revere Copper* decision follows the exception put forward in the *Aramco* arbitration for long-term economic development agreements, and expresses only the view of developed states.

V. International Legal Status of Long-Term Economic Development Agreements

As already intimated, there is a vigorous debate between developing countries and the developed nations on the question of whether development agreements convey rights to alien investors which cannot be abrogated by the host government or whether the host State retains residual sovereignty over its resources which subordinates all other considerations.[22] United Nations General Assembly resolutions buttress both positions.

The developed nations rely upon the traditional international

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21. Gov't of Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 Int'l L. Rep. 117 (1958); Texaco overseas Petroleum Co. (Topco) v. Gov't of Libya, 17 Int'l Legal Mat. 1 (1978) (Dupuy, Arb.). In *Aramco*, the arbitrators held that the law of Saudi Arabia must, in case of need, be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business, and by notions of pure jurisprudence, in particular whenever certain private rights—which must inevitably be recognized to the concessionaire if the Concession is not to be deprived of its substance—would not be secured in an unquestionable manner by the law in force in Saudi Arabia. *Aramco*, 27 Int'l L. Rep. at 169. However, the *Revere Copper* panel failed to cite an even earlier decision, *The Norwegian Claims Case*, which stated that, "should the public law of one of the parties seem contrary to international public policy . . . , an international tribunal is not bound by the municipal law of the states which are parties to the arbitration. Permanent Court of Arbitration, *reprinted in* 17 Am. J. Int'l L. 362, 383 (1922) (arbitration of claims arising from U.S. requisition of Norwegian ships during World War I).

22. *See* text accompanying note 17 *supra*.

law precept that international obligations must be kept (*pacta sunt servanda*). This principle is embodied in U.N. General Assembly Resolution 1803 which requires that "foreign investment agreements freely entered into by, or between, States shall be observed in good faith."[23] An arbitration decision involving a dispute between the Radio Corporation of America and the Republic of China over radio traffic rights relied on this proposition twenty-seven years prior to the U.N. resolution. In that case, the tribunal held: "The Chinese Government can certainly sign away a part of its liberty of action . . . it will, as any other party, be bound by law and by any obligations, legally accepted."[24]

The Aramco arbitral panel undoubtebly considered this principle controlling when it wrote: "Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the consessionaire irretractable rights. Such rights have the character of acquired rights."[25]

The developed nations' insistence upon the inviolability of contract derives from concern for the stability of international commerce which is grounded on the protection of contractual rights. Many developing countries, on the other hand, committed to redistribution of the world's wealth, declare their continuing sovereignty over their natural resources and assert their authority to amend or nullify long-term economic development agreements. Their arguments demonstrate their indifference to the traditional Western view of contract. Consequently, there is no international consensus on the legal status of long-term development agreements. The United Nations General Assembly Resolution, No. 3281, is the Charter most often cited by the developing countries to support their claim that international law gives priority to State sovereignty rights over contractual rights to natural resources. In this resolution the General Assembly proclaimed:

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23. G.A. Res. 1803, 17 U.N. GAOR 135, U.N. Doc. A/RES/1803 (XVII)(1962).

24. Radio Corp. of America (R.C.A.) v. Republic of China, *reprinted in* 30 AM. J. INT'L L. 535, 540 (1936). The award did state, however, that any restriction of a government's right of action must be clearly and distinctly noted. *Id.* at 540.

25. Gov't of Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 INT'L L. REP. 117, 168 (1958). *Accord,* Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., 35 INT'L L. REP. 136 (1963).

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

2. Each state has the right . . .

(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.[26]

The developing countries have taken these propositions to support their position that the law governing long-term economic development agreements must be the municipal law of the host State.[27] They also point to a decision by the International Court of Justice which supports their position, at least by inference. In the *Anglo-Iranian Oil Case,* the Court rejected the view that a concessionary contract between a government and a foreign private corporation could be considered an international treaty.[28] In keeping with this view, a former President of the International Court of Justice has considered the legal status of stabilization clauses, which the *Revere Copper* arbitral tribunal regarded as the hallmark of a long-term economic development agreement. He first dismissed the view that there is an international law of contracts, and argues that, even if there were, the principle of a State's permanent sovereignty over its wealth and natural resources would be recognized as a controlling principle of international law.[29]

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26. G.A. Res. 3281, Art. 2, paras. 1, 2(c), 29 U.N. GAOR, Supp. (No. 31) 50, 52 U.N. Doc. A/9631 (1974).

27. *See* ECOSOC Report, *supra* note 22 at 15.

28. Anglo-Iranian Oil Case, [1952] I.C.J. 93. *See* Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property,* 11 N.Y.U. J. INT'L L. & POL. 179, 190-91 (1978). Arechaga was until recently the President of the International Court of Justice. He appears to have retreated from the hardline ECOSOC position with respect to arbitration clauses, giving them independent standing in a contract. *Id.* at 191.

29. *Id.* at 191-92. Even while rejecting the necessity to comply with its contractual obligations, a developing country is likely to justify taking by a claim of changed circumstances (*rebus sic standibus*), as in *Revere Copper. See* Geiger, *The Unilateral Change of Economic Development Agreements,* 23 INT'L & COMP. L.Q. 73, 85-86 (1974). The principle of *rebus sic standibus* allows the abrogation of a treaty between two States due to a fundamental change of circumstances. Applicability of the doctrine is addressed by the Vienna Convention on the Law of Treaties, Article 62, which declares:

The Charter of Economic Rights and Duties of States has been dismissed by several commentators as a mere declaration of principles;[30] they have noted that the United States and five other industrialized countries voted against it.[31] Ten other industrialized nations abstained from voting.[32] Custom is recognized as a source of public international law.[33] However, since the Charter of Economic Rights and Duties was not voted for by a significant number of industrialized countries with significant international trade involvement, it has been argued that the Charter cannot be considered to be an expression of a consensus among nations equivalent to a new norm of customary international law.[34]

In contrast to the Charter of Economic Rights and Duties when Resolution 1803[35] was formulated in 1963 there was in fact a consensus of nations. The status of this resolution as representing customary international law was subsequently reinforced by the TOPCO arbitral award. Professor DuPuy noted in the arbitral award that, "[o]n the basis of the circumstances of adoption mentioned above and by expressing an *opinio juris communis,* Resolution 1803(XVII) seems to this Tribunal to reflect the state of

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A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

United Nations Convention on the Law of Treaties, art. 62, *opened for signature* May 12, 1969, *reprinted in* 8 *Int'l Legal Mat.* 679 (1969).

30. *See* Haight, *supra* note 1, at 597; Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?,* 9 INT'L LAW. 295 (1975); Rozental, *The Charter of Economic Rights and Duties of States and the New International Economic Order,* 16 VA. J. INT'L L. 309 (1976).

31. Belgium, Denmark, Federal Republic of Gemany, Luxembourg, and the United Kingdom.

32. Austria, Canada, France, Ireland, Israel, Japan, Netherlands, Norway, Spain, and Sweden.

33. STATUTE OF THE INT'L CT. OF JUSTICE, art. 38.

34. Most scholars agree that the resolutions of the General Assembly of the United Nations are not law and do not have binding effect. *See* Haight, *supra* note 1, at 597 and authorities cited therein.

35. *Supra* note 23.

customary law in this field."[36] DuPuy also analyzed the Charter of Economic Rights and Duties and concluded that "international law may operate as a factor limiting the freedom of the State should foreign interests be affected, even though Article 2 [of the Charter] does not state this explicitly."[37] Certainly, Resolution 1803 is the last expression of consensus on the principle that sovereign states are bound by contractual obligations with private entities. In view of both the resolve of some LDCs to exercise sovereignty and their voting patterns in the United Nations and in regional multilateral meetings, however, one is forced to conclude that this "consensus" has vanished.

VI. Compensation for Taking

The duty of a State under international law to compensate an alien for the taking of his property is recognized by industrialized countries and developing countries alike.[38] Even Socialist countries which had earlier denied any responsibility to compensate have now obligated themselves to reimburse private producers for losses caused by expropriation. While there may be a consensus on the duty of host States to compensate aliens for the taking of their property, there is no consensus on either the rationale for such a duty or appropriate standards of compensation.

Traditionally the alien investor has been accorded certain acquired property rights in his investment including the right to

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36. Texaco Overseas Petroleum Co. (TOPCO) v. Gov't of Libya, 17 Int'l Legal Mat. 1, 30 (1978) (Dupuy, Arb.).

37. *Id.*, at 31 (citing Castañeda, *La Charte des Droits et Devoirs Economiques des Etats. Note sur son Processus d'Elaboration,* 20 A.F.D.I. [sic] 31, 54 (1974)). Dupuy elaborated on this opinion as follows:

> One should conclude that a sovereign State which nationalizes cannot disregard the commitments undertaken by the contracting State: to decide otherwise would in fact recognize that all contractual commitments undertaken by a State have been undertaken under a purely permissive condition on its part and are therefore lacking of any legal force and any binding effect. From the point of view of its advisability, such a solution would gravely harm the credibility of States since it would mean that contracts signed by them did not bind them; it would introduce in such contracts a fundamental imbalance because in these contracts only one party—the party contracting with the State—would be bound. In law, such an outcome would go directly against the most elementary principle of good faith.

Id. at 31.

38. *See* Arechaga, *supra* note 28, at 192.

compensation by any host State which takes that property.[39] This "property view" is clearly stated in the arbitral decision in the *Norwegians Claims Case* where the tribunal held that: Whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under international law, based upon respect for private property.[40]

While the traditional view maintains that alien investors possess inherent property rights in their foreign investments, developing countries proclaiming the New International Economic Order advance the opinion that "the acquired right to private property, in particular private ownership of the means of industrial production, is no longer protected by contemporary international law. . . . The assertion of the existence of a duty of restitution of a nationalized undertaking would be tantamount to a denial of the right to nationalize."[41] These developing nations argue that the legal foundation for compensation payments to aliens does not spring from inherent or acquired property rights

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39. The bilateral agreements between the United States and Soviet bloc countries are good examples. *See, e.g.,* the United States-Romania Joint Statement on Economic, Industrial and Technological Cooperation, issued December 5, 1973, which contains the following clause:

"Except for a public purpose, assets belonging to nationals, companies and economic organizations of one of the two countries will not be expropriated by the other country, nor will they be expropriated without the payment of prompt, adequate, and effective compensation." 26 U.S.T. 2305, 2345, T.I.A.S. No. 8159.

The Soviet bloc countries have even formalized agreements among themselves which provide for compensation. Agreement Concerning the Settlement of Outstanding Property Questions, Feb. 11, 1956, Yugoslavia-Czechoslovakia, 397 U.N.T.S. 150.

40. Norwegian Claims Case (United States-Norway) 17 AM. J. INT'L L. 362, 388 (Perm. Ct. Arb. 1922). *See also* Radio Corp. of America (R.C.A.) v. Republic of China, where it was noted that,

> in public law the sentence *pacta sunt servanda* will also apply, just as public interest requires stability as regards any arrangement legally agreed upon. . . .
>
> How far an essential alteration in the interests of the public which may, in certain cases, lie behind an administration contract, may influence the continued validity of the contract will be dealt with later on, but it may be emphasized already here that any alteration or cancellation of the agreement on this basis as a rule should only be possible subject to compensation to the other party.

R.C.A. 30 AM. J. INT'L L. at 531 (footnote omitted).

41. Arechaga, *supra* note 29, at 181.

but rather from the doctrine of unjust enrichment.[42] The host state must avoid taking advantage of investments made by alien investors. Application of a theory of unjust enrichment has immediate consequences for such an investor. Mr. Arechaga succinctly stated these consequences:

> This principle signifies that it is not the elements of the loss suffered by the expropriated individual owner, but rather the enrichment, the beneficial gain which has been obtained by the nationalizing State, which must be taken into account. Any measure which results in a transfer of wealth in favor of the nationalizing State or one of its agencies gives rise to a duty to compensate. For example, the total suppression of a detrimental or inconvenient industrial or commercial activity, for reasons of general policy, is not subject to compensation. In that case, nothing is gained by the nationalizing State, despite the loss suffered by the foreign owner. Similarly, there is no duty to compensate for loss of good will when the abolition of free market conditions of competition nullifies the value of this intangible asset.
>
> However, the municipal law doctrine of unjust enrichment in all its aspects, cannot be mechanically transplanted into the sphere of international law. What makes the doctrine of unjust enrichment highly relevant to nationalizations is its equitable foundation, which requires the taking into account of all the circumstances of each specific situation and the balancing of the claims of the dispossessed alien with the undue advantages that he may have enjoyed prior to nationalization. Thus, the principle of unjust enrichment would take into account the undue enrichment gained by foreign companies during a period of monopoly or of highly privileged economic position, as, for instance, during a period of colonial domination.[43]

The lack of consensus about the legal rationale for compensation is manifest by the multiple standards of compensation which have been applied in expropriation cases.

The Permanent Court of International Justice articulated the classical standard governing compensation in the *Chorzow Factory Case*: "Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sus-

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42. For an earlier discussion of unjust enrichment as a philosophical basis for compensation, see Meron, *Repudiation of Ultra Vires State Contracts and the International Responsibility of States*, 6 INT'L & COMP. L.Q. 273, 281-82 (1957).

43. Arechaga, *supra* note 29 at 182-83 (footnotes omitted).

tained which would not be covered by restitution in kind or payment in place of it. . . ."[44]

This classical standard was later rejected by the Bremen Court of Appeals in the *Indonesian Tobacco Case*: "Compensations could not be paid in full and promptly out of the substance, but could only be made out of the proceeds of the nationalized enterprises. Compensation as to time and amount must therefore be made in accordance with the conditions in the expropriating state."[45] These early standards led to the prevailing international law standard of compensation today which is "appropriate" compensation, a standard open to many differing interpretations.

The two United Nations General Assembly resolutions discussed above, Permanent Sovereignty over Natural Resources (1803(XVII)) and the Charter of Economic Rights and Duties of States (3281 (XVX)) have required that compensation by host States be "appropriate." Resolution 1803 states:

> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.[46]

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44. [1928] P.C.I.J.,ser. A.,No.17, at 47. *See also* Norwegian Claims Case, in which it was held that

> "Just compensation" implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property. . . .
>
> It is common ground between the parties that just compensation, as it is understood in the United States, should be literally awarded, and that is should be based upon the net value of the property taken.

17 AM. J. INT'L L. at 393.

45. N.V. Verenrgde Deli-Maatschapijen & N.V. Senembach-Maatchappij v. Deutsch-Indonesrsche Tabak-Hândelsgesellschaft m.b.h., *cited in* Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 Am. J. Int'l L. 305, 317 (1960). *But see Foreign Nationalizations: Some Contemporary Aspects of International Law*, 55 AM. J. INT'L L. 585, 608 (1961). The Amsterdam Appellate Court felt that "under the actual circumstances a true intent to compensate for damages is to be considered as non-existent." Indonesian Tobacco Case, 54 AM. J. INT'L L., at 318.

46. G.A. Res. 1803, *supra* note 23, at 136.

Arechaga points out in his article[47] that developing countries are fully prepared to set off excessive profits against the present compensable value of the alien investor's property. In addition, alien investors may be penalized retroactively for rights granted by colonial powers. Factors that may be considered by the host State in determining the amount of compensation due include the amount, if any, of the initial investment recovered; undue enrichment resulting from colonial grants of right; excessive profits; the contribution of the enterprise to the economic and social development of the country; the investor's respect for labor laws; and reinvestment policies.[48]

The Carter administration recently instructed the Department of State to advise all United States diplomatic and consular posts of its policies toward foreign investment. A communication entitled "U.S. Government Policy on Direct International Investment" directed that the United States Government should neither promote nor discourage inward or outward investment flows or activities."[49] Somewhat anomalously, the United States policy statement then proceeded to note that

> We respect the right of each country to determine the environment in which foreign investment takes place in that country. Once foreign investments have been made on that basis, governments should not discriminate against established firms on the basis of nationality or deprive such firms of their rights under international law, such as *adequate compensation* for expropriated property.[50]

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47. Arechaga, *supra* note 28, at 183-85.

48. *Id.* at 185.

49. Dep't of State telegram no. 185216 to all diplomatic and consular posts (August 6, 1977), *reprinted in* [1977] DIG. U.S. PRAC. INT'L L. 773. This statement of neutrality is incongruous in the face of both the coercive economic statutes detailed in the text accompanying notes 60-80, *infra* and the U.S. tax law treatment of foreign expropriation loss. *See, e.g.,* I.R.C. § 1212(a) which allows a corporation a ten-year period which to carry forward a "foreign expropriation capital loss," defined in I.R.C. § 1212(a)(2)(A); I.R.C. §§ 165 (g)(3), 1231(a) permit a U.S. corporation whose foreign subsidiary is nationalized to treat the uncompensated loss as an ordinary loss to be deducted from current income. A net operating loss deduction is also available to a U.S. taxpayer as a carryover for ten years, I.R.C. §§ 172(b)(1)(D), (1351).

50. Dep't of State telegram no. 185216, *supra* n. 50 (emphasis added). *Cf.* 22 U.S.C. §§ 2351(a), 2351(b) (1976). The telegram's reference to "adequate compensation" suggests the United States view that only compensation which is "prompt, adequate and effective" is satisfactory under international law.

The traditional United States view of what constitutes adequate compensation is found in the Harvard Draft Convention on the Law of Treaties:

> *The taking, under the authority of the State, of any property of an alien, or the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if not accompanied by prompt* payment of compensation in accordance with the highest of the following standards:
>
> (a) compensation which is no less favorable than that granted to nationals of such State; or
>
> (b) *just compensation* in terms of the *fair market value* of the property or of the use thereof unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of the property in anticipation of the taking; or
>
> (c) if no fair market value exists, *just compensation* in terms of the *fair value* of such property or of the use thereof. If a treaty requires a special standard of compensation, the compensation shall be paid in accordance with the treaty.[51]

Similarly, the Second Restatement of United States Foreign Relations Law defines "just compensation" as that which is "adequate in amount, paid with reasonable promptness, and paid in a form that is effectively realizable by the alien."[52]

Perhaps the clearest expression of the United States commitment to this standard for compensation lies in the government's attempt to incorporate a "prompt, adequate and effective" definition of compensation within U.N. General Assembly Resolution 1803. The United States proposal read "the owner shall be paid appropriate, prompt, adequate and effective compensation."[53] This proposal met with sharp criticism that the proposed language was unnecessary and detrimental to the interests of developing nations.[54] The United States ultimately withdrew its propo-

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51. Draft Convention, *supra* note 2 art. 10, para. 4. (emphasis added). The Harvard Draft Convention provides that just compensation may be paid over a reasonable period of years if certain safeguards are provided. *Id.*

52. RESTATEMENT (SECOND) UNITED STATES FOREIGN RELATIONS LAW § 187 (1965).

53. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources,* [1963] A.B.A.J. 463, 465. Schwebel was the legal adviser to the U.S. Delegation the the 17th U.N. General Assembly, which adopted Resolution 1803 (XVII).

54. Hungary stated: "the concept of prompt, adequate and effective compen-

sal. Though the world community has apparently rejected the "prompt, adequate and effective compensation" standard, the United States has continued to endorse and promote it. For example, bilateral commercial treaties between the United States and other nations often contain a provision which stipulates that, in the event of a taking of property, compensation shall be "prompt, adequate and effective."[55] They also stipulate the currency to be used for payment in the event of expropriation.[56] Public statements by United States officials also evidence the United States standard for compensation. In a December 30, 1975, statement of policy the Department of State reiterated its view that foreign investors are entitled to the fair market value of their interests.[57] Subsequently, Richard J. Smith, Director of Investment Affairs, Department of State, succinctly stated the United States position in a 1976 address at Vanderbilt University:

> Our policy can be simply stated: we recognize the rights of any country to expropriate the property of a U.S. investor, in the absence of specifiic governmental undertakings to the contrary, so long as the taking is nondiscriminatory, for a public purpose and accompanied by prompt, adequate and effective compensation. In our view, these are the minimum standards under international law.[58]

The United States Congress has enacted several statutes which reflect the same stance taken in international commercial relations that, if a foreign State is not forthcoming with "prompt, adequate and effective" compensation for the taking of United

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sation, which the United States wished to impose and codify as a sort of international law, would be flagrantly unjust to emerging nations." *Id.*

55. *See, e.g.,* United States-Romania Joint Statement, *supra* note 40.

56. *See, e.g.,* the Investment Guaranties Agreement, Aug. 3, 1974, United States-Nigeria, T.I.A.S. No. 8012, *reprinted in* [1974] DIG. U.S. PRAC. INT'L L., at 428. These investment guaranties usually require the United States to subrogate the claims of its citizen-investors and to settle disputes by arbitration. For an expression of the position of the South American countries on the Calvo Clause, which would force an alien investor to renounce his right to have his country intercede diplomatically on his behalf, see Arechaga, *supra* note 29, at 193-94.

57. U.S. Policy on Foreign Investment and Nationalization Reiterated, Dec. 30, 1975, *reprinted in* 74 DEP'T STATE BULL. (No. 1910) 138 (1976). *See also* Leigh, *Expropriation of Foreign-Owned Investment-Recent Trends,* [1972] SOUTHWESTERN LEGAL FOUNDATION 197 (Leigh later became a legal advisor to the State Department.).

58. *Reprinted in* [1976] DIG. U.S. PRAC. INT'L L. at 443.

States citizens' property, it may face a cut-off of United States financial assistance. The best known of these legislative acts is the "Hickenlooper Amendment," a 1962 amendment to the Foreign Assistance Act of 1961.[59] Four legislative measures include the Trade Act of 1974,[60] the Fisherman's Protective Act of 1974,[61] regional development legal acts, and agricultural assistance acts.

(a) *Hickenlooper Amendment.*—Under the Hickenlooper Amendment, the President must suspend assistance to the government of any country which either has repudiated or nullified contracts with United States citizens or has nationalized, expropriated or imposed discriminatory taxes upon property with greater than 50 percent United States citizen ownership without paying "speedy compensation for such property in convertible foreign exchange, equivalent to the full value" of such property.[62] Where the President determines that such suspension of assistance is inimical to the national interests of the United States, the amendment is not applicable.[63]

(b) *Ineligibility for Preferential Trade Treatment.*—Subchapter V of the Trade Act of 1974[64] established the Generalized System of Preferences ("GSP"), a system which provides for tariff-free entry for merchandise imported from designated developing countries. This GSP treatment is highly desirable in that it insures less costly access to United States markets.

Section 502(b)(4)[65] of the Act, however, requires the President to withdraw or suspend eligible countries from GSP treatment if "prompt, adequate and effective" compensation is not paid for expropriations of United States citizens' property. Recently, the People's Republic of the Congo had its GSP eligibility withdrawn for failing to meet this compensation standard.[66]

(c) *Fishermen's Protective Act of 1967.*—In order to encourage the United States fishing fleets to operate despite the risks of seizure of their vessels, the United States enacted the Fishermen's Protection Act of 1967.[67] This statute guarantees United

59. 22 U.S.C. § 2370(e)(1) (1976).
60. 19 *Id.* §§ 2101-2487.
61. 22 *Id.* §§ 1971-79.
62. *Id.* § 2370(e)(1).
63. *Id.* § 2370(e)(2).
64. 19 *Id.* §§ 2461-65.
65. *Id.* § 2462(b)(4).
66. *See* [1977] DIG. U.S. PRAC. INT'L L. 674-75.
67. 22 U.S.C. §§ 1971-79 (1976). *See generally* Neville, *A Possible Tuna War*

States vessels both financial and consular protection of crew and owners upon seizure. The seizing State's eligibility for U.S. foreign assistance has been linked to reimbursement within 120 days of notification of costs incurred by the United States on behalf of a seized vessel.[68] Predictably, the countries targeted by this measure, *i.e.*, members of the Organization of American States, protested this statutory linkage of financial aid with efforts to neutralize the territorial fishery claims of the other Western Hemisphere States.[69]

(d) *United States Pressure on International Lending Institutions.*—Economic pressure can be brought to bear upon a State which has taken property of a United States citizen by denying financial assistance ordinarily channeled through international financial institutions. Under the Inter-American Development Bank ("IDB") Act,[70] the International Development Association ("IDA") Act,[71] the Asian Development Bank Act,[72] and the Africa

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with Canada, N.Y.L.J. (1979).

68. 22 U.S.C. § 1975(b) (1976).

69. In response to such a claim by the Government of Ecuador in 1972, the United States replied as follows:

> The application of United States law to the granting or withholding of foreign assistance does not come within the terms of the internaional obligation to which your note [of protest] referred. Assistance between nations depends upon a high degree of mutuality and such assistance is provided on terms that are acceptable to all parties concerned. An aid relationship is a function of many factors that can and do change, and nothing in international law or practice implies that either the furnishing or the acceptance of assistance is obligatory.

Note of March 14, 1972, *reprinted in* Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property,* 71 AM. J. INT'L L. 474, 491-92 n. 53 (1977). The Foreign Assistance Act of 1961 was amended in 1965 to exclude foreign assistance to any country which seizes or imposes any penalty or sanction against a United States fishing vessel on account of fishing activities in international waters. 22 U.S.C. § 2370(o) (1976).

70. 22 U.S.C. §§ 283-283(z) (1976). Section 283(r) containing loan restrictions for expropriation of United States property was added by the Gonzalez Amendment, Pub. L. No. 92-246, § 1, 86 Stat. 59. Further, pursuant to 22 U.S.C. § 283*l*(c), the U.S. representative must disapprove the IDB's affiliate Fund for Special Operations' assistance to countries for which assistance has been suspended under the Hickenlooper Amendment.

71. 22 U.S.C. §§ 284-284n (1976). Section 284 also contains loan restrictions added by the Gonzalez Amendment. *See* note 70, *supra.*

72. 22 U.S.C. §§ 285-285t (1976). Section 285(o) contains loan restrictions similar to section 283(r). *See* note 70, *supra.*

Development Fund Act,[73] the President is directed to instruct United States representatives sitting on the boards of international development banks, including the International Bank for Reconstruction and Development, to vote against any loan which is earmarked for the benefit of a country which has not given prompt, adequate and effective compensation to deserving United States citizens. The Congress was clearly concerned about the increasing number of expropriations of U.S. property which were not compensated under the United States standard.[74] An exception in the Inter-American Development Bank Act provides that if a seizing State has not completed compensation payments, but has nonetheless consented to arbitration pursuant to the [Washington] Convention for the Settlement of Investment Disputes, the United States will not require its representatives on the IDB to cast a negative vote against aid to that country.[75]

(e) *Agricultural Countermeasures.*—In 1962 the Congress authorized the President to withhold or suspend sugar import quotas of an expropriating State if it is not forthcoming with prompt, adequate and effective compensation.[76] In view of its im-

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73. 22 U.S.C. §§ 290g to 290g-10 (1976). Section 290(g-8) contains a veto for any use of funds for a country pursuing a "detrimental economic policy against United States interests."

74. The legislative history of these measures is clear on this point. H. R. REP. No. 770, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2002, 2007; H.R. REP. No. 772, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2011, 2017; H.R. REP. No. 771, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1992, 1997. *See also* SENATE COMM. ON APPROPRIATIONS, REPORT ON THE PROPOSED FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATION BILL, 1980, S. REP. No. 358, 96th Cong., 1st Sess. 26 (1979).

75. 22 U.S.C. § 283r(B) (1976). The House Committee on Banking and Currency Report shows that

> The Committee is disturbed that this useful instrument has not been utilized despite the fact of a growing number of expropriations. A quasi-judicial resolution of investment controversies would seem to be preferable to the political confrontations that now occur. It is the Committee's hope that this new provision will lead to greater use of the [CSID] forum.

H. REP. No. 92-770, 92nd Cong., 2d Sess. 10, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2008, 2018. On the Washington Convention, see 22 U.S.C. §§ 1650, 1650(a) (1976). The latter statute insures that "the pecuniary obligations imposed by such an [arbitral] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."

76. Act of July 13, 1962, Pub. L. No. 87-535, § 15, 76 Stat. 166 (1962) (codi-

portance to many developing countries, this statute provided direct and immediate coercion to comply with the United States standard.[77]

The President is ordinarily authorized to negotiate and conclude agreements with "friendly" countries which provide for sale of agricultural commodities in dollars (on credit terms) or foreign currencies.[78] If a country has taken United States property without prompt, adequate and effective compensation, however, it can be characterized as an "unfriendly" nation. The Hickenlooper Amendment disqualifies such taking States from United States agricultural assistance.[79]

United States officials have consistently advocated adoption of the "prompt, adequate and effective" standard for compensation. Domestic legislation clearly shows the United States willingness to use considerable financial leverage to discourage developing nations from taking its citizens' property without such compensation.

VII. CONCLUSION

The words of Professors Sohn and Baxter, even though nearly two decades old, sum up the developing nations' position.

> A rule requiring the payment of compensation under all circumstances had the positive benefit of stimulating international trade and investment by affording protection to the business activities of aliens in foreign countries. It would be inequitable that a government should . . . seek the economic benefits which foreign trade and investment carry with them, and at the same time call for the adoption of a rule placing such foreign activities at the mercy of the very government which seeks this economic assistance. In terms of social justice, the taking of the property of aliens may create greater hardships to the aliens whose property it is than it brings benefits to the State seizing the property. The events of two World Wars have demonstrated in a tragic fashion that a man may be as effectively killed by depriving him of his property as he can

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fied at 7 U.S.C. § 1158(c) (1976)).

77. For an appraisal of this statute's impact on Peru in the wake of the Peruvian nationalizations of U.S. property, see Huerta, *Peruvian Nationalization and the Peruvian-American Compensation Agreements,* 10 N.Y.U.J. INT'L L. & POL. 1, 30, 31-32 (1977).

78. 7 U.S.C. § 1701 (1976).

79. 22 U.S.C. § 2370(e)(1)(1976).

by his being executed.[80]

On the other hand, developing nations will continue to advocate minimal compensation based on the doctrine of unjust enrichment. These arguments based on equity appeal to nationalistic leaders who remain convinced that their nation has been exploited, and therefore the traditional rationale for compensation lacks merit. Given the continuing competition for the dwindling available natural resources in the world, questions of compensation will continue to play a dynamic role in litigation.

80. Sohn & Baxter, *supra* note 2, at 557.