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Establishing Minimum Compensation Criteria for Use in Expropriation Disputes

*Roger C. Wesley**

Value is a relative term. The value of a thing means the quantity of some other thing, or of things in general, which it exchanges for.

J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY

I. INTRODUCTION

The United States and Western European nations long have recognized the established international principle that expropriating governments must furnish fair and just compensation for properties taken. This, in turn, has been interpreted to require prompt, adequate, and effective payment.[1] The developing nations, on the other hand, have interposed significant objections to the orthodox application of this norm. In attempting to correct economic imbalances between the property owner's right to receive a fair return and the developing community's right to void, *ab initio,* rights and obligations incurred in adhesive colonial agreements,[2] the resulting deviations have called into question the continuing validity of traditional compensation criteria.[3]

As succeeding illustrations will attempt to establish, consummated expropriation agreements have utilized flexible mixtures of highly disputed compensation elements to reflect the particular circumstances of the properties taken, the nature of the owner, and the capacities of the deprivor government. The principal tools employed by the developing countries in their search for a more just compensation represent seemingly divergent approaches: market or going concern value, net asset

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1. The position was articulated in a letter from Secretary of State Cordell Hull, dated July 21, 1938, to the Ambassador from Mexico concerning expropriation of American-owned agrarian and oil properties between 1915 and 1940. *See* 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-57 (1942).

2. *See* D. MUMMERY, THE PROTECTION OF INTERNATIONAL PRIVATE INVESTMENT (1968); Friedmann, *Half a Century of International Law,* 50 VA. L. REV. 1333, 1345-46 (1964).

3. *See* F. DAWSON & I. HEAD, INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS 33 (1971).

value, payment in cash and in bonds, varying payment deferral periods, convertibility restrictions, differences in payment media, set-offs of blocked accounts, and limitations of total compensation to future profits under management contracts. From these divergent treatments, however, certain basic paradigms have emerged.

Common among countries in Africa and Latin America is resentment of foreign control over the exploitation of national resources.[4] More particularly, the friction stems from the belief that too little of the benefit of such exploitation accrues to the local economy.[5] These attitudes, whether real or conjured, have led to political determinations that certain forms of private foreign investment are inconsistent with the achievement of fundamental economic and social reforms. In the Middle East, for example, this has meant growing demands by member countries of the Organization of Petroleum Exporting Countries (OPEC)[6] to alter the relationships between the foreign oil companies and their host nations.[7]

4. *Compare* V. ALBA, THE LATIN AMERICANS 217-20 (1969), *with* Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law,* 15 INT'L & COMP. L.Q. 55 (1966), *and* Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law,* 14 INT'L & COMP. L.Q. 121 (1965).

5. *See* H. GIESECKE, INDUSTRIAL INVESTMENTS IN DEVELOPING COUNTRIES (1963); C. MCMILLAN, JR. & R. GONZALEZ, INTERNATIONAL ENTERPRISE IN A DEVELOPING ECONOMY (1964); R. ROBINSON, INTERNATIONAL BUSINESS POLICY 82 (1964).

6. The Organization of Petroleum Exporting Countries (OPEC) was founded in 1960 in response to reductions in posted prices of crude oil. Representatives from the 5 largest producing countries—Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela—agreed to work to restore prereduction prices and develop means for ensuring price stabilization. OPEC, RESOLUTION OF THE 1ST CONFERENCE (Baghdad, September 10-14, 1960). OPEC recently issued a communique that threatened sanctions against Western oil companies if the firms reject OPEC member bids for 20% share acquisitions in the firms' oil concessions. Washington Post, Mar. 25, 1972, § C, at 7, col. 2-3. The latest resolution sets an unofficial deadline of late 1972 for the companies to agree on compensation terms, timing, methods of acquisition, the price to be paid, the mechanism for payment, and other issues emanating from the buy-outs. The Arabian American Oil Company (ARAMCO) has taken the lead in acceding to the demands, averting a possible confrontation with African and Gulf oil states. ARAMCO Press Release, Mar. 11, 1972. Negotiations to determine compensation, whether based upon depreciated net assets, replacement value plus discounted future profits, or a combination thereof, have reached no published conclusions. For comment on the most recent negotiations see Platt's Oilgram, Aug. 22, 1972, at 1. OPEC's position has been a firm standard based upon net book value only. *Id.,* July 28, 1972, at 1.

7. Underlying concentrated efforts of OPEC and the Arab Petroleum Congress to extend state participation in the ownership of foreign oil producers are concerns for control of production levels, maintenance of posted prices for tax purposes, the expensing of royalties, and the raising of market prices for crude oil. Platt's Oilgram, June 2, 1972, at 1 (discussing the Beirut Conference of May 30-June 3, 1972). This trend resulted in the nationalization of the Iraq Petroleum Co. (IPC) on May 31, 1972, culminating an 11-year old dispute between the company and the Iraqi government over the company's lagging oil production. Law No. 69 of 1972, [1972] Official Gazette of June 1 (Iraq). The nationalization received the endorsement of the Arab Petroleum Congress members at their Beirut conference on June 5, 1972, Platt's Oilgram, June 6, 1972, at 1, and while compensation has not been set, IPC has placed a $436,000,000 valuation on its investment. Wash-

With the escalation of state economic participation in the Middle East and elsewhere, compensation for expropriated foreign property will continue to pose significant questions for legal inquiry. Lacking sufficient budgetary reserves, expropriating governments sometimes have utilized their fiscal inability to pay full compensation to buttress their denials of full compensation liability.[8] Regardless of the compensation theory ultimately adopted, such fiscal incapacity necessarily raises the mitigative consideration of impossibility. Recognizing the significant variations among political and economic strategies of mass resource allocation in lesser developed countries (LDC's) and the individual needs of each expropriation settlement, a uniform, basic framework of compensation criteria, flexibly employed, must be devised to provide for a responsible role of international law in the orderly disposition of transnational disputes. The following analysis will develop comprehensive valuation criteria accommodating both the demands of LDC's and the need for realistic valuation indices.

II. Compensation Traditionally Viewed

The international consensus of *restitutio in integrum*[9] is under-

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ington Post, June 10, 1972, § A, at 16, cols. 1-2. Upon agreement of the parties, the case was submitted to the secretary-general of OPEC for mediation. Washington Post, June 11, 1972, § A, at 27, col. 6.

8. *See* B. Wortley, Expropriation in Public International Law 108 (1959); Truitt, *The Foreign Investor: Realistic Rhetoric Required,* 13 Bus. Horizons 59, 62-63 (Dec. 1970).

9. *Restitutio in integrum* literally means restitution to the prior condition, implying fair, just, and entire compensation. Black's Law Dictionary 1477 (4th ed. 1968). This principle has formed the primary bar to referral of claims in Latin American countries for international review. *See* E. Borchard, The Diplomatic Protection of Citizens Abroad 792-816 (1928); C. Calvo, Le Droit International Théorique et Pratique 231 (5th ed. 1896). For a discussion of the question whether diplomatic intervention is deemed waived by contractual renunciation in contract claims in "Calvo" jurisdictions, *compare* Wesley, *Expropriation Challenge in Latin America: Prospects for Accord on Standards and Procedures,* 46 Tul. L. Rev. 232, 280-82 (1971), *and* Dawson, *International Law and the Procedural Rights of Aliens Before National Tribunals,* 17 Int'l & Comp. L.Q. 404, 422-27 (1968), *with* A. Roth, The Minimum Standard of International Law Applied to Aliens 117 (1949), *and* Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law,* 40 Am. J. Int'l L. 121, 130-32 (1946). The consensus is disputed by legal positivists who argue that *restitutio in integrum* is inapplicable when contrary expropriation standards do not discriminate between foreign and locally owned investments. Note from Secretary of State Cordell Hull to the Mexican Minister on Aug. 22, 1938 (implicit allowance for confiscation in expressed Mexican position, so long as nondiscriminatory). J. Brierly, Law of Nations 284-85 (6th ed. 1963);3 G. Hacksworth, *supra* note 1, at 658-60; Borchard, *The "Minimum Standard" of Treatment of Aliens,* 38 Mich. L. Rev. 445 (1940); Herz, *Expropriation of Foreign Property,* 35 Am. J. Int'l L. 243, 249 (1941); Rafat, *Compensation for Expropriated Property in Recent International Law,* 14 Vill. L. Rev. 199, 205 (1969); Williams, *International Law and the Property of Aliens,* 9 Brit. Y.B. Int'l L. 1 (1928). The requirement has been articulated further both by international tribunals, Case of Factory at Chorzow, [1928] P.C.I.J., ser. A, No. 17, at 46-47, and arbitral bodies, De Sabla Claim (United States v. Panama), [1933]

standable in light of its historical background of limited deprivations—seizures of individual farms, factories, vessels, and mineral deposits. The applicability of traditional valuation criteria, however, has been questioned in light of recent large-scale, industry-wide expropriations.

A. Promptness of Payment

The standard of prompt compensation has been construed as requiring payment within a circumscribed time radius.[10] The United States adheres to this interpretation of the international norm by demanding "speedy compensation"[11] from expropriating governments. In practice, this test means that payment in nonmarketable, long-term bonds is unacceptable.[12] A number of LDC's attempt to follow the orthodox view,[13] which emphasizes payment in cash, not bonds, prior to any taking, but difficulties in meeting this standard can be envisioned during periods of massive industrial nationalization.

Ann. Dig. 241 (No. 92), 6 U.N.R.I.A.A. 358 (1933); Melczer Mining Co. (United States v. Mexico), [1929] Ann. Dig. 193 (No. 119), 4 U.N.R.I.A.A. 481 (1929).

10. Case of Factory at Chorzow, [1928] P.C.I.J., ser. A, No. 17; The Delagoa Bay Case (E. African Ry. Co.) (Great Britain & United States v. Portugal) in H. LAFONTAINE, PASICRISIE INTERNATIONALE 402 (Bern 1902); Portugal v. Germany, [1930] Ann. Dig. 150, 151 (No. 92), 2 U.N.R.I.A.A. 1035, 1039 (1930) ("a reasonable time"); Goldenberg Case (Germany v. Rumania), [1928] Ann. Dig. 542, 545 (No. 369), 2 U.N.R.I.A.A. 901 (1928) ("as rapidly as possible"); Norwegian Shipowners' Claims (Norway v. United States), [1922] Ann. Dig. 542, 545 (No. 369), 2 U.N.R.I.A.A. 901 (1928) ("as rapidly as possible"); Norwegian Shipowners' Claims (Norway v. United States), [1922] Ann. Dig. 414, 416 (No. 289), 1 U.N.R.I.A.A. 307, 337 (1922) ("without undue delay").

11. "Payment with reasonable promptness . . . [as required by § 187] means payment as soon as is reasonable under the circumstances in light of the international standard of justice specified in § 165." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 189 (1965) [hereinafter cited as RESTATEMENT]. The Hickenlooper Amendment suggests that the requirement has grown even more strict. Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e) (1) (1970), *formerly* ch. 1, § 301, 76 Stat. 260 (1962).

12. In a Guatemalan expropriation, an offer to make "[p]ayment in bonds maturing in 25 years, with interest at 3 percent per annum . . ." was rejected. *Expropriation of United Fruit Company Property by Government of Guatemala,* U.S. DEP'T OF STATE, BULL. No. 29, at 357, 359 (1953). Similar provisions by the Cuban government to pay for expropriated landholdings taken pursuant to Law of July 6, 1960, Concerning Expropriations, [1960] G.O. No. 58, were rejected in a United States note to the Cuban government. U.S. DEP'T OF STATE, BULL. No. 48, at 171 (1960). *See also* RESTATEMENT, *supra* note 11, at § 189, comment *b.*

13. Article 99 of the Honduran constitution provides: "The expropriation of property on grounds of public need or benefit . . . shall not take place without prior compensation." HONDURAN CONST. art. 99 (1965), *translated in* 4 A. PEASLEE, CONSTITUTIONS OF NATIONS 750, 764 (rev. 3d ed. 1970). Similar protection is afforded in Venezuela, VENEZUELAN CONST. art. 101 (1961), in 4 A. PEASLEE, *supra,* at 1292, 1306-07, and Argentina, ARGENTINE CONST. art. 17 (1853, amended 1957), in 4 A. PEASLEE, *supra,* at 7, 10. Brazil requires fair compensation in money, except in certain situations involving rural land, BRAZILIAN CONST. art. 150(22) (1967), in 4 A. PEASLEE, *supra,* at 142, 193, and Kenya offers full and prompt payment of compensation, Foreign Protection Act of Kenya, Cap. 518, Rev. Laws of Kenya (1967).

B. *Adequacy of Payment*

Orthodox theory has defined adequacy as fair market or going concern value at an ordinary sale, at least in the case of an integrated multinational firm.[14] Moreover, the concept of adequacy has required full compensation despite contrary provisions regarding the expropriation of locally owned property and regardless of the host country's capacity to pay.[15] This standard perhaps is best illustrated by the *Lena Goldfields Ltd.*[16] arbitration case. Lena had been forced to terminate an outstanding mining concession agreement with the Soviet government after disputes arising because of extensive state interference. The Arbitral Tribunal ruled that the measure of damages should be the "fair purchase price of [the Lena concession] as a going concern."[17] This amount, in turn, was measured by the present value of Lena's estimated future profits for the duration of the expropriated agreement.[18]

Nationalizations in Western Europe since World War II demonstrate a basic problem in the application of the going concern standard:[19] antieipated news of the expropriations induced wide economic fluctuations and thus undermined fair market assessments, despite efforts to fix dates that would reflect true market value.[20] The recent record of developing countries indicates that full fair market value rarely is achieved; most expropriations have been negotiated settlements in which either the provisions for compensation have been below fair market value[21] or the amount or the criteria used in reaching a valuation figure have not been reported.

C. *Effectiveness of Payment*

Ensuring effective compensation essentially has revolved around

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14. RESTATEMENT, *supra* note 11, at § 188, comment *b*.

15. The United States Supreme Court developed the standard early in holding—despite a federal statute to the contrary—that the fifth amendment's just compensation provision for property taken for public use, properly construed, required that payment be made for a franchise right to take bridge tolls. Monongahela Navigation Co. v. United States, 148 U.S. 312, 345 (1893).

16. The unpublished text can be found in The Times (London), Sept. 3, 1930, at 7, col. 1. *See* Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L.Q. 31 (1950).

17. The Times, *supra* note 16 at 7, col. 1.

18. *Id.*; Nussbaum, *supra* note 16, at 41.

19. *See* B. WESTON, INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE 181 (1971); R. LILLICH, POSTWAR BRITISH PRACTICE 114-15 (1967).

20. M. EINAUDI, M. BYE & E. ROSSI, NATIONALIZATION IN FRANCE AND ITALY 41 (1955); Cairns, *Some Legal Aspects of Compensation for Nationalized Assets*, 16 LAW & CONTEMP. PROB. 594, 602, 604, 607-16 (1951).

21. *See* U.S. DEP'T OF STATE, RESEARCH STUDY: NATIONALIZATION, EXPROPRIATION, AND OTHER TAKINGS OF UNITED STATES AND CERTAIN FOREIGN PROPERTY SINCE 1960, at 39-40 (1971) [hereinafter cited as RESEARCH STUDY].

the trinity of interest, rate of exchange, and currency medium. While the minimum interest requirement has remained generally constant,[22] exchange rates and currency media have presented greater problems.[23] The inherent complexities of securing effective compensation for deprived alien investors are only too well dramatized by recent problems in currency realignment.[24] Although the Permanent Court of International Justice has required payment in "stable" or "hard" currency—currency supported by dollars, pounds, or gold reserves[25]—acceptance of this opinion has been varied.[26] If there is, indeed, a prevalent view regarding currency media, it is probably the minimum rule that the deprivor state need only make payment in the deprivor's local currency, whether convertible or not.[27] This bare requirement is at least an implicit recognition of foreign exchange shortages, in both Europe and contemporary emerging economies. The problem of availability of hard currency becomes even more acute in expansive nationalization programs predicated upon wholesale reforms of the capital structure. Thus, at the same time that the availability of foreign reserves to compensate multifirm takeovers is severely reduced, the risks of value reduction at maturity from inflation, deflation, or inconvertibility are correspondingly increased.[28]

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22. *Compare* 6 J. MOORE, DIGEST OF INTERNATIONAL LAW § 1059, at 1028-29 (1906), *with* C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 203-04 (1928).

23. Should the currency, for example, be that of the alien's state at the time of injury, the currency provided in the concession agreement, convertible currency geared to the time of the award, or set by the IMF in the casc of multiple exchange rates? Article 39 of the Harvard Draft Convention provides all 4, suggesting use of the one that will optimize the award. *Draft Convention on the International Responsibility of States for Injuries to Aliens* in Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 583-84 (1961).

24. *See* N.Y. Times, May 13, 1971, at 73, col. 3. For a good analysis of balance of payments instability in juxtaposition with private capital flows into LDC's see R. MIKESELL, FINANCING WORLD TRADE: AN APPRAISAL OF THE INTERNATIONAL MONETARY SYSTEM AND PROPOSALS FOR REFORM 112-25 (1969).

25. Case of the S.S. Wimbleton, [1923] P.C.I.J., ser. A, No. 1, at 32. More broadly, the terms "hard" or "stable" refer to currencies in which a relatively high degree of confidence aids in resisting exchange rate changes resulting from wide swings in the flow of capital transactions. *See* J. MADDEN & M. NADLER, THE INTERNATIONAL MONETARY MARKETS 37-38 (1968); Mikesell, *The Emerging Pattern of International Payments*, in ESSAYS IN INTERNATIONAL FINANCE 13-15 (1954). Strong currencies include the dollar, the pound sterling, the German mark, the Swiss franc, the Dutch guilder, and the Japanese yen. *See* D. SINGH, THE PROBLEM OF WORLD RESERVES 45-76 (1970).

26. *See, e.g.*, Caselli Claim, [1933] Ann. Dig. 438, 441 (No. 195) (United States-Panama Claims Commission) (substituted property recognized as appropriate settlement in certain instances).

27. Metzger, *Property in International Law*, 50 VA. L. REV. 594, 603-07 (1964) (citing a number of international agreements including the article of the International Monetary Fund in support of local currency minimum).

28. *See* F. DAWSON & I. HEAD, *supra* note 3, at 251.

The rate of conversion poses an additional barrier to effective compensation, particularly in countries whose local currencies have experienced a high degree of exchange fluctuation. Normally, compensation is based upon exchange rates at the time of the taking and computed in the recipient country's currency.[29] Because of the absence of clear international standards on treatment of exchange rates in compensation disputes,[30] however, the question continues to arise whether official rates of exchange or free market rates should be used.[31] Tribunals traditionally have tended toward the former rate choice,[32] but this in itself may destroy effective compensation during periods of substantial social, economic, and political readjustment, to which developing countries are particularly susceptible.[33]

III. Departures from Orthodox Valuation Tests

A necessary step in the development of realistic compensation criteria is an investigation of existing deviations from the traditional norm. While narrow, historically evolved standards of promptness and effectiveness remain in the constitutions and basic protection statutes of some LDC's, paradigms of mass resource transformation and state trading in many countries have induced disparate applications of traditional statutes and radical changes in the expropriation protection provisions of the statutes and constitutions themselves. By examining current applications, the areas in which change and increased flexibility are needed may be discovered. Although these seldom coincide in their details from nation to nation, the following four basic patterns can be discerned.

A. Statutory Standards, Techniques, and Valuation Bases

Numerous countries recently have adopted expropriation procedures, standards of compensation and valuation bases that directly or potentially deviate from the traditionally accepted norm of "full and just compensation" according to the "prompt, adequate, and effective" test. This trend is apparent even in Western Europe, where, for example,

29. *See* 8 M. Whiteman, Digest of International Law 1165 (1971).

30. *Id.* at 1192-93.

31. *Id.*

32. *See, e.g.*, Foreign Claims Settlement Comm'n, Fifth Semiannual Report, Panel Opinion No. 43, at 17 (1956).

33. Note, for instance, the different treatments in two sub-Saharan African countries. In Tanzania, compensation is to be made in the foreign currency and may be transferred abroad at the prevailing official exchange rates. Act No. 40 of 1963, § 6(2) (Tanganyika). Ghana, on the other hand, provides compensation for expropriated property in the currency in which the investment was originally made. Act No. 172 of 1963, § 8(1)-(2) (Ghana).

the preamble of the 1958 French Constitution provides for just, prior compensation upon taking of private property for public necessity, but the expropriation statute[34] itself apparently is not subject to the general constitutional requirement. The provision for compensation thus could be construed to allow something less than going concern value.[35] The German Constitution, on the other hand, provides compensation based upon a just consideration of the interests of the general public and the affected parties.[36] Expropriation legislation is left largely to provincial control and reflects substantial regional variation in awards criteria.[37]

Uganda, where expropriation was formerly conditioned upon "prompt payment of adequate compensation," recently has modified its compensation requirement by a constitutional amendment[38] that substitutes "payment of reasonable compensation" for the previous standard.[39] The nationalization of a number of industries, including several American banks and oil companies,[40] coincided with this change. Under the terms of a new Companies Act, the government acquired a 60 percent interest in designated firms.[41] This buy-out, however, subsequently was reduced to 49 percent in a few cases, reflecting a change in presidential policy.[42] The statute's compensation provisions authorize a minister to determine the purchased shares' value,[43] which will then be payable only "from the share of profits received by the Government

34. Ordonnance No. 58-997 of Oct. 23, 1958, [1958] J.O. 9654, [1958] D.L. 335 (Fr.). Certain speculative increases in value are specifically excluded in determining compensation. *Id.* arts. 10-23.

35. For further discussion of the statute see F. DAWSON & I. HEAD, *supra* note 3, at 243. In a current dispute involving the postwar nationalization of light, gas, and electric utility companies, the United States Government has espoused the claim of one Alan Arragon, whose interest in the utility companies is estimated at $8,700,000 plus interest. Because discussions are still in progress, final conclusions on criteria used cannot be made at this time. *See* RESEARCH STUDY, *supra* note 21, at 50.

36. GRUNDGESETZ art. 14(3) (1949, amended 1966) (W. Ger.). Although article 15 technically governs nationalizations, it refers to article 14 for compensation criteria. *Id.* art. 15. Whether full compensation is a constitutional requirement is subject to disagreement. *See* K. BRINKMANN, GRUNDRECHTS-KOMMENTAR ZUM GRUNDGESETZ art. 19, No. 1(7)(a) (1967).

37. K. BRINKMANN, *supra* note 36, at art. 1, No. 1(7) (a).

38. UGANDAN CONST. amend. I (1970).

39. UGANDAN CONST. ch. III, art. 22(1) (1962, amended 1963), in 1 A. PEASLEE, *supra* note 13, at 931.

40. Act of May 7, 1970, Concerning Ugandan Companies (Government & Public Bodies Participation), [1970] Ugandan Acts art. 3, at 3-4 [hereinafter cited as Ugandan Companies Act].

41. *Id.* at 6. *See* N.Y. Times, July 6, 1970, at 6, col. 4.

42. The announcement was made by President Amin on May 1, 1971. He also announced that although his government would honor fully executed 60% share acquisition agreements between the Obate Government and 7 foreign firms, the remaining companies earmarked for nationalization would be purchased on a 49% basis to preserve the delicate public-private investment balance. N.Y. Times, May 2, 1971, § 1, at 24, col. 4.

43. *See* RESEARCH STUDY, *supra* note 21, at 45.

. . . within a period of time not exceeding fifteen years."[44] Thus it appears that the government's immediate obligation is limited to its pro rata share of retained earnings at the time of taking each nationalized firm. Carried to its logical extreme this statutory scheme for "reasonable compensation" might produce anomalous results: if a particular firm had no retained earnings and exhibited no net profit, the parent would receive no compensation at all, notwithstanding its loss of valuable physical and intangible assets. Since there have been no compensation agreements under this scheme, however, hard conclusions on the ultimate Ugandan interpretation of "reasonable compensation" are premature.[45]

Another departure from the traditional market value criterion of "adequacy" of payment occurred in the Tanzanian nationalizations of 1967-70.[46] Representing the first large-scale deprivation program in East Africa, the Arusha Declaration[47] nationalization acts provide for "full and fair compensation with respect to the net value of the assets taken."[48] More specifically, a nationalized company receives a certificate of compensation representing a claim against the government.[49] Excepting some instances of exchanges of stock, however, valuation procedures pursuant to buy-outs more closely resemble a net assets test than the traditional going concern standard. Most valuations to date, moreover, have been computed on the basis of book value with some upward adjustments for heavily depreciated physical assets.[50] Intangible

44. Ugandan Companies Act §§ 2(1), (3).

45. *See* N.Y. Times, May 2, 1971, § 1, at 24, col. 4.

46. The actions were intended both to strengthen the cause of socialism by reducing "wasteful private competition" among foreign firms and to establish a definitive framework in which foreign guaranties could be issued. *See* Temu, *Nationalization in Tanzania*, 4 E. AFR. J. 35 (1967).

47. The text of the Declaration can be found in Dar es Salaam 3 (1967). For a discussion of the underlying economic and political motives behind the Arusha Declaration see Cliffe, *Arusha Declaration: Challenge to Tanzania*, 3 E. AFR. J. 13 (1967); Lonsdale, *The Tanzanian Experiment*, 67 AFR. AFF. 330 (1968); Note, *Tanzanian Nationalizations: 1967-1970*, 4 CORNELL INT'L L.J. 59 (1970).

48. The basic acts including amendments can be referred to as follows: Act No. 1 of 1967, National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act, *as amended*, Act No. 21 of 1967; Act No. 2 of 1967, State Trading Corporation (Establishment and Vesting of Interests) Act, *as amended*, Act No. 14 of 1967; Act No. 3 of 1967, National Agricultural Products Board (Vesting of Interests) Act, *as amended*, Act No. 14 of 1967; Act No. 4 of 1967, Insurance (Vesting of Interests and Regulation) Act; Act No. 5 of 1967, Industrial Shares (Acquisition) Act [each of the above acts is hereinafter cited as Tanz. Act No. ___ of 1967]. Only Tanz. Act No. 1 of 1967 expressly extends to Tanganyika and Zanzibar; the others apply only in Tanganyika.

49. Bradley, *Legal Aspects of the Nationalizations in Tanzania*, 3 E. AFR. L.J. 149, 160 (1967).

50. Only in those cases involving the government's share acquisition of companies registered

assets such as goodwill and going concern value generally have not been compensated.[51]

Ceylon[52] affords compensation based on cost or book value plus the reasonable value of any additions and improvements made to the property or, when no cost information is available, the market value of the property on the date of the transfer to the state.[53] Although the Ceylonese expropriation statute provides a deduction for depreciation,[54] the most interesting feature is its treatment of market value based solely upon the severable parts of the enterprise rather than upon a going concern basis.[55] The statute's failure to provide a compensatory allowance for the benefit of a nationalized corporation's entity reputation could create valuation distortions in the event of a compulsory buy-out of a local subsidiary of an integrated multinational firm.

Alternative valuation bases have been utilized with varying frequency. Tax evaluation, for instance, is statutorily provided as a basis in Argentina,[56] Colombia,[57] and Guatemala,[58] in addition to market valuation and historical price methods. Officials applied tax evaluation in fixing the compensable value of land expropriated in 1953 pursuant to Guatemala's Agrarian Reform Law.[59] The government claimed it had fixed the valuation base at the amount that the company had estimated in its tax declaration.[60] This system has been utilized to some extent in

in Tanzania was compensation based on share value. Tanz. Act No. 2 of 1967, § 22(1); Tanz. Act No. 3 of 1967, § 17 (1); Tanz. Act No. 4 of 1967, § 6(1); Tanz. Act No. 5 of 1967, § 4(1).

51. Tanz. Act No. 1 of 1967, § 20(1); Tanz. Act No. 2 of 1967, § 12(1); Tanz. Act No. 3 of 1967, § 7(1). Because compensation was determined by negotiated settlement in many of the cases, precise criteria are not available.

52. For a discussion of the application of the Foreign Assistance Act of 1961, § 620(e), 22 U.S.C. § 2370(e) (1964), *as amended*, 22 U.S.C. § 2370(e) (1970), in Ceylon see 2 INT'L LEGAL MATERIALS 386 (1963).

53. Act No. 28 of 1961, § 47(1), [1967] Legis. Enactments of Ceylon 779 (Ceylon).

54. *Id.*

55. *Id.*

56. Law of Dec. 22, 1948, Law of Expropriation 13,264, art. 13 (Argen.), modified with respect to foreign public utility enterprises by Convención Nacional Constiturgente, 1 Diario de Decisiones 282 (Argen. 1949).

57. Decree 1904 of July 18, 1962, art. 1, [1962] D.O. of Aug. 3 (Colom.).

58. Decree-Law 529 of July 9, 1948, arts. 12(a)(1), 14, [1948] El Guatemalteco of Sept. 9 (Guat.).

59. Appeal of the constitutionality of the Agrarian Reform Law was made to the President of the Republic. Receiving an adverse presidential order, Decree No. 900, [1952] El Guatemalteco of June 17 (Guat.), the company appealed to the Supreme Court of Guatemala for an injunction against the order. For a more detailed discussion see Brisk, *Tax Evaluation as a Measure of Compensation for Expropriated Property in Argentina, Colombia and Guatemala*, 19 N.Y.U. INTRA. L. REV. 52, 60 (1963).

60. *See generally* Brisk, *supra* note 59, at 60.

Western Europe.[61]

The historical cost basis for current income deductions and depreciation charges continues to have strong support as the basic valuation unit for both current and fixed assets despite some contested theoretical accounting opinions that periodic readjustments to historical cost should be made to reflect price index changes for specific assets valued on the basis of the enterprise.[62] The rationale favoring historical cost is that readjustment lends itself to an excess of subjective inquiry, thereby compromising the integrity of valuation procedures.[63] It is also felt with respect to a going concern that any excess value over historical cost will be reflected in going concern allowances for the enterprise.[64] The abundance of disagreement over the prevailing use of historical cost, however, reduces the probabilities of its global acceptance as an exclusive valuation basis.[65] Its role might thus be postulated as an alternative to read-

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61. Italy utilized tax evaluation to compensate peasant landholders under a partial land reform program. *See* Cairns, *supra* note 20, at 594 n.1.

62. Proponents of historical cost include: R. KESTER, ADVANCED ACCOUNTING 332 (4th ed. 1946); R. SCHATTKE, H. JENSEN, & V. BEAN, ACCOUNTING; CONCEPTS AND USES 69-70 (1969); A. SHUGERMAN, ACCOUNTING FOR LAWYERS 289 (rev. ed. E. Farris 1964). Cost-in-fact has been upheld by both the SEC, Central Ill. Elec. & Gas. Co., 5 S.E.C. 115, 130-31 (1939), and the Supreme Court, FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944). The American Institute of Certified Public Accountants has supported cost as a buffer against fluctuating currency values. A.I.C.P.A. COMM. ON ACCOUNTING PROCEDURE, ACCOUNTING RESEARCH BULL. NO. 33, at 268 (1947); *id.* No. 43, ch. 9(a) (1953).

There has been increasing support for revaluation of assets to reflect inflation and technological obsolescence. *See generally* A. CARRINGTON & G. BATTERSBY, ACCOUNTING: CONCEPTS, SYSTEMS, APPLICATIONS 38-39 (London 1967); R. CHAMBERS, ACCOUNTING, EVALUATION, AND ECONOMIC BEHAVIOR 351-55 (1967). *See also* the views of the various committees of the American Accounting Association: Committee on Concepts and Standards, *The Realization Concept,* 40 ACCOUNTING REV. 312 (1965); Committee on Concepts and Standards, *A Discussion of Various Approaches to Inventory Measurement,* 39 ACCOUNTING REV. 700 (1964).

63. *See* R. SCHATTKE, H. JENSEN, & V. BEAN, *supra* note 62, at 69.

64. *Id.* at 70; AMERICAN ACCOUNTING ASS'N, ACCOUNTING AND REPORTING STANDARDS FOR CORPORATE FINANCIAL STATEMENTS AND PRECEDING STATEMENTS AND SUPPLEMENTS 2 (1957); STUDY GROUP ON BUSINESS INCOME, CHANGING CONCEPTS OF BUSINESS INCOME 22-23 (1952).

65. In Canada, Europe, and the United States, cost or market, whichever is lower, seems to be used most consistently as a conservative means of measuring replacement cost. During inflationary periods, this will mean that cost will serve as the basic index. W. LEONARD & F. BEARD, CANADIAN ACCOUNTING PRACTICE 439 (2d ed. 1963); G. MUELLER, INTERNATIONAL ACCOUNTING 228 (1967). Statutory cost provisions, albeit subject to certain market write-downs, serve as the principal valuation bases in West Germany, France, and Great Britain. Companies Law and Financial Reporting, International Business Series, No. 10, at 13, 30, 52 (1971).

Revaluation procedures, on the other hand, have been used extensively in the Soviet Union as a supplement to contract prices. This procedure serves to adjust values in inventory categories to reflect balance sheet corrections in stock on hand. R. CAMPBELL, ACCOUNTING IN SOVIET PLANNING AND MANAGEMENT 144-45 (1963); N. JASNY, SOVIET PRICES OF PRODUCER'S GOODS (1952). Similarly, the Soviets have used revaluation to adjust prices of fixed assets to correspond

justment depending upon particular susceptibilities to realistic assessment under the circumstances.[66]

B. Reductions and Excess Profits

Somewhat more radical and controversial departures from the traditional norm have occurred in African and Latin American countries in which the use of compensation reductions, particularly for excess profits, has achieved its greatest effect.[67]

Libya's compensation enactment,[68] by which the Revolutionary Command Council passed ownership of various foreign oil companies to the state-controlled Libyan National Oil Corporation, contains a comprehensive reduction scheme. It includes a provision that allows many reductions from awards; these include the settlement of taxes, fees, and any other amounts due the public treasury.[69] The breadth of these reductions, combined with the nonappealable discretion reposed in a special government-appointed compensation committee,[70] probably makes possible the imposition of an excess profits reduction despite the lack of an express provision therefor. No decisions have yet been reached by the committee, and any insight into the ultimate thrust of these provisions that may be obtained from a recent accord with a number of nationalized foreign banks and insurance companies is minimal because the criteria of these agreements have not been published.[71] It appears from recent official indications, however, that Libya and

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with contemporary regional construction costs. P. BUNICH, AMORTIZATSIYA OSNOVNYKH FONDOV V PROMYSHLENNOSTI (AMORTIZATION OF FIXED ASSETS IN INDUSTRY) 77 (Moscow 1957). Similar combining of historical and revaluation costing as the basis for depreciation is used in the Netherlands. *See generally* Davidson & Kohlmeir, *A Measure of Impact of Some Foreign Accounting Principles*, 4 J. ACCOUNTING RESEARCH 183, 192 (Fall 1966).

66. *See* G. MUELLER, *supra* note 65, at 79-80.

67. In addition to the recently publicized takeovers in Peru, Bolivia, and Chile, described more fully in Furnish, *Peruvian Domestic Law Aspects of the La Brea y Pariñas Controversy*, 59 KY. L.J. 351 (1970), and Wesley, *supra* note 9, at 234-38, a potential problem has developed in Venezuela, which has adopted a stringent income tax amendment that replaces a progressive tax on foreign-owned petroleum firms with a 60% uniform rate. Law of Dec. 17, 1970, [1970] G.O. 1448 of Dec. 18 (Venez.). More ominous for the oil companies is the new Hydrocarbon Reversion Law, which earmarks installation equipment and machinery of oil concessionaires for government ownership upon expiration of the concessions in 1984 and requires the maintenance of minimum reserve amounts as security for proper care of the assets. Law of July 30, 1971, [1971] G.O. 29577 (Venez.).

68. 2 Law Nationalizing Corporations for the Import, Sale, and Distribution of Petroleum Products of July 4, 1970, (Petroleum Leg.) North Africa Basic Oil Laws & Concession Contracts, [1970] (Supp. 14, El-E5).

69. *Id.* art. 5.

70. *Id.*

71. *See* RESEARCH STUDY, *supra* note 21, at 38-39.

other Arab oil countries may limit recovery to net book value with no allowance for lost profits.[72]

Problems confronting Libya in its production and marketing of oil reserves may deter more radical departures from traditional valuation formulas which could trigger further disinvestments.[73] The recent nationalization of British Petroleum[74] could, moreover, discourage potential Libyan oil customers if BP prevails in its present attempt before an Italian tribunal to attack the expropriation by attaching oil produced and shipped from Libya since the nationalization.[75] Political and economic implications of the nationalization act—whether productive of conservative or radical applications of valuation theory—ultimately will dictate the tenor and weight accorded various statutory provisions by the Libyan government.[76]

The formula provided by the new Chilean constitutional amendment in conjunction with nationalization of the copper industry is considered an extreme position: in addition to rejecting market or going concern value by limiting compensation to book value,[77] the formula requires the application of many reduction items. These include depreciation, mine depletion, amortization, write-offs, devaluation through obsolescence, payments received under repudiated pre-Allende equity-purchase agreements, third-party contract debts deemed not usefully invested, and most importantly, excess profits.[78] The basic purpose of its application is to recapture funds attributable to economic exploitation.[79] The significant notoriety achieved by the scheme appears to ensure its recognition as a prospective precedent for other reform-minded governments.

The Chilean and Libyan enactments arguably differ in their effect upon the corporation: Chile's asset acquisition terminates the functional

72. Libyan oil exploration already has been cut back substantially because of increased government demands for national participation. Statement of Anis A. Shteiway, Chairman and Director General of the Libyan National Oil Corp. in Wall Street J., Feb. 3, 1972, at 1, col. 6.

73. Washington Post, Jan. 29, 1972, at 12, col. 7.

74. Wall Street J., Feb. 3, 1972, at 1, col. 6. A special arbitration committee has been designated to determine compensation for BP; the award will be nonappealable. Platt's Oilgram, Feb. 15, 1972, at 2.

75. Wall Street J., Feb. 3, 1972, at 1, col. 6.

76. For an extensive analysis of the legal, economic, and political problems that have confronted the oil companies in North Africa see R. MIKESELL, FOREIGN INVESTMENT IN THE PETROLEUM AND MINERAL INDUSTRIES; CASE STUDIES OF INVESTOR-HOST COUNTRY RELATIONS (1971).

77. For the text of the Chilean formula deductions under the constitutional amendment see 10 INT'L LEGAL MATERIALS 1067, 1070 (1971).

78. *Id.*

79. *See* N.Y. Times, Jan. 25, 1971, at 72, cols. 1-6.

presence of the local firm and severs all ties with the parent corporation, while Libya's share purchase retains at least the form of the local entity. While the transfer of control power to the Libyan oil corporation tends to denigrate the affected firm's status as a viable economic entity, the benefits of the parent firm's management skill, resources, and reputation are retained.

Unlike cost as a unit of valuation, the use of "excess profits" has no underlying historical precedent in international law. Its retroactive premise of recouping profits earned in accordance with contractual agreements sanctioned by existing municipal law has inspired charges of erosion of the rule of law.[80] Having been urged, however, on several occasions—including the Iranian[81] and Suez[82] nationalizations—as a compensation set-off or counterclaim, the excess profits reduction has emerged as a nascent vehicle for limiting compensation.[83] Absent submission to international adjudication or incorporation of the principle either by international agreement or by United Nations resolution, however, resistance to its adoption can be expected to continue.

Although excess profits reductions are recent developments in international law, the law of the renegotiation of government contracts in the United States provides some precedent for their use. There is an extensive body of United States statutory and decisional law dealing with excess profits of contractors and subcontractors involved in defense-related work.[84]

Initially, renegotiation served primarily a penalty function in holding the line on wartime profit accumulation.[85] Continued statutory authority for renegotiation in post-war years, however, suggests that the concept is supported by an underlying premise of the need for moral accountability on the part of firms deemed to have taken undue advan-

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80. *See* Statement of Secretary of State William Rogers in response to Chilean compensation announcement in 10 INT'L LEGAL MATERIALS 1307 (1971).

81. In response to compensation claims of the Anglo-Iranian Oil Co., Iranian officials claimed that unreasonable profits ranging between $500,000,000 and $550,000,000 had been made while the government had received only $45,000,000. 6 U.N. SCOR, 563d meeting 15 (1971).

82. Charges of unreasonable profits accruing to the Suez Canal Co. were made by President Nasser, pointing to adhesive provisions in the original concession agreement. *See* Speech by President Nasser, July 26, 1956, *recorded in* ROYAL INSTITUTE OF INT'L AFFAIRS, 1956 DOCUMENTS ON INTERNATIONAL AFFAIRS 77 (1959).

83. In addition to Chile, the question of "excess profits" was raised in the Gulf Oil dispute with the Bolivian government, Gulf Oil Press Release of Oct. 30, 1969, and in the Ecuadorian expropriation of All-America Cables & Radio, Inc., a subsidiary of ITT, Wall Street J., Aug. 26, 1970, at 3, col. 1.

84. Initiated during World War II to meet wartime emergencies, the process led to the Renegotiation Act of 1951. 50 U.S.C. APP. § 1211 (1970).

85. Walsh, *War Profits and Legislative Policy*, 11 U. CHI. L. REV. 191 (1944).

tage of their bargaining position with the Government—a view somewhat analogous to the views expressed by many expropriating governments.

The foundations of United States renegotiation requirements can be traced to the deficiencies of governmental use of the cost-plus-percentage-of-cost (CPPC) contract and its successor, the cost-plus-fixed-fee (CPFF) contract.[86] Employment of these cost-cutting techniques resulted in contractors' raising costs[87] or inflating CPFF contract estimates[88] to effect profit increases.

Statutory renegotiation emerged in 1942 chiefiy to cure the inability of the Government to recapture extra profits resulting from the institution of cost-cutting efficiencies in the later stages of defense contracts.[89] In adopting the Renegotiation Act, Congress subordinated existing procurement practices to statutory renegotiation or redetermination.[90] Systematic retrospective renegotiation of defense-related contracts thus came to replace prior processes, that had relied on prospective renegotiation of individual contracts.[91] More importantly, the Act's retroactive application was upheld on constitutional grounds.[92] Although the constitutional basis of the original act may be distinguished

86. Used as one of several devices to limit profits, along with excess profit taxes and price controls, CPPC contracts attempted to limit profits to 10% of actual costs. Hensel & McClung, *Profit Limitation Controls Prior to the Present War*, 10 LAW & CONTEMP. PROB. 187, 192-99 (1944). CPFF contracts provided a fixed fee based on a percentage of estimated costs. For a more detailed discussion see Braucher, *The Renegotiation Act of 1951*, 66 HARV. L. REV. 270, 274-77 (1951).

87. Braucher, *supra* note 86, at 273-76.

88. *See* Report to the Attorney General in the Aircraft Inquiry 134 (1918), *quoted in* United States v. Bethlehem Steel Corp., 315 U.S. 289, 306 (1942). For assessments and comparisons of statutory renegotiation see Mills, *Renegotiation Act of 1951 Analyzed and Compared with Acts of 1943 and 1948*, 91 J. ACCOUNTANCY 690 (1951); Wilson, *Renegotiation: Pro and Con*, 10 LAW & CONTEMP. PROB. 376 (1943); Note, *Reform of the Renegotiation Process in Government Contracting*, 40 GEO. WASH. L. REV. 1141 (1971).

89. 50 U.S.C. § 1191 (1970) (originally enacted as Act of Apr. 28, 1942, ch. 247, § 403, 56 Stat. 245). The twin recapture provisions were: (1) "redetermination," which provided for a downward adjustment in price to accord with actual prices unilaterally determined by the Government early in the contract, and (2) a "renegotiation clause" to effect either an upward or downward adjustment in price based on actual costs previously experienced, to be determined by mutual agreement. *See generally* Marbury & Bowie, *Renegotiation and Procurement*, 10 LAW & CONTEMP. PROB. 218 (1943).

90. CPPC contracts ultimately were barred entirely by § 304(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 254(b) (1970).

91. 50 U.S.C. APP. §§ 1213(g)(3), 1215(f)(2) (1970).

92. Lichter v. United States, 334 U.S. 742, 789 (1948); Blanchard Mach. Co. v. Reconstruction Fin. Corp., 177 F.2d 727 (D.C. Cir.), *cert. denied*, 339 U.S. 912 (1949). Indicating its disapproval, however, the Supreme Court has declared that "[r]etroactivity, even when permissible, is not favored, except upon the clearest mandate." Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944).

from the principles underlying peacetime expropriations because the act related to wartime purchase contracts,[93] it has been amended and extended ten times.[94]

In implementing a statutory scheme for unilateral[95] retroactive determination of excess profits subject to recapture, Congress has established an economic valuation system comparable both in principle and application to the recapture provisions of several expropriating foreign governments. The statutory standards for determining excess profits are general in nature[96] and repose broad discretion in the Renegotiation Board to fashion its own quantitative norms for assessing the statutory factors.[97] It should be noted that retroactivity and the absence of clear indices and methods for correlating various elements are the principal objections to the Chilean amendment's compensation reduction provision.[98] Even the narrow avenues provided by Chile for challenging an excess profits determination are similar to the specific limitations imposed by the United States upon the scope of judicial review.[99]

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93. United States v. Pownall, 65 F. Supp. 147 (S.D. Cal. 1946), *aff'd*, 159 F.2d 73 (9th Cir. 1947).

94. Pub. L. No. 92-41, 85 Stat. 97, extends the Act for an additional 2 years.

95. Unilateral orders are authorized by the Regional Boards and/or the Hull Board, depending on the profit totals when agreement with the contractor has failed. 50 U.S.C. APP. § 1215 (a) (1970).

96. Determination of excessive profits requires that consideration be given only to: (1) the reasonableness of costs and profits; (2) the net worth; (3) the extent of risk assumed; (4) the nature and extent of contribution to the defense effort; (5) the character of the business; and (6) such other facts as fair and equitable dealing with the Government may require. 50 U.S.C. APP. § 1213(e) (1970). For a more detailed breakdown of these factors see 32 C.F.R. §§ 1460.8 to -.15 (1972).

Without spelling out specific criteria for weighing the statutory factors, the cases have manifested varying infiuences from profit/cost ratio comparisons, Newport News Shipbuilding & Dry Dock Co. v. United States, 374 F.2d 516, 529-31 (Ct. Cl. 1967), risk/cost comparisons, LTV Aerospace Corp. v. Renegotiations Bd., 51 T.C. 369 (1968), profit/sales ratio comparisons to prior years, Park Sherman Co. v. United States, 29 T.C. 175 (1957), industry wide profit/sales comparisons, Drake-Mullen v. Renegotiation Bd., P-H TAX CT. REP. & MEM. DEC. ¶ 62,017 (1962), to net/worth profit ratios, Waltham Screw Co. v. Renegotiation Bd., 31 T.C. 227 (1958). For further analysis see Marcus, *The Need for Standards in Renegotiation and Other Determinations of Defense Profits*, 32 GEO. WASH. L. REV. 23 (1963).

97. Publication of the Board's specific application of statutory factors, methods of application, and the relative importance of the various factors was recommended by the COMMITTEE ON CLAIMS ADJUDICATION, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS: PRACTICES AND PROCEDURES AND THE RENEGOTIATION ACT OF 1951 (1970). Present treatment of statutory factors remains, however, highly discretionary with the Board, as the cases cited in note 96 *supra* illustrate.

98. *See* Memorandum of Kennecott Copper Corp. 88-89 (Aug. 16, 1971) (on file in the offices of the *Vanderbilt Law Review*).

99. A special tribunal was designated in the Chilean constitutional amendment to hear the appeals of the nationalized firms. 10 INT'L LEGAL MATERIALS 1069 (1971). The Tax Court once had exclusive jurisdiction of the resolution of all questions of fact or law involved in the determina-

In addition to the precedential value of statutory renegotiation, the possibility of imputed incorporation of the recapture doctrine in concession agreements by clauses referring to general principles of law as recognized by civilized nations[100] will have to be considered if there is ever an international adjudication on the merits of the excess profits issue. Retroactivity, however, is contrary to commercial expectations and, if sanctioned indiscriminately in international law, could hinder trade development by encouraging speculative profiteers at the expense of needed long-term investment programs.

Additional reductions for contractual agreements deemed "not usefully invested," like those provided in the Chilean constitutional amendment,[101] further erode the orthodox theory by adding out-of-pocket costs to lost profit expectations. Such provisions in effect constitute state authorization for expropriation of contracts between it and an already nationalized alien enterprise.[102] Granting the host government discretion

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tion of excess profits which do not raise either jurisdictional or constitutional questions, 50 U.S.C. APP. § 1218(a) (1962), but Congress substituted the Court of Claims in Pub. L. No. 92-41, § 3(a), 85 Stat. 98 (July 1, 1971).

In addition, by adopting Pub. L. No. 92-41, Congress deleted § 108A of the Act, which had provided a limited appeal from the Tax Court to the Court of Appeals. In its place Congress provided for review of the Court of Claims by the Supreme Court of petitions for redetermination of excessive profits filed after July 1, 1972. Pub. L. No. 92-41, § 3(b), 85 Stat. 98 (July 1, 1971). The appellate provisions of 50 U.S.C. APP. § 1218(a) (1970), however, will remain in effect with respect to all cases in which the Chief Judge of the Tax Court directs that a particular renegotiation case not be transferred to the Court of Claims. *Id.* § 3(e).

Given then the limitation of bases for appeal to questions of jurisdiction and constitutionality only, a petitioner would have to show arbitrariness by the Board or a lack of substantial evidence or rational bases for the Board's decision. United States v. Carmack, 329 U.S. 230, 243 (1946); O'Bierne v. Overholser, 193 F. Supp. 652, 656 (D.D.C. 1961). In effect, successful appeals from a Tax Court ruling require showings of failure to consider relevant sales and costs or previous Tax Court rulings bearing upon questions of law. Manifestly, the burden is a stiff one, and in the only case appealed by the Government or a contractor since the 1962 amendment to the Renegotiation Act established limited appellate standards, the Ninth Circuit affirmed the Tax Court's finding of no excess profits because it was "unable to find either errors of law by the Tax Court or that the findings of fact are arbitrary or capricious." B-E-C-K McLaughlin & Associates v. Renegotiation Bd., 443 F.2d 1180 (9th Cir. 1971) (per curiam). For cases in accord with respect to pre-July 3, 1962, petitions involving nonjurisdictional questions see United States v. California E. Line, Inc., 348 U.S. 351, 351-55 (1955); Metallurgical, Inc. v. Renegotiation Bd., 382 F.2d 843, 845 (8th Cir. 1967); Grannis & Sloan, Inc. v. Renegotiation Bd., 285 F.2d 908 (4th Cir. 1961).

100. Such principles have been treated as controlling rules on a number of occasions. *See, e.g.*, Petroleum Dev., Ltd. v. Sheikh of Abu Dhabi (1951), *reported in* 1 INT'L & COMP. L.Q. 247 (1952).

101. *See* 10 INT'L LEGAL MATERIALS 1067, 1070 (1971).

102. The question has not been dealt with specifically in international law, but the Arbitral Tribunal, in Norwegian Shipowners' Claims (Norway v. United States), 1 U.N.R.I.A.A. 307 (1922), recognized the principle of expropriation of the rights of an alien under a contract with a nation.

Although without specific reference to compensation reduction, a potentially Chilean-type

to view contractual considerations in retrospect, moreover, breaks sharply with international principles and standards that have treated contractual expectations like property rights[103] and affords little basis for objective assessment within the context of bargained-for consideration. The availability of broad contractual renunciation without corresponding compensation would extend to expropriating governments virtual retrospective veto power over productive decision making by foreign firms and thereby irreparably weaken the fabric of foreign investment.

C. *Management Contracts*

Recent nationalization programs in the Congo (Kinshasa) and Zambia similarly evidence a retraction from the traditional conception of adequacy of payment, both in doctrine and application. These programs illustrate an emerging technique: a government forces a buy-out of a majority share interest in the enterprise and then arranges a management contract tying varying combinations of compensation to profits. In 1966, for example, the Congolese government took over the Union Miniere du Haut Katanga copper mine and transferred its ownership rights to the state mining firm.[104] Through the mediation efforts of the World Bank,[105] a compensation agreement was made, with the result that the former owner will continue to run the mine under a 25-year management contract and will receive commission payments representing six percent of sales less marketing expenses for the first fifteen years and ten percent thereafter.[106] The criteria used in this agreement are clearly without tangible precedent in orthodox compensation theory; nor is there any certainty of the ultimate amount of payment.

provision was incorporated in a number of Algerian nationalization decrees regarding French oil companies. Article 5 (common to these decrees) provides for denunciation of all contracts, commitments, and other legal obligations which might otherwise encumber the value of the properties nationalized or burden or constrain conditions of exploitation. Ordinance Nos. 71-8, -10 to -11 of Feb. 24, 1971, published in [1971] Official Journal of the Democratic and Popular Republic of Algeria of Feb. 25. The absence of published settlements, however, makes comparisons more difficult.

103. *See* Anglo-Iranian Oil Co. Case, [1952] I.C.J. 93, 112; *accord*, Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924). *See also* Schwebel, *International Protection of Contractual Arrangements*, PROCEEDINGS OF 53D ANNUAL MEETING OF THE AMERICAN SOC'Y INT'L L. 266 (1959).

104. Finalization of the nationalization was effected by legislative enactments in January, 1967. Nine ordinances were passed to legalize the cessation of operations and asset dissolution of Union Miniere. *See* M.C. 1967, No. 2, at 29-32, 46-47, 56, 1 [1967] ANNUAL SURVEY OF AFRICAN LAW 364-65 (N. Rubin & E. Cotran eds.).

105. *See* RESEARCH STUDY, *supra* note 21, at 35.

106. *Id.*

The situation in Zambia is somewhat less complicated, but the principles are similar. Fifty-one percent control in the two largest foreign copper firms was acquired by the Government. The agreed compensation—negotiable dollar bonds payable over eight- to twelve-year periods—is subject to accelerated payment in the event of a copper price increase in excess of 57 cents per pound.[107]

D. Duration and Convertibility

Finally, the standards of promptness and effectiveness of compensation have been strained further by LDC expropriation provisions in recent years. Some Latin American deferral provisions have spread tentative settlements over a period of years at interest rates too low to equal the present discounted value of the property taken.[108] The emerging preference for delayed payment is also apparent in Africa: Uganda's former constitutional requirement that compensation be paid within six months from the date of the taking[109] was deleted in 1970.[110] Likewise, the Congo (Kinshasa) settlement with Union Miniere contemplates payment from sales commissions under the company's management contract over a period of 25 years.[111] The United Arab Republic's nationalization laws now provide for repayment in four percent government bonds payable over fifteen years.[112]

Exchange controls implemented to stabilize currency reserves have revealed marked disparities, often diluting effectiveness of payment and sometimes even immobilizing compensation awards.[113] Convertibility

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107. Significantly, neither profit remittance, payments, nor transfers of assets were subject to exchange controls. Law No. 28 of 1970, [1971] Republic of Zambia Official Gazette 175-80.

Compensation to one company, for example, is to total the book value of $117,800,000 plus percentages of sales and profits from a 10-year management contract with the Government and a guarantee that the company's taxes will not be increased for 8 to 12 years. *See* RESEARCH STUDY, *supra* note 21, at 47-48. *See also* Wall Street J., Aug. 7, 1970, at 14, col. 1.

108. Cuba's nationalization of American interests in 1960 originally had provided for compensation in bonds with a term of not less than 30 years with annual interest of not less than 2%. U.S. DEP'T of State, Bull. No. 43, at 171 (1960). Bolivia's compensation agreement with Gulf Oil entailed payment over a 20-year period from 25% of future profits. N.Y. Times, Sept. 12, 1970, § 1, at 35, col. 4. Chile, at the extreme, provided for payment in unmarketable bonds over a 30-year period at a minimum of 3% interest. 10 INT'L LEGAL MATERIALS 430, 434 (1971).

109. UGANDAN CONST. ch. III, art. 22(1) (1962, amended 1963), in 1 A. PEASLEE, *supra* note 13, at 931.

110. UGANDAN CONST. amend. I (1970) provides for deletion of "prompt."

111. *See* RESEARCH STUDY, *supra* note 21, at 35.

112. *Id.* at 52.

113. Algeria, for example, has not permitted foreign oil companies to repatriate earnings since placing the firms under state custodianship in 1967. Wall Street J., Aug. 5, 1970, at 1, col. 2. Uganda's exchange control requirements operate to restrict its compensation formula through

restrictions were well illustrated in *Perry v. United States,*[114] which held that the Government could not abrogate its contracts and must, therefore, honor its bond obligations in gold. Recovery was rendered virtually illusory, however, due to the Gold Clause Act's requirement that holders of gold coins and certificates trade them in for dollars at face, not gold, value.[115]

A number of LDC's have attempted to protect property owners against the risk of ineffective compensation[116] by employing multiple exchange rates for the allocation of foreign investment and earnings repatriation. The problem of effectively correlating convertibility rates to the nature and time of the respective investments, however, does not seem to have been tangibly explored in expropriation cases to date.[117]

Comparing these new techniques for valuation of expropriated property highlights some of the areas of discord that have plagued efforts to fashion definitive rules and criteria for satisfying the general requirement of just compensation. Should the international test be "prompt, adequate, and effective" compensation, and if so, what factors should shape its perimeters, taking into account the global spectrum of economic and political ideologies and priorities?[118]

IV. Proposed Framework of Minimum Criteria

Recognizing that the interests of the entire world community lie in promoting needed peaceful alterations of the factual and legal implications of taking control of private property is a fundamental step in establishing a new framework for just compensation. The absence of

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requirements that subject repatriation of contract and litigation payments to governmental discretion. Exchange Control Act, Cap. 158, *as amended,* No. 9 (1965) (Uganda).

114. 294 U.S. 330 (1935).

115. Act of Aug. 27, 1935, ch. 780, § 1, 49 Stat. 938 (codified at 31 U.S.C. 773(a) (1970)). Kenya allows remittance to be made out of the country free of any charge or tax. KENYAN CONST. ch. II, art. 19(4) (1963). Similar protection is afforded in Ghana, where fair compensation is to be made in the currency in which the investment was originally made. Capital Investments Act, No. 172, § 8 (Ghana, 1963).

116. India, for example, provided compensation in repatriable currency following its takeover of all general insurance firms. RESEARCH STUDY, *supra* note 21, at 57. Effective compensation in its purest sense, however, would require payment adjustments, upward or downward, to reflect currency ratios in effect at the time of the particular investment.

117. For discussion of foreign exchange risks and the corresponding need to relate individual investments to prevailing exchange rates see R. VERNON, MANAGER IN THE INTERNATIONAL ECONOMY 51, 55-59 (1968).

118. Valuation problems in connection with partial buy-outs are particularly difficult, since courts generally have refrained from separate evaluations of particular interests of an enterprise. *See, e.g.,* Brennan v. United States, 153 F. Supp. 377 (Ct. Cl. 1957); Esso Standard Oil Co. v. State, 15 Misc.2d 523, 181 N.Y.S.2d 578 (Ct. Cl. 1959). *See generally* G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 75 (1963).

clear criteria and effective international legal machinery for furnishing judicial refinement and enforcement has detracted severely from arguments for "prompt, adequate, and effective" compensation. Given this present vacuum in norm codification and reconciliation methodology, the timeliness of the development of minimum compensation criteria to form a nucleus for future dispute resolution becomes apparent.[119] It is also apparent that enforcement of new criteria can readily be achieved: viable independent states which have contributed to the fashioning of international rules governing compensation can be expected to respect new rules thus created.

The following framework of proposed compensation criteria is designed to promote harmonization of settlement expectations. By providing a uniform matrix of compensation rules, these criteria should enable negotiations to proceed with an appropriate substitution of factual analysis and interpretation for doctrinal principles without sacrificing flexible modes of inquiry when dictated by mitigatory circumstances.

A. Basic Valuation Framework

One of the chief difficulties in using market value as a permissible or required basis for computing full and fair compensation lies in the unproven premise that expropriated property realistically can be assessed at a value representative of open market conditions.[120] While an isolated takeover of a single firm or asset conceivably could be compensated at undepressed full market value, a discounting of value attributable to anticipated news of a proposed industry-wide nationalization normally would result in a market climate analogous to that surrounding forced liquidation sales.[121] Similarly, given a single takeover in a climate

119. Any prospective criteria development is attended by risks. In the past, equitable and political considerations have restrained jurists who would prefer the gradual accretion process of international case law from advocating prospective rule making regarding minimum compensation. *See, e.g.*, Kacckenbeck, *La Protection Internationale des Droits Acquis*, 59 RECUEIL DES COURS 321, 367 (1937). For favorable comments on the nced to devise new valuation formulas see Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORGANIZATION 41 (1961). Other commentators have felt that the difficulty is not the lack of precise and well-defined criteria for testing minimum requirements but the failure to adopt flexible procedures. *See, e.g.*, Rafat, *supra* note 9, at 255; Note, *Rome Conference on International and Comparative Law*, 7 INT'L & COMP. L.Q. 585, 586-87 (1958).

120. Keynoting the inherent difficulties in attempts to equate the fair market value of an enterprise, including goodwill and going concern value, to its stock exchange price is the statement of one eminent commentator: "We take as our theme . . . the views of a great accountant (George O. Macy) quoting a great lawycr (Brandeis): 'The capital stock of a corporation, its net assets, and its shares of stock are entirely different things. The value of one bears no fixed or necessary relation to the value of the others.'" Kripke, *Accounting for Corporatc Acquisitions and the Treatment of Goodwill: An Alert Signal to all Business Lawyers*, 24 BUS. LAW. 89, 109 (1968).

121. In theory, a forced sale usually results in a lesser return than the real asset value due

of projected recurring expropriations, it would be unrealistic to ignore the adverse psychological market effects generated by fears of further public takings.[122] In the past, these negative price reactions generally have resulted in less than fair compensation for the enterprises involved.[123] This is an inherent feature of market indices, which are heavily influenced by short-run factors of speculation that can often distort real asset values to a significant degree.[124]

Although assessment might be based upon market value prior to anticipation of the state's announcement,[125] an approach of this type would entail delicate considerations of both micro- and macro-economic influences interlaced with the politics of the local community.[126] Moreover, while it may be relatively easy to compute the market value of a small firm, under such circumstances it is questionable whether there could be any fair degree of accuracy when measuring the market value of a highly integrated enterprise. This is especially true when the parent's stability and international reputation contribute so greatly to the effectiveness of a local firm that it probably would incur a productivity loss under less skilled organizational guidance. After forcing the buy-out of a majority share interest, a host country generally will continue to enjoy the advantages of a link to the parent firm's productive and financial organizational skills, thus creating a disproportionate spill-off of benefits to the state shareholder and compounding the difficulty of determining open market resale value.

Although market or going concern value may be appropriate for measuring a small, locally established firm, multinational firms clearly require a more sophisticated form of evaluation. While a market of small firms presupposes the existence of a large number of informed buyers and sellers, the very concept of corporate integration suggests imperfect competitive market conditions. In such circumstances, mar-

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to an absence of freely competitive negotiations. E. HENDRIKSEN, ACCOUNTING THEORY 440 (1970).

122. Such market discounting probabilities can be inferred from the statement of an American oil executive concerned over recent nationalization crises in the Middle East: "I worry about nationalism the way I worry about the atom bomb—it is sudden, final and completely out of my hands." Wall Street J., Feb. 3, 1972, at 1, col. 6. In such a negative psychological environment, investor reaction necessarily would be expected to be bearish.

123. *See, e.g.*, R. LILLICH, *supra* note 19; B. WESTON, *supra* note 19; Delson, *Nationalization of the Suez Canal Company: Issues of Private and Public International Law*, 57 COLUM. L. REV. 755 (1957).

124. *See generally* E. DONALDSON & J. PFAHL, CORPORATE FINANCE, POLICY & MANAGEMENT 266-68 (1963); G. MCCARTHY, ACQUISITIONS & MERGERS 77-78 (1963).

125. *Cf.* RESTATEMENT, *supra* note 11, § 188, comment *b* at 576.

126. *See* R. MIKESELL, THE ECONOMICS OF FOREIGN AID 129-35, 138-45 (1968).

ket indices seldom can be expected to measure true value. A suggested alternative approach to minimum compensation requirements is to adopt a method that seeks to maximize the use of the most relevant features of valuation.

B. Physical Assets

The threshold task in establishing cost bases for tangible assets must necessarily be a reconciliation between the use of historical costs and the contrary practice of revaluation of assets to reflect various price index and functional obsolescence changes. Historical costs have been preferred in conservative accounting practice because they avoid speculation regarding replacement items. There is merit, however, in revaluation cost methods that reflect price changes in present assets as an accommodation of fluctuations in price indices.[127] Revaluation is based more in economic than in accounting theory; it anticipates the need to recognize economic choices over and above retrospective accounting assessments.[128] To eliminate some subjective facets of readjustments for technical obsolescence—which plausibly might be covered by going concern and goodwill measurements—revaluation could be limited to price index adjustments where warranted.[129] To implement this suggested conceptual practice, appraisal procedures may be utilized to assess individual assets by a combination of physical examination, depreciated rate pricing, and even engineering estimates.[130]

C. Intangible Assets

Like prospective profits and value added by superior managerial skills of a parent company under a management contract or a stock purchase,[131] special allowances for goodwill and going concern

127. Although the SEC continues to remain a rather firm proponent of historical cost methods, Kripke, *The SEC, the Accountants, Some Myths and Some Realities*, 45 N.Y.U.L. REV. 1151, 1190 (1970), it seems to have relented somewhat by requiring securities performance calculations for investment companies to include unrealized value changes in addition to realized gains or losses. 17 C.F.R. §§ 210.6-01 to -10 (1972).

128. R. CHAMBERS, *supra* note 62, at 351-55.

129. These limitations to price index adjustments have found relatively wide support when used in conjunction with other methods and have the additional benefit of meeting some arguments of replacement cost advocates. *See, e.g.*, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ACCOUNTING RESEARCH STUDY NO. 6, at 19 (1963); E. HENDRIKSEN, *supra* note 121, at 228; G. MUELLER, *supra* note 65, at 79-80.

130. *See* 1 J. BONBRIGHT, THE VALUATION OF PROPERTY 10 (1937).

131. Somewhat less value will accrue if the expropriating government operates a strict socialist economy and the acquisition involves assets rather than share capital. A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 332 (1962); Note, *supra* note 47, at 67. For a

value—as value added factors, rather than as general standards of what the local enterprise would bring in an open market sale—seldom have been acknowledged as legitimate claims under recognized principles of international law,[132] although the principal objection—that assessments of these items are often too remote and conjectural[133]—has been overridden in some instances.[134]

Even though not capitalized and carried on the books of a firm, intangible assets have been accorded present value by United States courts.[135] Going concern value as a separate allowance has been applied consistently in public utility rate cases.[136] As a value element additional to the book value of a firm's assets, it has been treated as a valuation factor in assembled and established plants doing business and earning money.[137]

When viewed as a compound of elements representing superior technical and management skills, the assigned transferable value of the going concern factor is directly related to the momentum that has contributed to the efficiency of the firm.[138] Accordingly, the rates used to add value to base assessments have varied in relation to the history and circumstances of the particular enterprise.[139] If these adjustments were

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short discussion of intangible value created by the subsidiary's relationship to the parent corporation see Spacek, *The Merger Accounting Dilemma—Proposed Solutions*, 25 BUS. LAW. 611-18 (1970).

132. I. FOIGHEL, NATIONALIZATION AND COMPENSATION 219 (1964); G. WHITE, NATIONALISATION OF FOREIGN PROPERTY 69 (1961).

133. Shufeldt Claim (United States v. Guatemala), 2 U.N.R.I.A.A. 1079, 1099 (1930).

134. Administrative Decision No. VII, Mixed Claims Commission (United States and Germany), Decisions and Opinions Nos. 1 & 2, at 331 (May 12, 1925); 3 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1821 (1943). *See also* Delagoa Bay Case (E. Africa Ry. Co.) (Great Britain and the United States v. Portugal) in H. LAFONTAINE, PASICRISIE INTERNATIONALE 402 (Bern 1902).

135. Kimball Laundry Co. v. United States, 338 U.S. 1, 19 (1949); FPC v. Natural Gas Pipeline, 315 U.S. 575 (1942). Moreover, failure to carry goodwill on the books does not preclude subsequent valuation attachment according to general accounting principles. C.M. Hall Lamp Co. v. United States, 97 F. Supp. 481 (E.D. Mich. 1951), *rev'd on other grounds*, 201 F.2d 465 (6th Cir. 1953).

136. *E.g.*, Los Angeles Gas & Elec. Corp. v. Railroad Comm'n, 289 U.S. 287, 313 (1933); Galveston Elec. Co. v. City of Galveston, 258 U.S. 388, 402 (1922); Cedar Rapids Gas Co. v. City of Cedar Rapids, 223 U.S. 655, 669 (1912).

Similar weighting of earning power as a significant valuation factor has been accorded manufacturing firms as well. In Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941), a case involving an industrial company reorganization, the Supreme Court observed that "a sum of values based on physical factors and assigned to separate units of the property without regard to the earning capacity of the whole enterprise is plainly inadequate." *Id.* at 526.

137. Des Moines Gas Co. v. City of Des Moines, 238 U.S. 153, 165 (1915).

138. *See* W. PATON, ADVANCED ACCOUNTING 427, 435 (1947).

139. *See* case histories compared in RESEARCH STUDY, *supra* note 21.

not made, the acquisition value of physical assets could be measured more precisely,[140] but the probability of earnings from managerial efficiencies would continue to effect uncompensated intangible value.[141]

Rather than capitalizing the excess of earnings over the valuations placed upon physical assets, United States[142] and British courts[143] recognize the accounting practice of treating going concern value as a percentage allowance of physical assets. Anglo-American judicial reluctance to employ capitalized earnings stems from difficulties both in assigning probabilities of achieving particular rates of return based upon correlations of past earnings and future opportunities and in measuring the probabilities of specific capital and marketing risks compared with corresponding risks of alternative asset employment.[144] Techniques capitalizing all income, rather than just income generated from specific physical assets, similarly have generated criticisms of inaccuracy;[145] gross revenues of the enterprise for the preceding period[146] and capitalization of investment expenditures[147] also have been employed occasion-

140. *See* 1 J. BONBRIGHT, *supra* note 130, at 37.

141. Justice Brandeis observed: "In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances." Galveston Elec. Co. v. City of Galveston, 258 U.S. 388, 396 (1922).

More recently, in the 1970 expropriation of All-American Cables & Radio by Ecuador, ITT, the parent firm, placed the value of its expropriated assets at about $4,500,000 of which $3,600,000 represented lost future profits, as compared to $800,000 for its physical assets. For additional comments see RESEARCH STUDY, *supra* note 21, at 27. For additional background see Press Release of ITT, Aug. 26, 1970. Similar compensation disagreements can be expected to arise from the announced nationalization of ITT's holdings in Chile. ITT has valued its holdings at $200,000,000, while the Chilean government's tentative valuation figure is less than 50% of that amount. Washington Post, April 19, 1972, § A, at 1, col. 4.

142. Los Angeles Gas & Elec. Corp. v. Railroad Comm'n, 289 U.S. 287, 313 (1933); Galveston Elec. Co. v. City of Galveston, 258 U.S. 388, 402 (1922); Cedar Rapids Light & Gas Co. v. City of Cedar Rapids, 223 U.S. 655, 669 (1912).

143. The British practice was affirmed in Perth Gas Co. v. City of Perth, [1911] A.C. 506, and Hamilton Gas Co. v. Borough of Hamilton, [1910] A.C. 300, 305. The Canadian rule, however, rejects value added percentage allowance for going concern value in favor of capitalized earnings. *In re* West Canadian Hydro Elec. Corp., [1950] 3 D.L.R. 321, 327, 334.

144. *See* Hillman, *How to Redeploy Assets*, HARV. BUS. REV. 95, 99 (Nov.-Dec., 1971). For an analysis of SEC risk variance determinations and the bearing of book values or original and reproduction costs upon future capitalized earnings see Note, *Valuation by the SEC in Reorganizations*, 55 HARV. L. REV. 125 (1941).

145. *See* May, *Losses as a Cause of Gain—A Footnote on Value*, 72 J. ACCOUNTANCY 221, 225 (1941); *cf.* Institutional Investors v. Chicago, M., St. P. & P.R.R., 318 U.S. 523, 540-42 (1942); Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510, 525-26 (1940). *Contra*, 1 J. BONBRIGHT, *supra* note 130, at 216-69.

146. Gross revenues have been recognized in cases dealing with excess profit tax bases. *See, e.g.*, Pioneer Laundry Co., 5 B.T.A. 821 (1926); Metropolitan Laundry Co., 2 B.T.A. 1062 (1925).

147. Regarded as creating a direct contribution to income-producing assets, this usage does

ally, but with varying success.

Realistically, none of the current going concern valuation methods is sufficiently precise to warrant its exclusive use in all expropriation situations. Each method, therefore, should be assessed in light of the particular circumstances. For example, suppose the question is whether anticipated profits should be allowed for the full remaining terms of concession agreements previously granted to nationalized oil and mining firms.[148] Ideally, each determination should be keyed to criteria used by private firms to determine the profitability of disintegration of corporate investments: the relative projected costs and benefits of continued operation as presently structured, discounted by anticipated risks, and the potential dollar impact.[149] When linear probabilities are constant, capitalized earnings could be employed; when economic and political uncertainty pervade the local economy, however, a substituted percentage of assets might be applied with greater effect.

Uniform imposition of the initial evidentiary burden upon the deprivee should be the sole rigid rule; in all other aspects, flexibility should govern. In public utility cases, for instance, a percentage of assets allowance, applied at the time of expropriation, may result in an unrealistically low return due to a write-down in computing physical asset value. Arguably then, a realistic rate recognizing generated earnings changes as the basis for upward limits should be correlated to historical costs exclusive of deductions. The true value in mining enterprises, on the other hand, presents a unique problem: the industry's abnormally high ratio of projected earnings to physical assets. Typically, value estimates of mineral property will require a discounted return of reasonable profits[150] on total investment under anticipated conditions of operation and marketing for the duration of the concession or until the ultimate depletion of the deposit. The selected discount, or rate of return for annual profits will depend on the risks involved: the character and provability of the mineral deposit, the degree of variation of reserves, and the economic and political stability of the country.

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not require the presence of surplus earnings. *See, e.g.*, Houston Natural Gas Corp. v. Commissioner, 90 F.2d 814 (4th Cir. 1937).

148. Diametrically contrary views have been taken by the oil companies in North Africa, demanding full present value for anticipated concession profits, and the OPEC countries, offering net asset values only. Washington Post, Jan. 29, 1972, at 12, col. 7.

149. *See* Hillman, *supra* note 144.

150. *See* R. MIKESELL, *supra* note 76. Discounting will be necessary to reflect the fact that the present worth of earnings today is greater than the same amount of earnings at some future date. *See* MANAGEMENT GUIDES TO MERGERS & ACQUISITIONS 14-15 (J. Harvey & A. Newgarden eds. 1969).

Significant variances can be foreseen in the relative risks of doing business in LDC's as opposed to more stable Western countries. A ten percent discount may be appropriate in Canada, for example, while twenty percent might be more realistic in Zambia. In ascertaining an appropriate rate, a system of valuation might compare previous earnings, particularly those of the immediate past, with special allowances for earnings trends.[151] Having obtained an average earnings base, future earnings could be capitalized over the projected life of the concession by applying the selected rate.[152] Correlation of new earnings to past earnings, of course, would be less relevant for new enterprises and highly volatile mining ventures in which earnings would not be expected to remain constant. To avoid arbitrary guesses involving subjective projections of future earnings in these situations, compensation might be delayed until more concrete evidence becomes available to assess adequately the earnings probabilities. Given the current elastic character of the "promptness" requirement in international practice, such an approach would avoid the many pitfalls of rigid criteria which too often frustrate legitimate goals of host countries and foreign investors.

Different valuation problems confront manufacturing industries in LDC's because their earnings estimates are not keyed to wasting assets. Thus, multiples of earnings indices, which can be compared with indices in other industries, adjusted to particular aspects of the specific industry or firm, such as its stage of maturity, should be employed. The degree of competition also may be important, particularly in countries provid-

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151. Consider the following example of earnings trends:

YEAR	COMPANY X	COMPANY Y
1968	$100,000	$ 50,000
1969	$150,000	$100,000
1970	$200,000	$300,000
TOTAL	$450,000	$450,000

In both of these companies, earnings average $150,000 annually. To give effect to the trend, though, a weight of 3 might be given to 1970, 2 to 1969, and one to 1968. The weighted average annual earnings would thus be computed as follows:

1968	1	X	$100,000	=	$100,000	1	X	$ 50,000	=	$ 50,000
1969	2	X	$150,000	=	$300,000	2	X	$100,000	=	$200,000
1970	3	X	$200,000	=	$600,000	3	X	$300,000	=	$900,000
					$1,000,000					$1,150,000

Based on these weighted averages, it is clear that Company Y would be worth more than Company X.

152. Should the proper capitalization rate approximate more closely the 14% maximum rate advocated by Andean Pact countries, or the 8 to 10% rate range favored by the SEC in reorganization cases? 6A W. COLLIER, BANKRUPTCY ¶ 11.05, at 602 (14th ed. 1965); *see* Gardner, *The SEC and Valuation Under Chapter X*, 91 U. PA. L. REV. 440, 453-56 (1943).

ing favorable concessions.[153] In short, realistic earnings valuations will require a large measure of flexibility to account for differences in circumstances. Absent precise indices to assess prospective earnings and corresponding capitalization rates, some subjective determinations seem inevitable. Given a basic recognition of earnings as an integral, although not exclusive, valuation factor,[154] innumerable variations are feasible.

Although conceptually parallel in some aspects, value added factors attributable to goodwill and to going concern value may be differentiated in that goodwill represents special customer advantage.[155] Usually it is calculable—representing surplus value over either specific tangible assets[156] or capital expenditures.[157] Although asset cost, in accordance with generally recognized accounting practices, has been accorded principal weight,[158] occasionally goodwill has been measured by reference to capitalized or averaged earnings.[159] The latter methods seem particularly appropriate when goodwill is not carried on the books of the local subsidiary, but inheres in the local enterprise from the parent's purchase or establishment of it.[160] Even though United States[161] and British[162] courts traditionally have forbidden balance sheet reflections of goodwill unless purchased for valuable consideration, support is emerging for the proposition that the acquisition of a subsidiary warrants a proportionate

153. Andean Pact countries, for example, offer comprehensive concessions to local enterprises at the expense of foreign firms. Schliesser, *Restrictions on Foreign Investment in the Andean Common Market*, 5 INT'L LAWYER 586 (1971).

154. Profits seldom have been treated as exclusive factors of valuation determination. *See, e.g.*, Administrative Decision No. VII, Mixed Claims Commission (United States and Germany), 1925 Decisions and Opinions 273, 308-09, 317-19, 331 (May 12, 1925).

155. Goodwill may attach to the business as an entity, the physical plant, the trade name, the "know-how," or the number or quality of its customers. Grace Bros. v. Commissioner, 173 F.2d 170, 176 (9th Cir. 1949). Thus, goodwill represents an influential reputation beyond the intrinsic value of the net physical assets. *See generally* J. COMMONS, INDUSTRIAL GOODWILL 18-26 (1919); De Capriles, *Modern Financial Accounting*, 37 N.Y.U.L. REV. 1001, 1084 (1962); Kripke, *A Good Look at Goodwill in Corporate Acquisitions*, 78 BANKING L.J. 1028 (1968); Spacek, *supra* note 131, at 622. Some financial analysts prefer to characterize the concept of goodwill as "organization value." *See, e.g.*, J. WESTON & E. BRIGHAM, ESSENTIALS OF MANAGERIAL FINANCE 226 (1971).

156. *Cf.* City of Omaha v. Omaha Water Co., 218 U.S. 180, 202-03 (1910); *accord*, J. YANG, GOODWILL AND OTHER INTANGIBLES 87-112 (1927).

157. Three-in-One Oil Co. v. United States, 35 F.2d 987, 989 (Ct. Cl. 1929).

158. *Compare* the cost basis of valuation in Bonwit Teller & Co. v. Commissioner, 53 F.2d 381 (2d Cir. 1931), *with* that employed in R. MONTGOMERY, AUDITING 293 (7th ed. 1949).

159. *See* H. BALLENTINE, CORPORATIONS 532 (rev. ed. 1946); R. KESTER, *supra* note 62, at 363.

160. *See* E. HENDRIKSEN, *supra* note 121, at 440.

161. C.M. Hall Lamp Co. v. United States, 201 F.2d 465, 467 (6th Cir. 1953).

162. *Cf.* Bailey v. Isle of Thanet Light Rys., [1900] 1 Q.B. 722, 724 (dictum).

credit to the recorded goodwill of an integrated parent enterprise.[163] Moreover, notwithstanding that termination of the local enterprise will undoubtedly diminish its goodwill,[164] use of this factor in expropriation cases affords a realistic basis for compensating the loss of a portion of the firm's merchantable reputation. Accordingly, just as going concern value should be based upon earnings contributed to the overall enterprise, goodwill should reflect the proportionate value of the entity's physical assets to all the assets of the integrated enterprise, subject to reductions reflecting increased production costs, if sanctioned.[165]

D. *Excess Profits Deductions*

Integration of the principles of deducting excess profits in ascertaining compensatory asset values must be viewed as a concession to the depriving community. Actual and anticipated resistance to it by the United States[166] and other countries,[167] however, has created an impasse soluble only by a comprehensive compensation reform package. Considering the growing precedent for the deduction, both in the United States[168] and abroad,[169] its significance as a corollary to partial compen-

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163. *See* C. GRIFFIN, T. WILLIAMS & G. WELSCH, ADVANCED ACCOUNTING 157-58 (1966); E. HENDRIKSEN, *supra* note 121, at 440.

164. Instances of past liquidation sales lend support to the view that goodwill has continuing vitality even after the transferor's own sales have phased out. Reconstruction Fin. Corp. v. J.G. Menihan Corp., 22 F. Supp. 180, 182 (W.D.N.Y. 1938), *rev'd on other grounds,* 111 F.2d 940 (2d Cir. 1940), *rev'd,* 312 U.S. 81 (1941), *cited in* Note, *An Inquiry into the Nature of Goodwill,* 53 COLUM. L. REV. 660, 673 (1953).

Monopolistic control over marketing distribution outlets has posed one of the chief considerations in weighing nationalization incentives. Such control has precipitated notions that foreign concerns weaken the competitive capabilities of the producing countries to increase their share of profits from company operations. Whether and to what extent marketing access can be transferred effectively should have a major bearing on the amount of goodwill compensable.

Additional factors which may relate to the goodwill of an enterprise include: (1) the acquisition or loss of superior management personnel, (2) the recent addition of new products reducing the need for future research and advertising expenditures, (3) the lack of reflection in profit accruals of newly developed products, and (4) the impending expiration of patents. G. MCCARTHY, *supra,* note 124, at 80.

165. *See* E. HENDRIKSEN, *supra* note 121, at 440; P. VAN ARSDELL, CORPORATION FINANCE: POLICY, PLANNING, ADMINISTRATION 1369 (1968).

166. Statement of Secretary of State William Rogers, *supra* note 106. The principle was similarly attacked by Kennecott in its appeal to the Chilean Special Tribunal. Memorandum of Kennecott Copper Corp., *supra* note 98, at 87-88.

167. *See* materials cited notes 81-82 *supra.*

168. *See* notes 84-99 *supra* and accompanying text.

169. *See* notes 81-83 *supra.* Recent resolutions generally have lacked specific guidelines, declaring only that foreign firms should be limited to earnings reflecting the going rate of return on capital plus an allowance for risk. Declaratory Statement of Petroleum Policy in Member Countries, Res. 26.90, OPEC Bull. 1-5 (Aug. 1968).

sation, especially in large-scale economic organizational reforms,[170] demands close examination. The types of indices, the maximum limits, the allowance of retroactivity, and the range of application—whether uniform or limited to certain kinds of takeovers—remain in doubt.

A combination of relevant indices measuring risk/earnings ratios, investment expenditures, interests of the public, and equity considerations should be utilized in excess profits computations. The first step in this procedure will be shaping criteria to fix the investment base from which appropriate profit ceilings can be set. Establishing these quantitative guidelines will require asset/earnings judgments considering the relevant factors of reasonableness, net worth, ownership comparisons (wholly foreign-owned or owned with local participation), incidents of risk involved, nature of contribution to the development of the local economy, and sources of resource acquisition.

In the past, profit ceilings have ranged from fourteen percent under the terms of the Andean Pact[171] to a low of six to ten percent in United States rate cases.[172] Rather than imposing an international rule governing percentage variations, consensual formulas might govern the firm's profit rates in light of a combination of indices selected by a designated panel of experts,[173] all according to procedures dictated in the concession or other agreement.

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170. *See* I. FOIGHEL, *supra* note 132, at 246; S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 206 (1953); 1 L. OPPENHEIM, INTERNATIONAL LAW 318 (Lauterpacht ed. 1948); Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125 (1948).

171. Article 37, which governs profit remittances abroad, retains flexibility by providing that "[u]pon authorization by the competent national authority, foreign investors shall have the right to transfer abroad, in freely convertible currency, the verified net profits resulting from the direct foreign investment, but not in excess of 14% of that investment annually.

"In special cases, the Commission [of the Cartagena Agreement] may, upon the request of any Member Country, authorize higher percentages than that provided in this Article." Codified text of the Andean Foreign Investment Code, Decision No. 24 (Concerning Treatment of Foreign Capital) of Dec. 31, 1970, as amended by Decisions No. 37 of June 24, 1971, and No. 37-A of July 17, 1971. The amended text may be found in 11 INT'L LEGAL MATERIALS 126 (1971).

172. *See* cases cited note 142 *supra*.

173. Consider the procedure afforded by the Foreign Investment (Protection) Act of 1963, § 6(3) (Tanganyika), which provides as follows: "If any question arises between the Government and the holder of a certificate as to the value of any enterprise, property, stock, or share, the question shall be referred to and determined by arbitration, and at any arbitration each party shall appoint one arbitrator, who shall jointly appoint a third." Act No. 40 of 1963 (Tanganyika). If existing rules permit, a tribunal might appoint independent experts on its own motion. For relevant discussion of the use of expert evaluation in compensation disputes see G. WHITE, THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS (1965). *See, e.g.*, Case of the Electricity Company of Warsaw (France v. Poland), 3 R.I.A.A. 1669, 1688, 1695 (1922). P.C.I.J. and I.C.J. practice furnish examples of the use of court ordered expert inquiry to determine compensation for expropriated property. *See* Case of Factory at Chorzow, [1928] P.C.I.J., ser. A, No. 17. Another noteworthy example is the Delagoa Bay Case (E. African Ry. Co.) (Great Britain & United States

Retroactive application of the principle, however, breaks sharply with the ethical considerations of expectancy and reliance that have undergirded normative rules of international conduct. Moreover, the international consensus[174] recognizes that certain rights and expectations inhere in the individual and impose some constraint on social engineering. Consistency with minimum rules of fairness to foreign investors, therefore, requires the limitation of excess profits reductions to prospective application—the present practice in United States renegotiation cases. This will enable the foreign investor to discount future expropriation probabilities when negotiating for concessions with a host country.

Questions of the projected scope of application of excess profit reductions are more appropriately reserved for ad hoc determinations. Although the most vehement proponents of an excess profits rule have pointed to the importance of the host country's valuable extractive resources as the basis for recapture,[175] other forms of exploitation may occasion condemnation, thus complicating efforts to scale down the area of application. Moreover, a flexible formula allowing supplemental bilateral arrangements to accommodate special situations occasioned in individual host countries could be adopted. The same formula could obtain in applying the principle to an expropriated firm vis-à-vis its total international operations. In fact, it is unlikely that LDC's could be persuaded to limit excess profits reductions to situations in which there is purely comparable local property if they are forced to agree to intangible asset allowances reflecting the deprivee's proportionate share of discounted projected earnings.

E. Duration and Convertibility

Another major item in a proposed valuation framework, prompt payment, must be reconciled with the panoply of deferral plans previously discussed. Although the promptness requirement has been interpreted[176] and legislated[177] to require payment either prior to the depriva-

v. Portugal) in H. LaFontaine, Pasicrisie Internationale 402 (Bern 1902); 3 M. Whiteman, *supra* note 134, at 1694-1703. For a more recent example, albeit not court ordered, see the Case Concerning the Barcelona Traction, Light & Power Co., Ltd., *discussed in* White, *The Problems of Valuation in the Barcelona Traction Case*, in The Valuation of Nationalized Property in International Law (R. Lillich ed., 1972); note 185 *infra*.

174. McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, in Studies in World Public Order 335 (M. McDougal ed. 1960).

175. *See* interview with Ambassador Letelier of Chile in Forbes, July, 15, 1971, at 33.

176. *See* cases cited note 10 *supra*.

177. *See* materials cited note 13 *supra*.

tion or within a period proximate thereto, sufficient variance remains[178] to support the need to establish international time ceilings. Amortization plans exceeding ten years, like Cuba's[179] and Chile's,[180] seem to stretch orthodox interpretations of promptness; reserve limitations in LDC's for funding large-scale operations, however, may compel time allowances that will forestall balance of payment crises. Uniform standards providing mid-range ceilings might be established as part of a global agreement according leave to accommodate more serious fiscal difficulties within the context of mitigative considerations that will be discussed. Time period norms could have an important effect on compensation negotiations by separating the legal issue of state responsibility from the more political questions of capacity and feasibility. The base ceilings themselves, however, should provide flexible guidelines that will reflect both the fiscal priorities of the expropriating country and the reasonable expectations of investment compensation. Satisfaction of both objectives appears possible within present prompt payment interpretations, which generally require only that deferred payment arrangements include suitable provisions to assure fiscal equivalence, including a fair rate of interest in marketable instruments.[181] Moreover, marketability also inheres in the "effective" requirement as applied to convertibility. Excepting unusual circumstances,[182] a further qualification could limit application of deferred payment provisions to broad takeover programs for development purposes.

Convertibility and exchange control reconciliation ensuring effective compensation merits careful treatment. Exchange controls that thwart fair compensation violate the deprivor state's responsibility. If the justification for retaining such controls lies in the need to preserve balance of payment parities, that need should be recognized as a permissible basis for downward adjustment—a mitigative factor of compensation diminution.[183] Differences in computing convertibility rates, on the other hand, raise seminal issues of effectiveness not currently treated

178. *See* notes 108-12 *supra*.

179. Note 108 *supra*.

180. *Id.*

181. 1 C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 717-19 (1945), interpreting the implicit conditions of Secretary of State Cordell Hull's demands to the Mexican government on June 16, 1939. The text of the note may be found in U.S. DEP'T OF STATE, PUB. No. 1288, at 39 (1939).

182. This standard was adopted by the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10(4), Draft No. 12 with Explanatory Notes, *quoted in* Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 553-63 (1961).

183. *See* F. DAWSON & I. HEAD, *supra* note 3, at 249-56.

with any degree of uniformity. A possible remedy for this defect would be a test utilizing the official exchange rate but at the same time making retroactive allowance for band adjustments between official and market rates within liberalized limits established by the International Monetary Fund or international bargaining groups.[184] While the present one percent margin of allowable fluctuation permits minor adjustments, the widening of permissible exchange rate variation would effect a more satisfactory compromise. This would arrest deepening variations between official and underlying market convertibility rates without falling into the speculative pitfalls of full exchange rate flexibility.[185] Accordingly, compensation could be computed to reflect real valuation differences owing to changes in relative currency convertibility rates.

Additional adjustments to the base currency or currencies of payment and the corresponding convertibility rate may also be necessary. These determinations will normally be keyed both to the nature of the respective investments—plant facilities, patent licenses, other intangible assets, sales, and depreciable reserves—and to their traceability to foreign or local currency investments. Depending upon past treatment of convertibility gains and losses as current incidents of income or as capitalized assets, additional allowances may be warranted. The lack of accounting accord with respect to instances in which a principal portion of the original investment was in local currency renders the situation problematic, when differences between the official and market exchange rates are translated in terms of gain or loss for the corresponding pe-

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184. It has been urged that the IMF's free fluctuation rate of 1% be expanded to a band of 2 to 3% as a part of a general realignment of official currency exchange rates. N.Y. Times, Nov. 30, 1971, at 45, col. 3. Former Secretary of the Treasury John Connally expressed the desire of the United States to form a Free World Group to negotiate wide-ranging international monetary reform. The Group, designed to expand representation to include underdeveloped countries, would replace the present Group of Ten. Connally's proposal also would embrace a loose linkage with the IMF, but on a basis which would limit the IMF's influence on major monetary issues such as measures to fund excess dollars held by foreign countries, the use of special drawing rights, and the creation of a more flexible exchange rate system. Washington Post, Mar. 12, 1972, § E, at 4, cols. 2-3.

185. For an historical analysis of comparative advantages of band adjustment proposals as a compromise solution to the floating-fixed exchange rate dichotomy see R. MIKESELL, *supra* note 24, at 99-100; Halm, *The "Band" Proposal: The Limits of Permissible Exchange Rate Variations*, in SPECIAL PAPERS IN INTERNATIONAL ECONOMICS (1965). For a contrary assessment see Yeager, *A Skeptical View of the "Band" Proposal*, 4 NAT'L BANKING REV. 291 (1967).

The problem of relating asset value to currency fluctuations of the Spanish peseta was noted by the accounting firm employed by Belgium in the *Barcelona Traction Case*. Report of H. Gelissen & J.C. van Stavern, New Documents submitted by Belgium, April 1969, Doc. No. 6 (First Report), ¶ 75, [1971] I.C.J. The *Barcelona Traction Case* involved the efforts of Belgium to contest a bankruptcy adjudication entailing the sale of assets at a derisory price that Belgium considered an expropriatory move by Spanish administrative authorities.

riod.[186] If recognized as a capital asset and so carried on the books of the firm, gains in unrealized foreign exchange arguably would be recoverable as a physical asset.

Payment in long-term bonds foreseeably involves special dilemmas. If the convertibility rate is altered in the interim, adequacy and effectiveness of compensation may be materially affected. Consistency with minimum criteria, therefore, requires a corresponding adjustment to reflect both windfalls and losses beyond the control of the expropriated firm.[187] Such adjustments would assuage a principal objection to deferred payment—the uncertainty of future money values.[188]

Because so many variables are involved in convertibility questions, few a priori guidelines can be formulated. Selective use of the criteria suggested, however, if employed judiciously and impartially, will improve the overall reliability of compensation theory.

F. Extra-Judicial Considerations

Definitive criteria can provide an international valuation nexus for negotiating parties; they cannot, however, provide finite rules governing every conceivable situation. Moreover, parties to a dispute may of course resort to accepted guidelines of international law—which embrace the thinking of all countries—as a frame of reference in negotiating mutual settlements.

Disputes regarding individual claims will continue to require upward or downward adjustment on both negotiative and adjudicative levels of inquiry. Questions of mitigative character surely include the earning capacity of the host country,[189] the amount of industry affected,

186. For comparative treatment of unrealized gains and losses as current income or capitalized assets see G. MUELLER, *supra* note 65, at 200-02.

187. The revalorization cases arising in the aftermath of World War I are instructive precedent in adjusting for value changes in exchange rates during the period of deferral. *See, e.g.*, Catty v. Germany, 4 Trib. Arb. Mixtes 261 (1925), *discussed in* 3 M. WHITEMAN, *supra* note 134, at 1897-98; *accord*, United States (Francis J. Acosta) v. United Mexican States, 1929 Opinions of Commissioners 121; Dougherty v. Equitable Life Assurance Soc'y, 144 Misc. 363, 259 N.Y.S. 146 (Sup. Ct. 1932).

188. The argument that deferred payment is advantageous when appropriate convertibility is assured is not novel. *Cf.* REPORT OF THE 36TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION 351 (1930) (remarks to the Conference by Prof. Borchard).

189. Proponents of basing compensation considerations in part upon equitable principles of capacity to pay include: C. VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW (1957); Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 AM. J. INT'L L. 801 (1960); Dawson & Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727 (1962); Delson, *supra* note 123; Kuhn, *Nationalization of Foreign-Owned Property in Its Impact on International Law*, 45 AM. J. INT'L L. 709 (1951); Rafat, *supra* note 9.

the number of claimants involved, the participation of local nationals among the claimants, the quality of treatment furnished foreign and local claimants, the availability of foreign exchange, the possibility of local currency devaluation,[190] and the export base of the host country. If the parent firm's government intercedes in pressing the firm's claim, additional questions arise involving the availability of set-off funds, beneficial trade arrangements, and the desire of the interceding country to subsidize broad economic development programs for which funds otherwise would have been allocated by the host country. One or a number of these facts could be instrumental in the decision by the firm's government whether to support partial compensation.[191]

Although the factors mentioned above suggest the need for downward adjustments in certain cases, situations can be envisaged that seemingly contradict notions of ability to pay and policies of subsidization. To illustrate, comparisons might be made between a small foreign enterprise charged with interfering in the political processes of the host country—a case for little or no compensation—and a more typical situation involving a multinational enterprise whose marketing outlets and capital acquisitions are deemed essential to the host country's economic growth—a case for full compensation.

V. CONCLUSION

Departures from traditional compensation standards suggest basic underlying changes in the patterns of economic growth in developing countries. The shift towards increased state participation to achieve fundamental changes in economic relationships has changed the complexion of expropriation and nationalization from isolated incidents to a recurring theme in development policies. Moreover, while developed principles of contract have governed concession negotiations, a paucity of unified criteria has accompanied deprivation payment negotiations. The absence of consensus rules and the lack of effective and impartial adjudicative machinery have created a vacuum in the procedures neces-

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190. The United States has recognized the right of underdeveloped countries to withhold remittance of foreign exchange for deprivations, when it would otherwise seriously impair the LDC's foreign reserves. S. METZGER, INTERNATIONAL LAW, TRADE AND FINANCE 164 (1962).

191. Under such an arrangement for partial compensation if government espousal occurs, the investor presumably would have a claim against its own government, but the question has never been tested in United States law. RESTATEMENT, *supra* note 11, § 213, Reporter's Note at 629. Although the right of the foreign investor to seek the difference when the government in espousing his claim agreed to a partial lump-sum settlement has been upheld, Gray v. United States, 21 Ct. Cl. 340, 392-93 (1886), the question has never been decided regarding other forms of partial compensation.

sary to conciliate and accommodate mutually excessive demands by host countries and foreign investors.

For the future, investment patterns can be expected to gravitate toward the increased use of management contracts and joint government ventures—both of which promise lower profit returns than in the past. Developing countries seek strategies that will embrace both an appropriate quantum of economic control and an optimum measure of private freedom of action and initiative in sectors demanding special capital and expertise. Reciprocal attainment of these objectives will require a minimum *détente* on compensation.

The basic criteria suggested in this article are not intended to be exclusive determinative factors, and in most cases, mitigative considerations will continue to play a dominant role. It is hoped, however, that the present analysis will spur the organized initiation of additional proposals on standards and criteria, not only by executive departments and parliamentary chambers, but also by organized bar groups and other representatives of the private sector. The cumulative effect of new proposals hopefully will be the positive enlargement of rule of law considerations in expropriation disputes by a draft convention on investment protection, which to date has failed to elicit unified global support.