Requirements of Lawful Taking of Foreign Property in International Law

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Introduction

The primary goal of this monograph is to examine the requirements of lawful taking of foreign property in international law. Furthermore, it tries to prove that there are three[1] requirements of such taking, that is to say, taking should be for public purpose, non-discriminatory and appropriate compensation should be provided. To prove this, international jurisprudence, related academic literature, and international case law will be analyzed.

Taking of foreign property is one of the so-called non-commercial risks foreign investors have to face abroad.[2] There might be other non-commercial risks as well, like that of currency inconvertibility, repatriation limitation, currency devaluation, political violence (which includes war, terrorism and revolution), and deterioration in investment environment.[3] However, the risk of taking property constitutes the greatest risk for a foreign investor.[4] This does not need much explanation: when the investment is taken it is not possible to operate it any more. Thus, for many investors the issue of decreasing the risk of taking their investment is a crucial one. With good investment protection systems (*e.g.*, investment protection treaties, investment insurance) the risk of taking cannot be avoided entirely - but, the loss to the investor can be minimized. However, many times, even a good investment protection system can only mitigate the loss. The reason is that even if there is compensation paid for the property taken, usually it does not gratify foreign investors. For example, they will not be compensated for (as *appropriate* or *full* compensation usually does not include)[5] the expected future profits, or for the business idea and know-how of where (it can be geographic place or an economic branch) and how to look for good profit. Transferred technology and transferred know-how can also constitute a considerable value, for what there is usually no compensation paid. Therefore, the risk factor is many times present for the investors. In addition, many investments require high initial expenditure. This means that in the case of indirect or so-called *creeping expropriation*,[6] it is very expensive to withdraw from the host state quickly if the investment environment becomes hostile. Therefore, investors usually look for investment opportunities with low risk of taking. Such law risk of taking exists in countries with long tradition of stable political and economic system.

[1] Additional requirement is that during taking 'due process' should be respected. However, this last requirement is not examined in this book because of its procedural character.

[2] Some examples for commercial risk: rescission or cancellation of contract, suspension of performance, non-payment because of insolvency or default of the debtor *see* HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 286 (2002).

[3] *See* J. W. Yackee, *Political Risk and International Investment Law*, 24 Duke J. Comp. & Int'l L. 477, 478-83 (2013-2014); ROBERT B. SHANKS, PROTECTING AGAINST POLITICAL RISK, INCLUDING CURRENCY CONVERTIBILITY AND REPATRIATION OF PROFITS IN EASTERN EUROPE 26 (1992).

[4] *See* SEBASTIÁN LÓPEZ ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 1 (2014).

[5] *See infra* Chapter IV.

[6] For creeping expropriation see Chapter I.

Chapter I

Notions

Property. Before examining the notion of taking, we want to devote few words to the notion of property and also to the issue of what can be object of taking. The term property is defined in Black's Law Dictionary as "an aggregate of rights which are guaranteed and protected by the government"[7]. According to Bergmann, a German scholar, there is no common notion of property in international law. International law deduces this notion from different national laws.[8] Another scholar, Sacerdoti, claims that all rights having an economic content (including immaterial and contractual rights) are covered by international law in the case of taking, thus any of such rights can be considered property (and thus can be taken) in his understanding.[9] Regarding case law, in Starett Housing Corporation case the Iran – United States Tribunal[10] stated that shareholder rights and contractual rights can also be the object of expropriation.[11] Or in another case, the Tribunal stated that "Expropriation, […], may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value".[12] Based on all this, it can be concluded that the term property is relatively widely defined.

Taking. Academic literature, treaties, court and arbitral decisions frequently use interchangeably the notions *taking*, *expropriation* and *nationalization* for a very similar legal concept. Hence, it is a very difficult task to define what is exactly understood under the notion of *taking* of foreign property. We use this term, as we have found it the most comprehensive and general of the above mentioned three notions. In Black's Law Dictionary the notion of *taking* is formulated as:

> The government's actual or effective acquisition of private property either by ousting the owner and claiming title or by destroying the property or severely impairing its utility. There is a taking of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property.[13]

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[7] BLACK'S LAW DICTIONARY 845 (6th ed. 1991).

[8] *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 31 (1997).

[9] *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 381 (1997).

[10] The Iran - United States Claims Tribunal was established to solve disputes related to expropriated American property following the Iranian revolution in 1979.

[11] Starrett Housing Corporation v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 156-57 (1983); *See also* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 189 (1998); V. Heiskanen, *Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. World Investment & Trade 215, 221-25 (2007); ANDREW NEWCOMBE LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 327 (2009).

[12] Amoco Int'l Finance Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 220 (1987).

[13] BLACK'S LAW DICTIONARY 1467 (7th ed. 1999).

This definition can be considered broad, as it includes not only direct, but also indirect *taking* of property, the owner is not in the position of using and enjoying his property. Richard Epstein gives an even broader definition when he argues that any governmental action, that interferes with any aspect of the use of private property protected by common law, constitutes a *taking*.[14] Under this theory, every regulation, even taxation (not only excessive taxation, but the regular one as well), would constitute a *taking*.[15] Folsom and Gordon, two American authors, formulate this notion as the loss, to various degrees, of the "use and/or ownership incidents, which accompany the private ownership of property".[16] The above definitions might sound general, but at the same time they cover the comprehensive nature of the term. *Infra*, where the notion is examined in related case law, this comprehensive nature is showed, in the sense that there is no single definition for taking, and that even rights, like contractual rights, can be included, that is to say, 'taken'.

Not only in international legal literature, as already mentioned above, but also in legislation of individual countries and in international agreements, many times, *taking*, *expropriation* and *nationalization* are used interchangeably. The problem is usually not with the usage of these terms, but more with the issue what is in practice covered by them. Sometimes these terms are defined in detail in legal texts containing these words. However, the majority of documents examined show that there is frequently a lack of exact definition of the concept of *taking* (*expropriation*, *nationalization*), and it is not at all clear what is covered by these terms in certain situations.[17] The reason might be that it is the interest of capital exporting countries to understand *taking* of property as widely as possible, and therefore, they will refrain from any definition that is too narrow. They might sometimes even prefer vague definitions when concluding investment protection agreements to avoid dispute at the time of concluding such agreements. However, such policy might result in later disputes with a very uncertain outcome. It should be noted, that it is also very difficult to draw the line between *de jure* and *de facto* expropriation, that might, and in fact, constitutes another problem. However, we will deal with this problem in detail below.

[14] *See* NEIL K. KOMESAR, LAW'S LIMITS 93 (2001) [Primary source was not available].

[15] There is an interesting article on this issue by P. B. Stephan (Taxation and Expropriation - The Destruction of the Yukos Oil Empire. Houston Journal of International Law. Vol. 35, Issue 1 (Winter 2013), pp. 1-52.

[16] *See* RALPH H. FOLSOM, MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 639 (3d ed. 1995); Ian Brownlie defines it as: "[…] deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control". The right of management also constitute a right that has a value and can be taken. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 534 (5th ed. 1998); Restatement (Second) Foreign Relations Law of the United States, sec. 192 (1965) defines it as "conduct attributable to state that is intended to and does, effectively deprive an alien of substantially all the benefit of his interest in property even though the state does not deprive him of his entire legal interest in property".

[17] Here under 'certain situation' we mean cases when legal norms are applied in practice.

Some authors use the term *taking* as a collective notion, covering even *intervention* and *confiscation*.[18] Following this path, we channel our analysis of notions accordingly. However, it has to be emphasized again that both in practice and in theory, terms *taking*, *expropriation* and *nationalization* are many times used interchangeably.[19] It follows that there is no elaborated concept on these terms in international law, which might give opportunity for abuse and for legal uncertainty.

Expropriation, nationalization. The most widespread term connected to taking of foreign investment, though it does not have such a general meaning as the term taking, is *expropriation*. The simplest definition of *expropriation* is given in Black's Law Dictionary, which defines it as a "governmental taking or a modification of an individual's property rights."[20] However, this is a fairly general definition again. It can include both *de facto* and *de jure* taking. *Nationalization* is defined in the same dictionary as the "act of bringing an industry under governmental control or ownership."[21] It is, in one aspect, narrower than the definition of *expropriation*: it emphasizes the taking of 'industry', and not property or property rights which definitely makes it narrower. However, it is worth mentioning that the wording "governmental control" does not make the definition of *nationalization* wider compared to the definition of *expropriation*, as this control is not more and not less than "taking or a modification of an individual's property rights" as it is stated in the definition of *expropriation*.

Folsom and Gordon define *expropriation* as an 'angry' taking of property of foreigners where the two (or more) states are involved in political conflict. They suggest that *expropriation* has a harsher tone than *nationalization*,[22] but at the same time they argue that an important element of the term *expropriation* is that in such case we assume that there is some compensation for the taken property.[23] In their opinion, *nationalization* is the taking of property on a permanent basis by the government, with the intention to become the owner and the operator. In their opinion, it is a softer word than *expropriation*.[24] Folsom and Gordon assume some kind of conflict between the home state of the investor (or the individual investor) and the expropriating state. However, we do not find necessary the existence of conflict for *expropriation*, first of all, because

[18] *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 639 (3d ed. 1995); Sacerdoti even simply defines taking of property as non-commercial risk. *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 380 (1997).

[19] For example some awards of the Iran – United States Claims Tribunal deliberately confuse these terms. *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 66 (1994); Moreover, in the award Dames and Moore of the Tribunal, the two terms (taking and expropriation) were equated. *See* Dames and Moore v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 223 (1985); Pellonpaa and Fitzmaurice in connection with the Iran-US Claims Tribunal study use the term taking as "general concept of deprivation by the state of alien-owned property, and as such it encompasses both 'expropriation' and 'nationalization'". *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 55 (1988).

[20] BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

[21] *Id.* at 1046.

[22] *See* RALPH H. FOLSOM, MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 640 (3d ed. 1995).

[23] *See id.*

[24] *See id.*

regulatory taking is the reason for many *expropriations*; and also, as usually in the case of conflict between the nations, there is no good chance for adequate compensation.

A very simple, but good "textbook" definition of *expropriation* is given by O'Keefe, when he writes that:

> Expropriation may be defined as a compulsory acquisition of property by the state. Usually this means that the property of a private person is directly taken over by the state, the former being divested of ownership which is reinvested in the latter.[25]

Sacerdoti, a European scholar, gives a concise and simple definition. He defines *expropriation* as a "coercive appropriation by the state of private property".[26] In his opinion, *nationalization* differs only in the fact that it is directly statutory based and has a wider coverage.[27] He also emphasizes the socio-economic element in the case of *nationalization*.[28] Though Sacerdoti's definition seems simple, it touches the heart of the matter better.

Another distinguished European commentator in the field, Dolzer, offers a different and more 'modern' definition of *expropriation* and *nationalization*. He defines *expropriation* as "individual measures taken for a public purpose," as opposed to *nationalization*, which he defines as "large-scale taking on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain."[29] In our understanding, the difference is in the scale of the measure and in the character of the underlying legislation. In the case of *expropriation*, it should be based on a 'general' legislation as opposed to *nationalization* that is based on 'specific' legal act which is created with the purpose to take a certain property. In both cases public purpose is a precondition and this requirement makes it 'modern' not only in the sense that it is new (the requirement of public purpose became widely accepted by international law in the seventies) but also that it requires justification (the 'public purpose') for an act that

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[25] *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 256 (1974).

[26] *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 379 (1997).

[27] *See id.*; Pellonpaa and Fitzmaurice makes similar distinction between the two terms: under expropriation is meant "single, more or less isolated deprivation, while the term nationalization denotes large-scale takings,…" *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 55 (1988).

[28] Brownlie and Kronfol also place the emphasis on the social and economic reform element: "Expropriation of one or more major national resources as part of a general programme of social and economic reform is now generally referred to as nationalisation or socialisation." *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (5th ed. 1998); "[Expropriation is]… the utilization of all or part of the means of production in the interests of society and not of private individuals." *See* ZOUHAIR A. KRONFOL, PROTECTION OF FOREIGN INVESTMENT 20 (1972). In comparison Foighel emphasizes the economic element when she writes: "[Nationalization is] the compulsory transfer to the state of private property dictated by economic motives and having as its purpose the continued and essentially unaltered exploitation of the particular property." *See* WE. FOIGHEL, NATIONALIZATION 19 (1957); As O'Keefe places the emphasis on both: "[Nationalization] whereby certain industries or means of production, distribution or exchange are, in pursuance of social or economic policies, concentrated in public hands.". *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 256 (1974).

[29] *See* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 98 (1995).

infringes with one of the oldest human rights, the right to property. Thus, the latter definitions are modern, in our opinion, in the sense that they focus on the public interest in the case of taking, and also that they suggest some kind of obligation of the state, so the state is subjected to the interest of its citizens.

Examining international case law, we can say that there were only a few awards that tried to define these terms. For example, the case law of the Iran - United States Claims Tribunal is a good example of how inconsequentially these terms are used.[30] At the same time the essence is not in what term is used, but what is understood under the concept (which is basically the same here). In Dames and Moore case the claimants filed claims for breach of contract, or, as an alternative, for reasonable value of services rendered by this corporation.[31] The Tribunal was of the opinion that: "unilateral taking of possession of property and the denial of its use to the rightful owners may amount to expropriation".[32] Here, the Tribunal used the wording "may amount," meaning in our interpretation that it depended on the circumstances. Here, taking the possession of the property and denying the rightful owner the use of it, in the Tribunal's opinion, was sufficient to constitute expropriation.

In another decision, Amoco Int'l Fin. v. Government of the Islamic Republic of Iran, the Tribunal required "transfer of property rights" from the original owner (claimant) to the expropriating state to consider it as taking.[33] In the opinion of the Tribunal, the act of the state is qualified as expropriation only if these rights have been transferred.[34] However, such requirement might be interpreted broadly, and might mean that the transfer of all the classical rights related to property are required, which is, in fact, a narrow interpretation for the rightful owner and gives more elbow-room to the expropriating state. Another decision of the Tribunal raises an interesting question: does the *expropriated* (*nationalized*) property have to be taken by the state itself to constitute expropriation? In the Eastman Kodak Company case,[35] Judge Brower, an arbitrator in Iran – United States Claims Tribunal, formulated the term *expropriation* as "when the state involved has itself acquired the benefit of the affected alien's property or at least has

[30] The Tribunal itself stated that Claims Settlement Declaration applies equally to expropriation, nationalization and other forms of taking not making distinction among these terms, or separately defining them. *See* American International Group, Inc. v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 96,101 (1983).

[31] The Tribunal found that it has no jurisdiction over the claim and dismissed it. *See* Dames and Moore v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 220 (1985).

[32] Dames and Moore v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 223 (1985).

[33] Amoco Int'l Fin. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).

[34] *Id.*

[35] Eastman Kodak Company claimed that due to the acts of the Government of Iran it lost control over a subsidiary in Iran, and that it holds liable the Government of Iran for the debts owed by its subsidiary to Eastman Kodak Company. It also alleged that Iran expropriated the subsidiary, and claimed compensation. The Tribunal found for the respondent. Charles N. Brower wrote the dissenting opinion. Eastman Kodak Company v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 161 (1985).

been the instrument of its redistribution".[36] Meaning that the 'intermediary' role of the state can already equal *expropriation*.[37]

We can conclude that both in the case of *expropriation* and *nationalization* private property is taken by the state on permanent basis. According to some writers, in the case of *nationalization* compensation is, not assumed, however, it is not true in general. In the case of *expropriation* the expropriating state usually provides some compensation. Another important difference is that *nationalization* is usually related to some socio-economic and/or political changes in the given society, and there is a 'specific' underlying legislation, while, in case of *expropriation*, 'general' legislation constitutes the basis of the taking.

Intervention. Few words should be devoted to the terms intervention and confiscation. *Intervention* means an action of the government, when it assumes control of a business (or any other private property) with the intention of operating the business for a limited period of time and to achieve a particular goal.[38] It is important that after a reasonable period of time the property gets back to the original owner.[39] Here the question may arise as to what compensation the original owner is entitled to, even if there was no expropriation in question. According to experts in the field, owners of such property are entitled to compensation for the time they were not able to use their property.[40]

Confiscation. Confiscation is taking of property without compensation.[41] We can find some similarities to the definition of nationalization and expropriation, in the sense that, in case of *confiscation*, there always should be underlying public interest (either social or economic). Alternatively, Wortley defines *confiscation* as deliberate seizure of property by the state, without providing adequate compensation.[42] This means that he still implies some compensation, however not necessarily 'adequate'. According to him, c*onfiscation* also typically implies the denial of any right to restitution or to damages. Wortley finds confiscation justifiable by international law only in the following two exceptional cases: when there is a forfeiture or a fine to punish or suppress crime[43], or when the loss is indirectly caused by the territorial state imposing legislation restricting the use of property, thereby confiscating or limiting rights normally enjoyed by an owner

[36] Eastman Kodak Company v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 167 (1985).
[37] Throughout the history there were some takings when the ruling political elite tried to gain supporters by 'redistributing' the property of the old elite to its own supporters. *See e.g.,* Tanzania.
[38] *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 639 (3d ed. 1995).
[39] *See id.*
[40] *See* Loukis G. Loucaides, *The protection of the right to property in occupied territories* 53 ICLQ 677 (2004); H. LAUTERPACHT ED., OPPENHEIM'S INTERNATIONAL LAW II: DISPUTES, WAR AND NEUTRALITY 234-5 (7TH ED., 1952); However, the right of states for intervention is usually limited by laws that foresee compensation (*e.g.,* confiscation of goods during war time).
[41] *See id.* at 641; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 534 (5th ed. 1998).
[42] *See* BEN ATKINSON WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 39 (1959).
[43] *E.g.,* The Serbian Criminal Code provides the confiscation of goods that result from a criminal delict (*e.g.,* art. 199 (5) of the Code).

(*e.g.,* environmental regulations).[44] Wortley is of the opinion that taxation is in no case *confiscation*, as in the case of taxation there is some consideration received for the tax paid.[45] We agree that there is some kind of reward, as taxpayers receive certain services for the tax paid. However, there is the case of excessive taxation that, in our opinion, falls under *creeping expropriation*, and in such case compensation is due.

Creeping expropriation.[46] Distinction can be made between *de jure* and *de facto* expropriation (taking).[47] The host state may take measures which in fact (*de facto*) dispossesses the owner of his property, but legally do not affect the ownership – this is called *creeping, indirect* or *de facto expropriation*.[48] Such measures (*e.g.,* requiring undue permits, restricting the activities of the business, extensive taxation) may significantly reduce the investor's economic opportunities and prospects of making profit. This is the reason why, for example, in bilateral investment treaties investor states usually include quite general clauses concerning the definition of expropriation.

Sacerdoti defines *creeping expropriation* as "measures which, even if they are not aimed at transferring property rights, imply an interference with the exercise of such rights equivalent to that of a measure of expropriation"[49]. Sacerdoti gives two other definitions as well for *creeping expropriation*. He also defines it as a measure that "do not involve an overt taking but that effectively neutralizes the benefit of the property for the foreign owner".[50] Another definition he uses is a "progressive erosion of the investor's rights by regulatory measures".[51] "Neutralizing the benefits" means that there is no chance given to the investor to make profit, although the objective of investments is making profit. It can be also defined as loss over the use of the enjoyment of the owner's property, but at the same time the owner does not relinquish the title to the property.[52] Examples of *creeping expropriation* could be excessive taxation, prohibition of dividend distribution, refusal of access to raw materials, restricting the repatriation of profits,

[44] *See id.*
[45] Wortley cites Adam Smith in support: "Every tax, however, is to the person who pays it a badge, not of slavery, but of liberty." *See* BEN ATKINSON WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 39,46 (1959).
[46] The expression "creeping expropriation" instead of "creeping taking" is used by scholars, thus we use this one.
[47] *See* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 99 (1995); ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 70 (1994).
[48] *See* ANDREW NEWCOMBE LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 325 (2009); RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 100 (1995); According to the European Court of Human Rights *de facto* expropriation occurs when a state deprives the owner of his "right to use, let or sell property." *See also* Mellacher and Others judgement of 15.12.1989. Mellacher and Others v. NN, 20 Eur. Ct. H.R. (ser. B) at 23 (1989).
[49] *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 383 (1997);
[50] *See id.* 382.
[51] *See id.* 339.
[52] Marisa Yee, *The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases,* 9 HASTINGS W.-N.W.J. ENV. L. & POL'Y 85, 88 (2002).

imposing new labor or local content requirements, etc.[53] Thus, it would be very difficult task to find uniform criteria for this kind of taking.[54]

We can agree that the issue of *indirect* or *creeping expropriation* is a very delicate issue, because it is difficult to determine what constitutes such expropriation, and to evaluate legal effects of certain measures. The examination of international case law might be of some help. For example, in the case law of the Iran – United States Claims Tribunal, at first glance it seems that the Tribunal easily solved the problem of definition: it stated that the term *expropriation* covers both *de jure* and *de facto* expropriation, that is to say, all kinds of taking whether formal and direct or informal and indirect (like *creeping expropriation*).[55] At the same time, it does not solve the problem of determining an action of the state (does not give conditions), if it constitutes *de facto* expropriation at all. Concerning the practice of international tribunals in general, including that of the Iran – United States Claims Tribunal, Dolzer, in one of his writings, argues that courts tend to bring decisions on the basis of clearly identifiable measures of the host state, and not on the basis of general economic or social developments that can be connected to the alien property affected only indirectly.[56]

Creeping expropriation can also have another important effect on the compensation in case of expropriation: it can devalue the property in the state where such expropriation happens.[57] Sometimes only the threat of formal expropriation or further regulatory change leads to property devaluation. And taking the advantage of this loss of value of the property, the host state might *de facto* and *de jure* expropriate the investment on low value.[58]

Creeping expropriation in case law. Examining case law, in one of the latest awards of the United States-Iran Claims Tribunal, in the Frederica Lincoln Riahi v. the Government of the Islamic Republic of Iran case, the Tribunal tries to give a very precise

[53] The Commentary to article 3 of the OECD Draft Convention on the Protection of Foreign Property of 1967; *See also* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 644 (1998).

[54] The Commentary to article 3 of the OECD Draft Convention on the Protection of Foreign Property of 1967 defined it as: "[…] measure otherwise lawful applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation."; Article 11.a.ii. of the 1985 MIGA Convention: "A creeping nationalization would exist besides when there is no immediate prospect that the owner will be able to resume the enjoyment of his property." *See* Multilateral Investment Guarantee Agency Info page (visited Aug. 10, 2011) <http://www.miga.org/screens/about/about.htm>.

[55] In Mouri's opinion, the jurisprudence of the Tribunal shows that "de facto expropriation relates to the actual seizure or control over property, coupled with its use by the government or beneficiaries appointed by it". *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 69 (1994). *See also* V. Heiskanen, *Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. World Investment & Trade 215, 218-19 (2007).

[56] Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REVIEW 41, 65 (1986).

[57] *See* Patrick Del Duca, The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization 51 UCLA L. Rev. 35, 56 (2003).

[58] *See id.*

definition of *de facto* expropriation.[59] In this case the claimant (Frederica Lincoln Riahi), a United States citizen, filed a claim against the Iranian Government seeking compensation for expropriation of her property.[60] This property included, among others, equity interests in different Iranian businesses.[61] Concerning *de facto* expropriation, the Tribunal stated in this case that: "[…] measures taken by a state can interfere with property rights to such an extent that these rights must be deemed expropriated, even though no law or decree was issued in this respect."[62] Examples of such taking given by the Tribunal are the following: when the owner is deprived of the effective use, control or benefits of his/her property. So, expropriation can happen even if the state does not formally recognize it, and even if the legal title of the property formally remains with the original owner (the one whose property was *de facto* expropriated).[63] In the opinion of the court, once the owner is deprived of fundamental rights of ownership (provided such measures are not temporary, because then it is intervention) the intent of the Government is not relevant any more, the factual state of affairs has to be taken into consideration when examining whether taking has happened.[64] This broad interpretation of expropriation is supported by some other decisions and authors as well.[65] However, the Tribunal emphasized an additional requirement, that is to say, such action has to be attributable to the state.[66]

It is also worth examining case law of the International Centre for Settlement of Investment Disputes (ICSID) when we talk about the issue of *creeping expropriation*. In one of the latest ICSID cases, the Eudoro Armando Olguin v. Republic of Paraguay case,[67] the claimant argued that Paraguay's actions, with respect to the claimant's investment, were tantamount to an expropriation.[68] Olguin alleged that the Republic of Paraguay carried out indirect expropriation through a series of omissions like not preventing the financial institution, into which Olguin had invested his money, from becoming insolvent and from the ongoing economic crisis.[69] In 1993 E. A. Olguin, a citizen both of Peru and the United States, with residence in the United States, transferred a certain amount of money to Mercantil, a Paraguayan financial institution, with the

[59] Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, Iran-U.S. Cl. Trib. Rep. cite: IRAN FINAL AWARD 600-485-1, signed February 27, 2003, filed February 27, 2003.
[60] *Id.* para. 1.-40.
[61] *Id.* para. 2.
[62] *Id.* para. 3.
[63] *Id.* para. 344. *See also* V. Heiskanen, *Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. World Investment & Trade 215, 220 (2007).
[64] Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, para. 345.
[65] *E.g.*, in Otis case the Tribunal was of the opinion that there is expropriation if the claimant proves that "[…] its property rights had been interfered with to such an extent that its use of those rights or the enjoyment of their benefits was substantially affected and that it suffered a loss as a result [...]." In this case, the claimant Otis claimed compensation for its shares expropriated in an Iranian elevator producing company. *See* Iran-US Claims Tribunal Reports 15 (1997) at 220; *See also* V. Heiskanen, *Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. World Investment & Trade 215, 217 (2007).
[66] Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, para. 136-138.
[67] Yearbook Commercial Arbitration Vol. XXVII – 2002, International Council for Commercial Arbitration, Gen. ed. Albert Jan van den Berg, The Hague, 2002 at 48.
[68] *Id.* at 55 para 20.
[69] *Id.* at 60 para 46.

intention of financing an establishment of a corn product plant in Paraguay. Investment titles issued by Mercantil on the name of E. A. Olguin were signed by a Banco Central del Paraguay official and by an official of the authority supervising financial institutions in Paraguay. In 1995, during the financial crisis in Paraguay, Mercantil stopped payments under these investment titles. Following this, E. A. Olguin initiated ICSID arbitration against the Republic of Paraguay under the Bilateral Investment Protection Treaty between Paraguay and Peru claiming that the Republic of Paraguay was responsible for unpaid investment titles under the investment protection treaty. The Tribunal dismissed E. A. Olguin's claims. In the award, among others, the Tribunal stated the following:

> In expropriation, a person is deprived of a good by an act of the state which appropriates this good and is logically bound to pay its price. It cannot be said in this case that Paraguay appropriated Olguin's investment, which was lost in the crisis of La Mercantil and of the Paraguayan financial system in general.[70]

Furthermore, the Tribunal admitted that there can be cases where the state indirectly acquires possession, or at least profits from private property (acknowledging the concept of *de facto* or creeping expropriation). Meanwhile, it also stated that "expropriation also requires an intention to expropriate; omissions, serious as they may be, do not suffice for expropriation to exist".[71]

In another case, Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica,[72] the Tribunal analyzed at some length the notion of "creeping expropriation". Among others, it stated that:

> […] measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title.[73]

It concluded that it is crucial to establish the "extent to which the measures taken have deprived the owner of the normal control of his property".[74] In Compania del Desarrollo, the Tribunal concluded that the expropriation had happened, even though the investor remained in possession of his property, but he could not use freely his property (for the purpose of commercial development).[75] Thus, the expropriation is subject to compensation when the state's "interference has deprived the owner of his rights or had made those rights practically useless".[76] It also established that it is the task of the Tribunal, case by case, to determine whether it has happened.[77]

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[70] *Id.* at 56 para. 26.
[71] *Id.* at 60 para. 47.
[72] Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (ICSID Case No. ARB/96/1). The award can be found at: ICSID Info page, ICSID Cases (visited on Jan. 24, 2011) <http://www.worldbank.org/icsid/cases/santaelena_award.pdf>.
[73] *Id.* para. 76.
[74] *Id.*
[75] *Id.* para. 81.
[76] *Id.* para. 78.
[77] *Id.* Related to this *see* Max Gutbrot, Steffen Hindelang, Steffen, *Externalization of Effective Legal Protection against Indirect Expropriation*, 7 J. World Investment & Trade 59, 63 (2006).

In Tradex Hellas S.A. v. Republic of Albania case Tradex, a Greek company, commenced arbitration proceedings against the Republic of Albania for alleged expropriation of an agricultural joint venture in Albania.[78] Tradex, following negotiations with the Albanian Government, entered into a joint-venture (in the field of agricultural production) with T.B. Trovitsa, an Albanian state-owned company.[79] Tradex claimed that shortly after the conclusion of the joint-venture agreement, Albania had expropriated "substantial" part of the agriculture land owned by the joint-venture and had given it to local farmers.[80] Furthermore, Tradex claimed that, following the grant of land to villagers, local farmers stole crops and other property (not expropriated) of the joint-venture, and the Albanian state did not intervene.[81] Therefore, Tradex claimed that Albania had expropriated its investment.[82] The Tribunal concluded that Tradex could not prove that expropriation occurred, and therefore denied Tradex's claim.[83] What is relevant to us, is the Tribunal's interpretation of the provision of the applicable law[84] that states: "foreign investment shall not be expropriated: (1) directly; (2) indirectly; (3) or by any measure of tantamount effect."[85] Thus, the Tribunal concluded that this provision covers:

> A wide range of takings and makes it clear that not only government measures expressly denominated as 'expropriations' or directly taking away all or part of the investment are prohibited, but also other measures that indirectly or by their effect lead to the foreign investor losing acquired rights […][86]

In Tecnicas Medioambientales case[87], Tecnicas Medioambientales Tecmed S.A. (Tecmed), a Spanish company, requested arbitration against Mexico based on the bilateral investment treaty concluded between Spain and Mexico.[88] Tecmed, among others, claimed that Mexican authorities had in fact expropriated its investment by denying the renewal of the license to operate Tecmed's landfill.[89] The claimant also argued that not granting the permit deprived the investment of its market value.[90] The respondent argued that it had the discretionary powers for not granting the permit, as it was regulatory measure[91] within the state's police power.[92] The Tribunal concluded that

[78] *Id.* para. 1-4 and 52-58 in Tradex Hellas S.A. v. Republic of Albania (ICSID Case No. ARB/94/2), (visited on Jan. 24, 2013) <http://www.worldbank.org/icsid/cases/tradex_award.pdf >.
[79] *Id.* para. 52.
[80] *Id.* para. 57.
[81] *Id*.
[82] *Id.* para. 59.
[83] *Id.* para. 208.
[84] Albanian Law No. 7764 of 2 November 1993 on Foreign Investments, para. 68.
[85] *Id.* para. 133.
[86] *Id.* para. 134.
[87] Award in Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2). ICSID web page (visited on March 16, 2013) <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>. *See also* CARLOS JIMÉNEZ PIERNAS (ED.), THE LEGAL PRACTICE IN INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW, 218-22 (2007).
[88] Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, para. 1-4.
[89] *Id.* para. 35-45.
[90] *Id.* para. 96.
[91] Regarding the issue of regulatory measures that are for public purpose, the Tribunal referred to the Compania del Desarollo case. *Id.* para. 121.

such denial was in fact expropriation of the investment and awarded damages of USD 5.5 million to the claimant.[93] As the bilateral investment treaty did not define what is to be understood by expropriation, the Tribunal tried to define it. It based the definition of expropriation on the opinion of the Tribunal in the Metalclad case and defined expropriation as follows:

> Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as *de facto* expropriation, where such actions or laws transfer assets to third parties different from the expropriating state or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government.[94]

As we can see, the Tribunal interpreted the term of expropriation very broadly, including *de facto* taking as well. It also construed terms contained in the treaty like "equivalent to expropriation" and "tantamount to expropriation" meaning "indirect expropriation", "creeping expropriation" or "*de facto* expropriation".[95] It set up the following test to determine whether not granting of the permit constituted expropriation: "[…] if the claimant, […], was radically deprived of the economical use and enjoyment of its investment, as if the rights related thereto – […] - had ceased to exist".[96] Basically, it examined to what extent did the investment lost its "value and economic use".[97] It also concluded that measures

> adopted by a state, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "…any form of exploitation thereof…" has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.[98]

It also stated that:

> Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary.[99]

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[92] *Id.* para. 97.
[93] The claimant originally requested USD 52 million. *Id.* para. 201.
[94] Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, para. 113.
[95] *Id.* para. 114.
[96] *Id.* para. 115.
[97] *Id.*
[98] *Id.* para. 116.
[99] *Id.*

Furthermore, it concluded that the intention of the government, when implementing such measure, is less important than the actual effects of the measure on the investor.[100]

The case law of the North American Free Trade Agreement (NAFTA) is also rather interesting.[101] In the Metalclad case, a U.S. waste disposal company, Metalclad Corporation, initiated arbitration proceedings against Mexico alleging, among others, breach of NAFTA articles 1110. Its notice of arbitration asserted that Mexico wrongfully refused to permit Metalclad's subsidiary to open and operate a hazardous waste facility that the company had built in La Pedrera, despite the fact that the project was allegedly executed in response to the invitation of certain Mexican officials and allegedly met all Mexican legal requirements.[102] Metalclad sought damages of USD 43,125,000 and damages for the value of the enterprise taken.[103] In this case, the ICSID Arbitral Tribunal interpreted expropriation[104] as including:

> […] not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state.[105]

The Arbitral Tribunal was of the opinion that Mexico took measures that "amount to an indirect expropriation" in violation of article 1110 of NAFTA by allowing and/or tolerating[106] the conduct of the local government.[107] It also added that the implementation of Ecological Decree issued by the local governor, that also affected the rights of

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[100] *Id*.

[101] This Agreement deals with the issue of foreign direct investment and expropriation of investment in its Chapter 11. It distinguishes between 'direct' taking and 'indirect' taking (and 'measures tantamount to expropriation'). NAFTA Secretariat (visited Nov. 15, 2013) <http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=79>. *See also* on this issue Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 859-60 (2003).

[102] The Metalclad case is of crucial importance also for the "Trade and environment debate". *See* Balázs Horváthy, *Az Észak-amerikai Szabadkereskedelmi Egyezmény környezetvédelmi összefüggései [Environmental Aspects of the North American Free Trade Agreement]*. 56 Külgazdaság Jogi Melléklet, 71-90 (2013).

[103] United States Department of state, Metalclad Corp. (visited on Apr. 27, 2013) <http://www.state.gov/s/l/c3752.htm>; *See also* on this case Patrick Del Duca, The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization 51 UCLA L. Rev. 35, 85-94 (2003); A*lso* Charles H. Brower II, *Beware the Jabberwock: A Reply to Mr. Thomas*. 40 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 454, 465 (2012).

[104] Under article 1110 of NAFTA.

[105] ICSID CASE No. ARB(AF)/97/1 (visited on May 5, 2013) <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>, para 103.

[106] *Id.* para. 107. These measures, taken together with the representations of the Mexican Federal Government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation. (*Id.* para. 107 of ICSID CASE No. ARB(AF)/97/1 (visited on May 14, 2012) <www.worldbank.org/icsid/cases/mm-award-e.pdf>).

[107] Para. 107 and 112 of ICSID CASE No. ARB(AF)/97/1 (visited on May 14, 2013) <www.worldbank.org/icsid/cases/mm-award-e.pdf>.

Metalclad, would have in itself tantamounted to an act of expropriation. But, even without such decree, the events preceding the announcement of the decree (conduct described above) themselves constituted expropriation.[108] However, we have to mention that the Supreme Court of British Columbia was in part on different opinion when the case reached this court.[109] It concluded that:

> […] the Tribunal did decide the matter beyond the scope of the submission to arbitration when it concluded that the acts preceding the announcement of the Ecological Decree amounted to an expropriation within the meaning of article 1110 because it based its conclusion, at least in part, on a lack of transparency."[110]

The Court also found that the Arbitral Tribunal gave "an extremely broad definition of expropriation" for the purposes of NAFTA article 1110.[111] However, as the definition of expropriation was a question of law, the Court did not try to define it.[112] Finally, the Court concluded that the Arbitral Tribunal was correct when stating that the Ecological Decree constituted an act tantamount to expropriation without compensation, and did not set aside the arbitral award.[113]

Pope and Talbot, Inc. v. Canada is the next NAFTA case worth examining. In this case, Pope and Talbot claimed that, by reducing its quota of lumber that could be exported to the United States without paying a fee, Canada "had taken actions that so extensively interfered with claimant's Canadian production and exports" that these actions were tantamount to expropriation in violation of article 1110.[114] Pope and Talbot based its claim on the following arguments: (i) Canada's export control regime deprived the investment of its "ordinary ability" to sell its products to its traditional markets,[115] (ii) expropriation under international law "refers to an act by which governmental authority is used to deny some benefit to property",[116] (iii) the Canadian action tantamounted to expropriation in violation of article 1110.[117] Pope and Talbot argued that the phrase

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[108] *Id.* para. 109. *See also* SEBASTIÁN LÓPEZ ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 1-2 (2014); Alberto R. Salazar V., *NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law.* 27 Ariz. J. Int'l & Comp. L. 31, 38 (2010); Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*. 16 J. Transnat'l L. & Pol'y 275, 280-83 (2006-2007).

[109] Reasons for Judgement of the Honourable Mr. Justice Tysoe lexis *2 Asper Rev. Int'l Bus. & Trade L. 473.*

[110] Reasons for Judgement of the Honourable Mr. Justice Tysoe lexis *2 Asper Rev. Int'l Bus. & Trade L. 473.* at 498, 499; According to Yee 'transparency' means access of investor to relevant information for the operation of the investment. *See* Marisa Yee, *The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases,* 9 HASTINGS W.-N.W.J. ENV. L. & POL'Y 85, 101 (2002).

[111] Reasons for Judgement of the Honourable Mr. Justice Tysoe lexis *2 Asper Rev. Int'l Bus. & Trade L. 473* at 500.

[112] *Id.*

[113] *Id.*

[114] Pope and Talbot interim award (visited on Apr. 8, 2013) <http://www.naftalaw.org>. *See also* Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*. 16 J. Transnat'l L. & Pol'y 275, 286-88 (2006-2007).

[115] *Id.* para. 81.

[116] *Id.* para. 83.

[117] *Id.* para. 84-86.

'tantamount to expropriation' expanded to the concepts of indirect taking and creeping expropriation, covering even non-discriminatory measures of general application which have the effect of substantially interfering with investments of investors.[118] Canada, in contrast, argued that: (i) Pope and Talbot could continue to export lumber, (ii) "mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required,"[119] (iii) 'tantamount' simply means 'equivalent' and did not expand article 1110's coverage beyond creeping expropriation to cover regulatory action.[120] The Tribunal was of the opinion that the investment's access to the U.S. market (meaning that the investor is allowed to invest in the U.S. market) is a property interest subject to protection under article 1110.[121] The Tribunal also rejected the claim that "those regulatory measures constitute an interference with the investment's business activities substantial enough to be characterized as an expropriation under international law", or that the expression 'tantamount' to nationalization or expropriation widened the ordinary concept of expropriation under international law.[122] It was the Tribunal's opinion that 'tantamount' means nothing more than equivalent.[123] The Tribunal rejected the claim of expropriation under article 1110.[124]

Another NAFTA case where article 1110 was scrutinized is the S. D. Myers case. S. D. Myers, a U.S. company, was in the business of remediation of hazardous waste. Canada had an inventory of waste contaminated with polychlorinated biphenyls. S. D. Myers wanted to enter to the business of transporting such waste to the United States. There, S. D. Myers planned to recycle the waste, or dispose of it in a safe manner. S. D. Myers' affiliate in Canada was Myers Canada, which also had to be involved in this business.[125] We should mention that S. D. Myers spent considerable effort and money in Canada and in the United States to develop its business.[126] Among others, it lobbied long and hard to obtain regulatory approval from U.S. authorities to import waste into the U.S.

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[118] *Id.*
[119] *Id.* para. 87-88.
[120] *Id.* para. 89.
[121] *Id.* para. 96.
[122] *Id.*
[123] *Id.* para. 104.
[124] *Id.* para. 100; "First of all, there is no allegation that the Investment has been nationalized or that the [export control] Regime is confiscatory […] The investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained [...] Canada does not supervise the work of the officers or employees of the Investment, does not take any part of the proceeds of company sales […,…] does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions outing the Investor from full ownership and control of his investment." (*Id.* para. 100.)
The Tribunal considered it significant that Pope & Talbot "continues to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales". (*Id.* para. 101.) It suggested further that in determining "whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner". *Id.* para. 102.
[125] S.D. Myers, Inc. and Government of Canada NAFTALA.ORG Info page (visited on May 22, 2013) <http://www.naftalaw.org>. *See also* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 316 (2009).
[126] S.D. Myers, Inc. and Government of Canada.

It got the permit in 1995. However, immediately after this, Canada imposed a ban on the export of PCB wastes into the United States.[127] The Government of Canada said that it had "environmental concerns about the proposed export of PCBs by companies like S.D. Myers".[128] Following this, S. D. Myers claimed that the export ban amounted in substance to a nationalization or expropriation.[129]

In this case, the Tribunal defined the difference between expropriation and regulation:

> Expropriations tend to be severe deprivations of ownership rights; regulations tend to amount to much less interference. The distinction between expropriation and regulation screens out most potential cases of complaints about regulatory conduct by the state, and reduces the risk that governments will be harassed or chilled as they go about managing public affairs.[130]

The Tribunal further stated that article 1110 of NAFTA applies to indirect expropriations or measures tantamount to expropriation, but the phrase 'tantamount to expropriation' in such case needs deeper scrutiny. The Tribunal examined whether the governmental conduct amounted in substance to an expropriation. It concluded that the real purpose and impact of a measure must be considered, not merely the official explanations offered by the government:

> A government might proceed with a gradually unfolding series of disparate measures; none of them individually may amount to expropriation, but the whole series might in some cases be substantially equivalent to an expropriation. Usually, an expropriation amounts to a lasting removal of the ability of an owner to make use of its economic rights. The export ban here was temporary. It may be that in some contexts and circumstances, it would be appropriate for international law to view a deprivation as amounting to an expropriation, even though it is partial or temporary. But the temporary nature of the impairment here is one factor, albeit not decisive in itself, in refraining from characterizing the export ban as an expropriation.[131]

Whole in whole, the Tribunal did not qualify the export ban as expropriation.[132]

The issue of repudiation or breach of contract by the state. Few words should be devoted to the problem of repudiation or breach of contract by states. The issue examined here is whether contractual rights can be taken (expropriated) or not. In general, contracts between a state and a foreign investor are governed by the municipal law of the host state.[133] From this follows that, if the state breaches the contract, it will not automatically

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[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 218 (1993); P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 254 (1974); A good example is China.

infer international liability, it will not be in breach of international law *per se*.[134] However, according to Dixon, there are few exceptions.[135] One of these is the case when the investor is prevented from obtaining due process of law, in which case the home state of the investor has the right to make an international claim against the state that denied the due process of law against the investor. Another exception is when contractual rights are regarded as property that may be unlawfully expropriated.[136] The most interesting exception is when the contract becomes 'internationalized'. This can be achieved with a so-called stabilization clause in the contract.[137] Such clauses provide that, even if the legislation is changed after the signature of the investment contract, only that law applies to the investment contract and to the investment that was in force at the time of signing the contract. If the state agrees to add such a clause to the contract, it becomes an international obligation, and it may mean that property or property rights connected to such contract cannot be lawfully expropriated.[138]

The case law of the Iran – United States Claims Tribunal also supports that contractual rights can be expropriated. In the Mobil Oil case, a consortium of companies negotiated a 20 years long concession agreement in 1973 for purchase of crude oil produced in Iran. Following the revolution in 1980 the Revolutionary Council of Iran nullified the concession contract.[139] One of the issues in this case was whether Iran had breached the concession agreement, and, with this, unlawfully expropriated property interest of the company.[140] The Tribunal found Iran liable and stated that a concession (that is to say, contract) might be the object of taking ('nationalization', with the words of the Tribunal).[141]

In Phillips Petroleum Co. Iran (claimant) v. Islamic Republic of Iran case, the claimant, a Delaware corporation, had rights to explore and exploit petroleum resources in Iran on the basis of the contract signed with the National Iranian Oil Company in 1965. Following the Iranian revolution,[142] the Government of Iran declared these contracts null and void *ab initio*.[143] The claimant asked for compensation on the basis of expropriation of contractual rights.[144] However, the Tribunal was of the opinion that if there is liability, it should be assessed on the basis of taking of foreign property in international law. Finally, the Tribunal found Iran liable for taking of contractual rights, maintaining that: "expropriation by or attributable to a state of the property of an alien gives rise under international law to liability [...] whether the property is tangible, […], or intangible, such

[134] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 218 (1993); P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 255 (1974).
[135] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 218 (1993).
[136] Example for this might be concession contracts between the state and a company.
[137] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 218 (1993); *See also* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 57 (1988).
[138] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 218 (1993).
[139] Mobil Oil Iran Inc. v. Islamic Republic of Iran, 16 Iran-U.S. Cl. Trib. Rep. 25 (1987).
[140] *Id.* para. 128.
[141] Regardless of the law the parties chose as the law of the contract. *Id.* para. 175.
[142] Phillips Petroleum Co. Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 106 (1989), para. 1-4.
[143] *Id.*
[144] *Id.* para. 75.

as the contract rights […]".[145] These cases of the Tribunal strengthen the proposition that not only tangible assets but also contractual rights can be expropriated.[146] This is based on the above findings and on other case law and academic literature that will be examined *infra* in this work.[147]

Conclusion. We can see that there are many different definitions for the terms mentioned above: *taking*, *expropriation*, *nationalization*, *intervention*, *confiscation* and *creeping expropriation*. Generally, we may conclude that capital exporting countries try to define the term taking (expropriation, nationalization) as general as possible, while capital importing countries try to give an interpretation to the term as narrow as possible. As we could see, in common usage, the term *expropriation* is used both in wide and narrow sense, as an individual measure for a public purpose, generally decided on the basis of a pre-existing law. *Nationalization* is a matter of public policy concerning a state's internal order. It may affect a whole branch of the economy or some of the major enterprises.

Defining these terms should be the first and basic step towards a secure legal environment for foreign investors. These investors want to have clear and internationally valid definitions and rules that will protect their investments to the maximum extent possible.

In the following chapters we will study three issues of dominant importance that arise in connection with taking, and which constitute the core of the work: the issue of the right to take property, the issue of non-discrimination, and the issue of compensation. Each of the foregoing issues will be discussed in a separate chapter.

[145] *Id.* para. 76.
[146] *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 192 (1998).
[147] Norwegian Shipowners' Claims [Norway v. U.S.A in Reports of International Arbitral Awards, Vol. 1, New York: United Nations, 1948 at 332]; *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 255 (1974); American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States (1965), pt. IV, Responsibility of States for Injuries to Aliens, at 587.

Chapter II

The Right to Take Property and the Public Purpose

Introduction. Before examining the requirements of taking of foreign property in international law, a short overview of the rules of customary international law will be given regarding the treatment of foreigners, and accordingly, the treatment of foreign investors. These rules are mainly derived from the practice of states,[148] which means they are not uniform.[149] First of all, it is apparent under international customary law that in principle (historically) there is no obligation to admit foreigners to the territory of sovereign states.[150] From this follows that, theoretically, there is also no obligation on the state to allow foreigners to undertake investments on their territory. However, if they do, it should be borne in mind that foreign investors, as a general rule, are subject to local laws.[151] Of course, states can voluntarily limit their sovereignty through treaties,[152] and, in this case, investors are also subject to treaties, conventions and, in some cases, even to contracts concluded between investors and the host state. In general, according to international law, sovereign states have the right to expropriate foreign property under certain conditions.[153] This is supported by several international documents and agreements. The General Assembly Resolution 1803 on Permanent sovereignty over natural resources is one of the first documents of the United Nations that laid down the right of sovereign states to take property. In its Preamble, it emphasizes the right of sovereign nations to dispose with their natural resources. In its article IV, it explicitly grants the right to states to expropriate foreign property.[154] Another important document

[148] Of course, there are many international treaties that establish some basic standards.

[149] *See* ZOUHAIR KRONFOL, PROTECTION OF FOREIGN INVESTMENT 13 (1972); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 THE INTERNATIONAL LAWYER, 655, 660 (1990); Ian Brownlie, Principles of Public International Law 13-16 (1998).

[150] *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 252 (1974); ZOUHAIR KRONFOL, PROTECTION OF FOREIGN INVESTMENT 13 (1972)*;* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 THE INTERNATIONAL LAWYER 655, 660 (1990); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 321 (1997).

[151] "The alien rights are not derived directly from international law, but from municipal law of the state of residence, […]" *See* ZOUHAIR KRONFOL, PROTECTION OF FOREIGN INVESTMENT 14 (1972*); Also supported* by GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 321 (1997).

[152] *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 242 (1974).

[153] *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 60 (1988); P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 256 (1974); ABI-SAAB, PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES AND ECONOMIC ACTIVITIES, IN INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 608-609 (1991); Verwey and Schrijver, *The taking of foreign property under international law: a new legal perspective?* 15 NETH. Y. B. INT'L 1, 3-9 (1984).

[154] General Assembly resolution 1803 (XVII) of 14 December 1962 on Permanent sovereignty over natural resources (visited on May 11, 2013) <http://www.hri.ca/uninfo/treaties/8.shtml>.

of the United Nations was the Declaration on the Establishment of a New International Economic Order of 1974. This document reinforces the rights granted by the General Assembly Resolution 1803 as to "full permanent sovereignty of every state over its natural resources and all economic activities". To achieve this end, the Declaration empowers sovereign states to "nationalize or to transfer [the] ownership to its nationals".[155] We assume that the expression 'to its nationals' in the provision of this document must have been inserted to emphasize that, primarily, the property of foreign nationals is targeted by taking, as, in these countries, mostly the property of the ex-colonizers and foreign investors had been taken. This attitude was the result of social justice promotion efforts of newly de-colonized countries.[156] Taking of foreign property was one of the tools for promotion of this 'justice'. Newly de-colonized countries internationally declared and succeeded to make the international community to accept the right of sovereign states to take property of foreigners. However, this principle is still valid nowadays. Another international document of importance for the issue of right of sovereign states to take private property is the Charter of Economic Rights and Duties of States of 1974, which states in its article 2 that "each state has the right: […] to nationalize, expropriate or transfer ownership of foreign property, [...]".[157] These documents constitute strong basis and support for our claim that sovereign states have the right to take private property, as they are primary sources of international law. However, states should be liable for the taking of foreign property both under national and international law.[158] At the same time, it should be mentioned that a distinction can be made between responsibility for lawful and unlawful acts of states according to technical

[155] Art. 4 (e) of the Declaration on the Establishment of a New International Economic Order (1974). The text of the declaration can be found at The Robinson Rojas Archive web page (visited on Feb. 21, 2011) <http://www.rrojasdatabank.org/basdv03.htm>.

[156] *Id.* art. 4 (d).

[157] Art. 2 of the Charter of Economic Rights and Duties of States, Dalhousie University Info page (visited on Apr. 16, 2011) <http://www.dal.ca/~wwwlaw/kindred.intllaw/EcRtsandDuties.htm>.

[158] Martin Dixon writes about state responsibility the following: "state responsibility occurs when a state violates an international obligation owed to another state. […] The obligation may be derived from a treaty or customary law or may consist of the non-fulfillment of a binding judicial decision. Similarly, responsibility may occur when a state ill-treats the national of another state […] The origin of the international obligation is irrelevant for the purposes of state responsibility. […] In general terms, state responsibility comprises two elements: an unlawful act, which is imputable [attributable] to the state. It is clear, however, that responsibility may be avoided if the state is able to raise a valid defense. If not, the consequences of responsibility is a liability to make reparation." *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 197 (1993); *See also* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 73,74 (1988). Dixon also writes that: "[…] conduct in international law is judged by international rules." *See id.* 198. "[…] responsibility can arise from either an act or an omission, so long as this causes a breach of an international obligation." *See id.* 198. "In order for a state to be fixed with responsibility, not only must there be an unlawful act or omission, but that unlawful act or omission must be attributable to the state. In other words, it must be an unlawful act of the state itself and not of some private individuals acting for themselves." *See id.* 200. "[…], it should be noted that according to the International Law Commission, 'damage' is not a precondition of international responsibility. In other words, for responsibility to arise it is enough that there has been an internationally unlawful act attributable to the state." *See id.* 204. "In general, every state is under an obligation not to ill-treat foreign nationals present in its territory." *See id.* 205.

literature in the field.[159] The basic assumption is that sovereign states can take foreign property lawfully only under well-established conditions in international law.[160] At the beginning, there was no accord regarding these conditions. The United States Supreme Court stated in 1964 that: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.".[161] Circumstances have changed since then, and, respecting certain requirements, sovereign states have the power to take the property of foreigners. These requirements are the following: the taking has to serve public purpose, has to be non-discriminatory, accompanied by *appropriate* compensation and due process of law should be guaranteed for the investor whose property is taken.[162] If these conditions are not fulfilled, the assumption is that the taking is unlawful.[163]

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[159] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 197-205 (1993); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 74 (1988).

[160] "According to general international law a state is free to adopt measures of expropriation or nationalization of a foreign investment in its territory." *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 380 (1997); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 24 (1997); SEBASTIÁN LÓPEZ ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 4 (2014); *See also* Pellonpaa M., Fitzmaurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, (1988) 53-178 at 60. But what constitutes international law? The answer for this question we can find in art. 38 (1) o the Statute of the International Court of Justice, as this provision is usually accepted as constituting a list of the sources of international law. *See* PETER MALENCZUK, AHEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 36 (7th ed. 1997). These are the following sources: (a) international conventions; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations. *See* International Court of Justice Info page (visited on Nov. 2, 2012) <http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm>. However, we can say that bilateral investment treaties are the major instruments in international relations related to the protection of foreign investments. *E.g.,* Western countries have concluded more than thousand bilateral treaties promoting and protecting foreign investments to clarify the relevant legal framework. *See* PETER MALENCZUK, AHEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 37 (7th ed. 1997*); See also* Taylor, J. Michael, The United States' Prohibition On Foreign Direct Investment In Cuba-Enough Already?!? 8 SPG L. & Bus. Rev. Am. 111, 118 (2002). Bergmann quotes arbitrator Dupuy (original source not available) who wrote the following: "The exercise of the national sovereignty to nationalize is regarded as the expression of the state's sovereignty." *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 24 (1997); *See also* Pellonpaa M., Fitzmaurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, (1988) 53-178 at 60.

[161] Banco National de Cuba v. Sabbatino, 376 U.S. 428 (1964).

[162] Section 712 of the Restatement (Third) of the Foreign Relations of the United States of America also emphasizes these three basic principles; *See also* RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS - A PROBLEM-ORIENTED COURSEBOOK 1020 (3d ed. 1995); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 214-15 (1993); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, 53, 65 (1988); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 40 (1997); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 381 (1997); HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 248 (2002); *E.g.*, The International Law Association on August 30, 1986 adopted the Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order. Article 5 (5) of this Declaration states: "A state may nationalize, expropriate […] subject to the principle of international law requiring a public purpose and non-

The standards of treatment of foreign investors. The standard of treatment of foreign investors is closely related to the issue of conditions of taking. The strong protection of private property, as well as property of foreigners, that came into existence in the 19th century, has lost its strength following the Russian Soviet Revolution, with the spread of leftist ideas. Therefore, it was desirable for capitalist states to develop and promote in international law the so-called *minimum standard* of protection of foreigners.[164] According to this theory, there are rights created and defined by international law: once a state lets the investor and his investment to enter the country, it has to ensure for the investor and his investment the same protection as it ensures for its own citizens, and the investor, in addition, has the right for protection that is considered *fair and equitable* under international law. These rights may be claimed by or on behalf of aliens who were lawfully admitted to the state and acquired property.[165] According to this standard, foreigners should be treated in a *fair and equitable* manner.[166] The theory of *minimum standard* rejects the Calvo Doctrine, according to which aliens have only the same rights as local nationals.[167] This standard requires more than national treatment of foreign investors, because sometimes, national treatment of private property can be poor (*e.g.*, Cuba). In other words, the investment recipient state has to respect minimal international norms (international public order), irrespectively of what is allowed by the municipal law concerning the treatment of its own citizens in the case of taking.[168] States that do not respect these basic principles of *minimum standard*, and thus harm foreign investors, commit international wrong, according to this theory.[169]

A similar standard to the *minimum standard* mentioned above is the *standard of equitable treatment*. This requires states to apply their law in a "fair, reasonable,

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discrimination, and subject to appropriate compensation as required by international law and to any applicable treaty […]". *See* para. 46 Sola Tiles, Inc. v. the Government of Iran, Award No. 298-317-1.

[163] In this case principles applying to state responsibility for a wrongful conduct is applicable. *See also* L. C. A. Barrera, *Lack of Definition of Compensation in International Investment Disputes for Non-Expropriation Claims: Is There an Appropriate Mechanism to Determine It*, 10 Revista E-Mercatoria, 81, 84 (2011); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 389 (1997); However, for the purpose of compensation a distinction should not be made between lawful and unlawful taking of foreign property. Interview with Prof. David J. Bederman, Law Professor, *Emory Law School* (Apr. 21, 2004).

[164] *See* RUDOLF DOLZER, EIGENTUM, ENTEIGNUNG UND ENTSCHÄDIGUNG IM GELTENDEN VÖLKERRECHT [PROPERTY, EXPROPRIATION AND COMPENSATION IN CURRENT INTERNATIONAL LAW] 128 (1985); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 39 (1997).

[165] *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 341 (1997).

[166] *See id*.

[167] *See* Detlev Vagts, *Minimum Standard, in* 3 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 408 (Rudolf Bernhardt ed., 1997); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 40 (1997); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 212-13 (1993).

[168] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 206 (1993); Detlev Vagts, *Minimum Standard, in* 3 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 408 (Rudolf Bernhardt ed., 1997); HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 4 (2002).

[169] With committing international wrong States become liable. *See* HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 248 (2002).

equitable and adequate manner" to foreigners.[170] Both of these standards could be applied without any treaty provision among states.

There is also a standard, called the *standard of national treatment* in international law that is a special one, in connection with the treatment of foreign investors, which can be applied only on treaty basis (an exception might be if the host state unilaterally grants this treatment). Under this treatment, investors should not have less favorable treatment than that granted to domestic investors.[171]

The *standard of most favored treatment* requires that all the benefits conceded to any other investor in the host state, also have to be given to the investor under *most favored treatment*.[172] This treatment can be of crucial importance if there is a strong international competition present in the field of the specific investment.[173]

Finally, *preferential treatment* is a kind of exception to the most *favored treatment*, and it is used within custom unions and free trade areas.[174]

Both international multilateral instruments and bilateral treaties are based on the combination of the above-mentioned treatment standards.[175]

It has to be noted, regarding these international standards of treatment of foreign investors, that different states apply (depending on whether they are investment expropriating or investor states) different standards. These standards are laid down in international bilateral or multilateral treaties concluded between parties.

Public purpose. It is seldom disputed by international legal literature that lawful taking should be only for public purpose.[176] Many other international documents, like

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[170] *See id.* at 4.

[171] *See id.*; *Also* ZOUHAIR KRONFOL, PROTECTION OF FOREIGN INVESTMENT 15 (1972); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 348 (1997).

[172] *See* HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 5 (2002); ZOUHAIR KRONFOL, PROTECTION OF FOREIGN INVESTMENT 16 (1972).

[173] *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 350 (1997).

[174] *See* HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 6 (2002).

[175] *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 343-45 (1997).

[176] *See e.g.*, P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 Journal of World Trade Law 239, 256 (1974); Abi-Saab, Permanent Sovereignty over natural resources and economic activities, in international law: achievements and prospects 608-609 (1991); Verwey and Schrijver, *The taking of foreign property under international law: a new legal perspective?* 15 Neth. Y. B. Int'l 1, 3-9 (1984); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 54, 65 (1988); Ralph H. Folsom et al., International Business Transactions - A Problem-Oriented Coursebook 1020 (3d ed. 1995); Martin Dixon, Textbook on International Law 214-15 (1993); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 40 (1997); Taylor, J. Michael, The United States' Prohibition On Foreign Direct Investment In Cuba-Enough Already?!? 8 SPG L. & Bus. Rev. Am. 111, 125 (2002); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON

multilateral and bilateral treaties, mention this requirement explicitly and, almost without exception, require the existence of public purpose in the case of taking. This requirement is not only widely accepted in legal doctrine, but has also found expression in state practice.[177] Some documents use the expression *public interest*, *general interest* or *public utility* instead of public purpose with the same meaning. For example, the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, article 1 (Protection of property) states that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the *public interest* and subject to the conditions provided for by law and by the general principles of international law. *[emphasis added]*[178]

However, more important issue is what is covered by this concept (*i.e.*, these terms), than what term is used to express it. It is still not clear in international law what should be understood under public purpose, that is to say, what is covered by this concept. International legal instruments do not define this term. Therefore, in the following we try to find the answer to the question who and on the basis of what and how determines what is public purpose. First, let us see what does the academic literature say about this issue. Some authors argue that public purpose must principally be directed toward improving the quality of life in the nation.[179] It might be defined as well as the improvement of the social welfare or economic betterment of the nation.[180] As a matter of fact, public purpose is somehow defined in almost all legal systems in legal norms in a certain way (however, it should be noted that these are not international but national legal

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INVESTMENT PROTECTION 381 (1997); HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 248 (2002); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 395 (2004). Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order and The Restatement (Third) of the Foreign Relations of the United States.

[177] *See* LILLICH ET. AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 200 (1998); Folsom, Ralph H., International Business Transactions , 2 International Business Transactions § 33.7 (2d ed.) Source: Westlaw; A Project of the American Society of International Law Interest Group on International Economic Law (June 12, 1990) Document III-H World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment para. 38 (Source: Westlaw). *See also* art.1 (1) of the Protocol No. 1 to the European Convention on Human Rights and UN General Assembly Resolutions 1803.

[178] The same article also states that: "The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.". Art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms European Court of Human Rights (visited on Apr. 5, 2012) <http://www.echr.coe.int/Convention/webConvenENG.pdf>; *See also* RACHELLE ALTERMAN (ED.), TAKINGS INTERNATIONAL 26 (2010).

[179] *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS (3d ed. 1995); Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 12-13, vol. 1 (1986); F.A. MANN, STUDIES IN INTERNATIONAL LAW 476 (1973); Kurt J. Hamrock, The ELSI Case: Toward an International Definition of "Arbitrary" Conduct, 27 Tex. Int'l L.J. 837 (1992); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 391 (1997); A.F.M. Maniruzzaman, state Contracts with Aliens: The Question of Unilateral Change by the state in Contemporary International Law, 9 J. INT'L ARB. 141, 165-68 (1992); IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 81 (1983).

[180] *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS (3d ed. 1995).

instruments).[181] In the United States, the legislative defines what is considered public purpose, and when there is a dispute, courts have the power to decide on it.[182] Black's Law dictionary defines public purpose as "an action by or at the direction of a government for the benefit of the community as a whole".[183] We agree with authors who claim that states have to exercise good faith concerning the issue and definition of public purpose when taking foreign property.[184] For example, Sacerdoti argues that although public purpose (interest) is superior to contractual undertakings towards private parties, expropriation has to be justified and taking must be evaluated under a strict good-faith standard.[185]

Many times, foreign investors argue that public purpose should be defined by international law, as this might be more favorable for them when it comes to taking of their property in the host state. We are of the opinion that international law should have some kind of rational public purpose definition laid down in an international instrument that is accepted by the international community. Under rational public purpose we understand reasons that are beneficial for the wider society, respecting human rights. For example, Resolution of the United Nations on Permanent Sovereignty over Natural Resources (1962) states that nationalization, expropriation or requisitioning "shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign".[186] This provision defines public interest broadly, including public utility,

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[181] *SEE* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 24 (1997); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 316 (1994).

[182] In the Hawaii Housing Authority case, the Court wrote the following in its opinion regarding the issue of public purpose: "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it [467 U.S. 229, 240] […] be Congress legislating concerning the District of Columbia [..] or the States legislating concerning local affairs.[…] This principle admits of no exception merely because the power of eminent domain is involved.[…]." *Id*., at 32 (citations omitted). HAWAII HOUSING AUTHORITY v. MIDKIFF, 467 U.S. 229 (1984).

[183] Westlaw legal database Blacks (visited on Apr. 19, 2013) <http://international.westlaw.com/search/default.wl?rs=WLIN5.04&spa=intbaltic-000&db=blacks&fn=_top&mt=WestlawInternational&vr=2.0&sv=Split&rp=%2fsearch%2fdefault.wl>.

[184] *See* A.F.M. Maniruzzaman, state Contracts with Aliens: The Question of Unilateral Change by the state in Contemporary International Law, 9 J. INT'L ARB. 141, 165-68 (1992); Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 12-13, vol. 1 (1986); Kurt J. Hamrock, The ELSI Case: Toward an International Definition of "Arbitrary" Conduct, 27 Tex. Int'l L.J. 837 (1992); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 391 (1997); Ian Brownlie, System of the Law of Nations: state Responsibility 81 (1983); F.A. Mann, Studies In International Law 476 (1973); The Project of the American Society of International Law Interest Group on International Economic Law (June 12, 1990) Document III-H World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment para. 38 and 48 (Source: Westlaw) also emphasises this requirement.

[185] *See id.* at 393.

[186] *See* Human Rights Internet (visited Apr. 5, 2013) <http://www.hri.ca/uninfo/treaties/8.shtml>.

security and national interest. It is also good that individual interests are expressly excluded by the wording of the Resolution. A similar definition of public purpose could be acceptable in our opinion when foreign property is taken by sovereign states.

Important issue is who determines what falls under public purpose (public interest, etc.) if the term is not defined, defined vaguely or if there is a dispute regarding it. And also the basis on which it should be construed. Should it be the court of the host state, the court of the state of origin of the investor or maybe some international judicial body?

Case law. One of the cases dealing with the issue of public purpose is the case of James and others v. the United Kingdom. In this case, James and others represented the Westminster Family Trust against the United Kingdom. A legislative act of the United Kingdom entitled tenants (only with long term lease contract) of certain properties owned by the Trust to become owners on price determined on the basis of conditions given by the legislation. In many cases, the Trust (lessor) provided the land for the tenants (lessees) to build houses on it on their own cost, which did not become their property. They were only leasing it on long term. As the property of the Westminster family was affected by this legislation, the representatives of the Family Trust claimed that the compulsory transfer was against article 1 of Protocol No. 1 (P1-1) to the Convention.[187] The European Court on Human Rights ruled for the defendant, and stated that: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest.".[188] The only limit set up by the court was that this appreciation has to "[…] respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation".[189] The judgment clearly supports the idea that public purpose should be determined by national courts based on the norms of the national legislation.[190]

Examining further international case law, we can see that it also supports the assumption that one of the prerequisites for lawful taking is the existence of a public purpose.[191] However, similarly to the case above, the definition of public purpose is not always clear. Thus, some awards of the Iran - US Claims Tribunal expressly state that it is in the ambit of the host state to determine this term.[192] Therefore it is not easy to cast doubt on the existence of this requirement in certain cases, as it would be, at the same

[187] James and Others v. the United Kingdom, published in A98 (visited on Oct. 14, 2013) <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=12&Action=Html&X=121025707&Notice=0&Noticemode=&RelatedMode=0>.
[188] *Id.* para. 46
[189] *Id.*
[190] This is also supported by authors (*e.g.*, Taylor, J. Michael, The United States' Prohibition On Foreign Direct Investment In Cuba-Enough Already?!? 8 SPG L. & Bus. Rev. Am. 111, 125 (2002).
[191] *See* Pellonpaa M., Fitzmaurice M., *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53-178, 60 (1988). *See also* Eisenber, Andra: "Public purpose" and Expropriation: Some Comparative Insights and the South African Bill of Rights, 11 South African Journal on Human Rights 207-209 (1995).
[192] Pellonpaa M., Fitzmaurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, (1988) 53-178 at 62.

time, question of the policy of a sovereign state.[193] Thus, international tribunals usually do not examine the existence of this prerequisite, so to say, they take it for granted.[194]

However, returning to the practice of the Iran – United States Tribunal, on the bases of the examined cases, we can say that the existence of public purpose was always required, but did not play a decisive role, as it was rarely used as base of dispute.[195] At the same time, the Tribunal confirmed the continuing existence of this requirement.[196] For example, in the American International Group case,[197] the Tribunal stated that it cannot be held that the "[…] nationalization of Iran America was by itself unlawful, either under customary international law or under the Treaty of Amity […], as there is not sufficient evidence before the Tribunal to show that the nationalization was not carried out for a public purpose as part of a larger reform program […]".

In the case of the Amoco International Finance Corporation the Tribunal stated that there is no definition for public purpose "agreed upon in international law nor even suggested".[198] Furthermore, it stated that "as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that states, in practice, are granted extensive discretion".[199]

Similar view was taken in the INA Corporation and Islamic Republic of Iran case regarding the requirement of existence of public purpose.[200] In 1981 INA Corporation (INA), a United States corporation incorporated under the laws of Pennsylvania, filed with the Tribunal a claim for compensation for the expropriation of its 20 percent shareholding in Bimeh Shargh (public joint-stock company) (Shargh), an Iranian insurance company. INA claimed USD 285,000 representing what it alleged to be the going concern value of its shares, together with interest at 17 percent and legal costs. The issue in this case was not if expropriation happened, but the determination of the level of compensation for the taken property. At the same time, in the INA Corporation case, the separate opinion of Judge Lagergren clearly states the requirement of public purpose: "It is generally accepted that some types of expropriation are inherently unlawful - among these one can cite cases in which foreign assets are taken […] for something other than a public purpose".[201] However, this case did not deal with the issue of who determines what is considered to be public purpose.

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[193] *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 387 (1997).
[194] *See id.*
[195] *See* LILLICH ET. AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 201 (1998).
[196] *See id.* at 202-205.
[197] American Int'l Group, Inc. and Islamic Republic of Iran, 4 C.T.R. 96 and 105 (1983-III)
[198] 15 IRAN-U.S.C.T.R. 189, Amoco International Finance Corporation v. the Government of the Islamic Republic of Iran, award no. 310-56-3, 1987 para. 145.
[199] *Id.* para. 145, 146.
[200] INA Corporation and Islamic Republic of Iran 8 C.T.R. 373 (1985-I).
[201] IRAN-U.S.C.T.R. 373, INA Corporation v. the Government of the Islamic Republic of Iran, award no. 184-161-1, 1985, para. Separate Opinion of Judge Lagargren.

In the case law of the International Center for Settlement of Investment Disputes, the issue of public purpose (or public interest) was raised in the Tecmed case. In this case Mexico claimed that, because of the existence of public purpose (environmental regulation) it is not obliged to pay compensation. In a certain way, the Mexican State misused the requirement of public purpose, interpreting it as an excuse for not paying compensation. The Tribunal was of the opinion that the environmental regulation was itself an expropriation. However, the fact that the proprty was taken for environmental reasons was only one of the requirements of lawful expropriation – *i.e.*, this was the public purpose requirement. Thus, the Tribunal stated that:

> Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[202]

However, the Tribunal did not give any definition regarding public purpose and no other ICSID case was found during the research, where the issue of public purpose was raised.

Wilson, an American author, examined the issue of the definition of public purpose in connection with the Ethyl Corporation v. Canada, a NAFTA case. Invoking Shrybman, he stated that public purpose might have broad application and concludes that this requirement is essentially "not subject to effective reexamination by other States".[203]

Conclusion. On the basis of the foregoing, we can conclude that the requirement of public purpose, in the case of taking foreign property, undoubtedly exists in international law. In practice, many different expressions are used to denote public purpose; however, it is generally of no relevance. The real issue is how to define public purpose. We have seen that there is no general definition of public purpose in international law. The determination of what is considered public purpose is left to national legal systems and national courts. Thus, it seems that sovereign states have broad power to determine the content of public purpose based on legislative norm in good faith. The examined case law also supports our findings. The little case law that is related to this issue show that courts and tribunals are reluctant to re-examine the definition of public purpose given by state legislations. However, it has to be based on legislation respecting the principle of good faith. We have also noticed that, in the case of expropriation, public purpose is the least tested requirement of all.

Considering all the arguments, we believe that it would be useful to have some kind of definition of public purpose created and accepted by the wider international

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[202] Para. 121. Award in Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2). ICSID web page (visited on March 16, 2011) <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>.

[203] *See* Wilson, Timothy Ross: Trade Rules: Ethyl Corporation V. Canada (NAFTA Chapter 11) Part II: Are Fears Founded? 6 NAFTA: L. & Bus. Rev. Am. 205, 215-16 (2000).

community that would give an unambiguous definition of public purpose or at least clear guidelines for international tribunals as to what should fall under public purpose.

Chapter III

The Principle of Non-discrimination

Introduction. In this chapter, we will show that the principle of non-discrimination, as a requirement in the case of taking foreign property, is a generally accepted principle in international law. Non-discrimination is, in fact, the principle of equal treatment in international law expressed in negative form. As regards to the requirement of non-discrimination, a specific question is whether this treatment should be applied to the relationship between nationals and foreigners, between foreigners and foreigners or to both relationships. In our opinion, and also in the opinion of some authors, in both cases discriminative treatment tends to be considered forbidden under international law.[204] Otherwise, the basic principle of freedom of competition would be infringed. Thus, we can talk about discrimination if the measure is directed against a particular party, and for reasons unrelated to the substance of the matter, persons in the same situation are treated in a not equivalent manner.[205]

The principle of non-discrimination. Based on our research (documents referred to in this very chapter), we found that discriminatory treatment of foreign investment, in the case of taking foreign property, is not accepted. However, it should be mentioned that opinions regarding the issue of non-discrimination were not as uniform a few decades ago as they are nowadays. Following the Second World War, when many former colonies became independent, there were some opinions in international legal literature that supported discrimination with the following justification:

> [D]eveloping countries, which had to rebuild their national economies from the legacy left by colonialism, were not prepared to accept, equally with the highly developed countries, an obligation to guarantee the same economic rights to their nationals and to non-nationals. That was not discrimination; but it would be discrimination to compel countries of unequal strength to carry the same load. The developing countries held inevitably to correct the consequences of the discrimination practiced under the colonial regime by taking certain measures which might conflict with the interests of a privileged minority.[206]

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[204] *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 388 (1997); Maniruzzaman, A. F. M.: *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview.* JOURNAL OF TRANSNATIONAL LAW AND POLICY Fall, 57 (1998); IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 81 (1983); However, if discriminative treatment (in regulatory mechanisms) is based on legitimate grounds, it is considered legitimate. *See* M. SORNARAJAH, INTERNATIONAL LAW OF FOREIGN INVESTMENT 380 (2004).

[205] *See* KRONFOL, ZOUHAIR A., PROTECTION OF FOREIGN INVESTMENT 25 (1972); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 390 (1997).

[206] Summary of Records of Meetings of 3d Committee, U.N. GAOR, 3d Comm., 17th Sess., at 358, U.N. Doc. A/C.3/SR.1206 (1962); This opinion is also supported by: Sornarajah (M. SORNARAJAH, The Pursuit Of Nationalized Property 187 (1986)); Baade (Hans W. Baade, Permanent Sovereignty over Natural Wealth and Resources, in Essays on Expropriation 24 (Richard S. Miller & Roland J. Stanger eds., 1967)); Schachter (Oscar Schachter, Sharing the World's Resources, in International Law: A Constructive Perspective 525, 528 (R. Falk ed., 1985)).

In our understanding, this is a certain kind of affirmative action that is aimed to restore equality between newly de-colonized countries and developed countries. However, such arguments are more socio-political considerations than legal, and therefore cannot give legal foundation for discriminatory taking. Moreover, in our opinion, such discriminatory treatment can lead to unjust economic advantages and unfair competition both on local and global levels. Such socio-political considerations must be the reason why the United Nations Resolution on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties do not mention the principle of non-discrimination.[207] The issue of discrimination was a very sensitive one in the decades following the de-colonization. Capital exporting countries secured non-discriminatory treatment for their investors through bilateral investment treaties. A good example is the United States of America. This way, newly de-colonized countries preserved their face and, at the same time, complied with the requirements of investors.

Contrarily to developing countries, American and other western authors emphasize the importance of the principle of non-discrimination when taking foreign property.[208] The reason must be that the United States is the biggest foreign investor in

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[207] U.N. GAOR, 17th Session, U.N. Doc. A/5217 (1962); A/RES/3281 (XXIX) art 2.; United Nations Dag Hammarskjöld Library (visited on 10. Oct. 2012) <http://daccessods.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement>; CHARLES N. BROWER & JOHN B. TEPE, THE CHARTER OF ECONOMIC RIGHTS AND THE INTERNATIONAL LAWYER 306 (Vol. 9, 1975).

[208] *See* P. C. Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract*, 80 S. Cal. L. Rev. 1, 5-6 (2006-2007); Kenneth Robert Redden ed.: Modern Legal Systems Cyclopedia. North America. Vol. 1A. Buffalo, New York, USA: William S. Hein & Co. Law Publisher, 1988, p. 1.A.30.10; Nevertheless, the United States itself does not respect the principle of non-discrimination. In theory, constitutional protection is guaranteed for any person, citizen or alien in the United States, but according to Redden, practice shows that judges are more likely to protect only resident aliens (*See* at 1.A.30.12). Non-resident aliens are subject to the protection of the Fifth Amendment only when fundamental human rights are involved (*See* Kenneth Robert Redden ed.: Modern Legal Systems Cyclopedia. North America. Vol. 1A. Buffalo, New York, USA: William S. Hein & Co. Law Publisher, 1988, p. 1A.30.12); This raises the question of whether property rights can be treated as fundamental human rights. Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ensures the peaceful enjoyment of property (First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 – Protection of property: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". (visited on July 22, 2012) <http://www.echr.coe.int/Convention/webConvenENG.pdf>) In the case of corporations, there is also a distinction made between corporations registered in the United States and corporations registered in other countries. (*See* Kenneth Robert Redden ed.: Modern Legal Systems Cyclopedia. North America. Vol. 1A. Buffalo, New York, USA: William S. Hein & Co. Law Publisher, 1988, p. 1A.30.12; "There has always been considerable support for the view [in international public law] that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality. Before examining the validity of the principle of national treatment, it must be observed that it is agreed on all hands that certain sources of inequality are admissible." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 526 (5th ed. 1998). "A state may place conditions on the entry of an alien on

the world, and therefore, it is of crucial importance for it to get equal treatment with other investors. Besides, as already mentioned, discriminatory treatment disables free competition.

Case law. The existence of the requirement of non-discrimination is confirmed by international case law.[209] However, it has to be admitted that, during our research, we found only a few cases dealing with this issue. At the same time, none of these cases rebutted the principle of non-discrimination.

In one of the cases of the Iran - US Claims Tribunal, the Amoco International Finance Corporation case, the Tribunal stated that discrimination is "widely held as prohibited by customary international law in the field of expropriation".[210] In this case, Amoco, an American corporation, had a joint-venture (Khemco) with the Iranian National Petrochemical Company (NPC) in the petrochemical industry.[211] Following the Iranian revolution, all American interests in petrochemical joint-ventures were expropriated, including that of Amoco.[212] Whereas, in another of NPC's joint-venture with a Japanese company, the Japanese share was not taken. [213] Therefore, Amoco argued that the fact that another joint-venture in the same economic branch had not been taken is discriminatory and therefore it had been unlawful expropriation.[214] In its decision the Tribunal accepted that the principle of non-discrimination should be respected in the case of expropriation of foreign property, however, at the same time, it stated that characteristics of some cases could justify different treatment:

> The Tribunal finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or to both, may justify such a difference of treatment…. In the present Case, the peculiarities discussed by the Parties can explain why IJPC was not treated in the same manner as Khemco. The Tribunal declines to find that Khemco's expropriation was discriminatory.[215]

The 'peculiarities' referred to by the Tribunal were the two issues brought by the defendant as defense. The first one is that the operation of the IJPC joint venture was not closely linked with other contracts relating to the exploitation of oil fields, whereas the

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its territory and may restrict acquisition of certain kinds of property by aliens." "Apart from such restrictions, an alien individual, or a corporation controlled by aliens, may acquire title to property within a state under the local law." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 534 (5th ed. 1998)).

[209] In American International Group and in Amoco cases. *See also* Pellonpaa M., Fitzmaurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, (1988) 53-178 at 63-64). Lillich, Richard B., Daniel Barstow Magraw ed.: The Iran-United States Claims Tribunal: its contribution to the law of state responsibility. Irvington-on-Hudson, N.Y.: Transnational Publishers, c1998.at 205-207.

[210] IRAN-U.S.C.T.R. 189, Amoco International Finance Corporation v. the Government of the Islamic Republic of Iran award no. 310-56-3, 1987 para. 140.

[211] *Id.* para. 28, 29 and 30.

[212] *Id.* para. 139.

[213] *Id.*

[214] *Id.* para. 139 and 142.

[215] *Id*. para. 142.

operation of the Khemco plant was linked to the supply of gas from the oil fields operated jointly by Amoco and NIOC.[216] The second, that the Japanese-Iranian joint-venture was not yet an operational concern at the relevant time.[217] In our opinion, these are weak arguments. First of all, both companies were working (or at least were planning to work) in the same economic branch. Thus, we should not place emphasis on the fact that the Japanese joint-venture did not conclude specific contracts for the supply of gas. And secondly, the joint-venture was existing legally between the Japanese and the Iranian company, whether operating or not at the relevant time. However, it might easily be that the reason why it was not operating was the political situation in Iran.

In another case, the one of the INA Corporation, the issue was not the non-discrimination requirement. However, the separate opinion of Judge Lagergren clearly refers to the requirement of non-discrimination as one of the requirements of lawful taking of foreign property: "It is generally accepted that some types of expropriation are inherently unlawful - among these one can cite cases in which foreign assets are taken on a discriminatory basis.".[218]

Conclusion. Based on the findings above, it can be concluded that the principle of non-discrimination, in the case of taking of foreign property is a generally accepted principle of international law nowadays. Though, during the sixties and seventies, following the last phase of de-colonization, there were views that, under certain circumstances, discrimination may be allowed. However, the majority of authors support the idea that discriminatory taking of foreign property is unlawful. This is not only supported by legal writers, but also by international multilateral and bilateral treaties, and the related case law examined.

In a free market economy, discrimination is impediment to free competition. Notwithstanding, such discriminatory treatment happens usually when a government wants to win the political support of its own nationals, strengthen national economy, or simply needs revenue by expropriating foreign property. At the same time, there are also examples for discrimination between foreigners, *e.g.*, when the government prefers and treats better strategic investors or investors from countries with political influence on the expropriating government. However, on long term, it cannot be profitable.

[216] *Id*. para. 141.
[217] *Id*.
[218] In this case, following the revolution, the Iranian state expropriated the share (20%) owned by INA Corporation (INA), a United States corporation, in an Iranian insurance company. *See* 8 IRAN-U.S.C.T.R. 373, INA Corporation v. the Government of the Islamic Republic of Iran award no. 184-161-1, 1985 para. Separate Opinion of Judge Lagargren.

Chapter IV

Compensation for the taken property

Development of compensation theories. As it has been already showed in previous chapters, the right of sovereign states to exercise power on their territory and to take (expropriate) foreign property is recognized in international law. That is to say, we proceed from the assumption that the majority of states[219] recognize the lawfulness of expropriation provided the taking is non-discriminatory, there is a public purpose and there is compensation for the taken property.[220] In the previous chapters, we have seen several proofs that the existence of public purpose and of non-discrimination is an indispensable requirement of lawful taking of foreign property. In this chapter, we will examine what standards of compensation exist as requirement of lawful taking, and if there is common agreement in international law on this issue. Indeed, the majority of states recognize that some form of compensation is due for taken foreign property. The dispute is usually about the standard of compensation.[221] Therefore, in the following, the

[219] This is also recognized by many constitutions of independent states, several international documents, international arbitral awards, and by the majority of authors dealing with the issue. *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 47 (1997); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 213-14 (1993); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 60 (1988).

[220] *See* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 70 (1988); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (5TH ED. 1998); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 215 (1993); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 69 (1988); It is interesting to mention that in the text of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR Info page (visited on June 14, 2012) <http://www.echr.coe.int/Convention/webConvenENG.pdf>) there is no explicit reference to the duty of states to compensate (if "the conditions provided for by law" ensure such right then there is). However, the European Court of Human Rights stated that there is obligation of compensation of the state, and this obligation has to be of reasonable amount. *See* TAMAS BAN, *A TULAJDONJOG VEDELME AZ EMBERI JOGOK EUROPAI EGYEZMENYEBEN [THE PROTECTION OF RIGHT TO PROPERTY IN THE EUROPEAN HUMAN RIGHTS CONVENTION], IN* CSALAD, TULAJDON ES EMBERI JOGOK [FAMILY, PROPERTY AND HUMAN RIGHTS] 132 (1999).

[221] Since, according to international law, every violation of an international obligation creates the duty to make reparation. The principle of restitution or compensation is also included in the Draft articles on Responsibility of States for internationally wrongful acts of the International Law Commission:

"A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

The state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

emphasis will be placed on the analysis of the standard of compensation in the case of taking foreign property.

In the first part of this chapter, we will examine the development of compensation theories and the current state of international law concerning the issue of compensation in the case of taking property of foreign investors. The development of compensation theories will be examined through the two most important international landmark cases (the Norwegian Shipowners' Claim Case and the Chorzow Factory Case), the Hull and Calvo Doctrines and the documents of the United Nations related to the protection of foreign property. Following this, we will give a general overview of the current state of international law and practice in the field, with special emphasis on the Restatement of Foreign Relations Law of the United States and the work of the Iran – United States Claims Tribunal. During this examination, besides international legal sources and the above-mentioned ones, the opinion of distinguished authors in the field of international law will be invoked. This historical overview will help us to find out what compensation standard is the most acceptable and recognized in international law.

Many issues and questions can arise in connection with compensation; however it is beyond the scope of this book to examine all these issues. Thus, we will concentrate only on the most important ones when focusing on the development of compensation theories. The first of these will be the issue of the applicable law (whether this is the law of the host state, the investor's home state or maybe some other source of law). The next important issue will be the standard of compensation. There is a strong interdependence between the standard of compensation and the method of valuation, thus the issue of valuation standard will be also examined. And finally, we will take a look at the form and the time of payment of the compensation. We begin our discussion with the first landmark case in the history of the development of compensation standards in international law.

Norwegian Shipowners' Claims case – 'just' compensation. The first well-known international case related to compensation of expropriated foreign property was the Norwegian Shipowners' Claims case, in which the arbitrators decided that *just* compensation should be paid.[222] In 1917 the United States entered the First World War. The President of the United States was authorized to order the cancellation of shipbuilding contracts, the taking of legal title to ships and the requisition of shipyards in

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See art. 35 and 36 of Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), UN Info page (visited on Sep. 28, 2012) <http://www.un.org/law/ilc/texts/state_responsibility/responsibilityfra.htm>; *See also* L. C. A. Barrera, *Lack of Definition of Compensation in International Investment Disputes for Non-Expropriation Claims: Is There an Appropriate Mechanism to Determine It*, 10 Revista E-Mercatoria, 81 (2011); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 24 (1997).

[222] Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation.* Law & Valuation. Spring 2001, (visited on May 20, 2012) <http://www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>; We have to note that the government of the United States originally also promised, and later even offered *just* compensation, though this was a much lower amount that the one determined by the Tribunal. *See* Norwegian Shipowners' Claims Case (Nor. v. U.S.), 1 Reporters of International Arbitral Awards (UN) 313-14 (1948).

the United States in return for *just* compensation.[223] This action affected Norwegian ship owners as well, who were promised *just* compensation for the physical property taken.[224] However, Norway claimed compensation also for the affected contractual rights.[225] The Tribunal was of the opinion that contracts were also taken, not only physical property;[226] and that this taking was exercise of the power of eminent domain under the United States law.[227] Regarding the applicable law, the United States claimed that its municipal law should be applied; while Norway was of the opinion that it was the international law.[228] The Tribunal stated that as long as international public order is not violated thereby, the municipal law of the United States was applicable.[229] Concerning the issue of compensation, the Tribunal accepted that *just* compensation was due, however it interpreted it as: "*Just* compensation implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property. [*emphasis added*].".[230] The Tribunal also stressed that Norway was a friendly nation and that there were no extraordinary circumstances that would warrant the disregard of due process of law in the course of the taking.[231] Discussing the amount and time of compensation, the Tribunal added that Norway was entitled to *immediate* and *full* compensation.[232] The Tribunal, furthermore, stated that the value of the claimants' initial property should be determined by the standard of *fair market value*.[233] Finally, about USD 15 million was awarded, a sum which included interest.[234] From the fact that the Tribunal ordered the respondent to pay the compensation in US Dollars we can infer that the form of compensation fulfilled the criterion of *effectiveness*, that is to say, it was in a

[223] Norwegian Shipowners' Claims Case (Nor. v. U.S.), 1 Reporters of International Arbitral Awards (UN) 314-18 (1948).
[224] *Id.* at 318-25.
[225] Compensation offered by the United States for the physical property taken was only approximately USD 2.7 million, while the amount claimed by Norway amounted to about USD 18 million. *See id.* at 313-14.
[226] "It is common ground that the word 'property' in the fifth Amendment of the United States Constitution, is treated as a word of most general import, and that it is liberally construed and includes *every so called 'interest' in the thing taken*. [*emphasis added*]" *See id.* at 332.
[227] "1… the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed.
2. That in fact the claimants were fully and for ever deprived of their property and that this amounts to a requisitioning by the exercise of the power of eminent domain within the meaning of American municipal law." *See id.* at 325.
[228] *See id.* at 330.
[229] *See id.* at 331.
[230] *See id.* at 338.
[231] *See id.* at 338-39.
[232] *See id.* at 340.
[233] *See id.* Investorwords Dictionary defines *fair market value* as: "The price that an interested but not desperate buyer would be willing to pay and an interested but not desperate seller would be willing to accept on the open market assuming a reasonable period of time for an agreement to arise." (visited on Dec. 14, 2012) <http://www.investorwords.com/cgi-bin/getword.cgi?1878>; or Money Glossary defines it as: "Fair market value is the price, in cash or equivalent, that a buyer could be expected to pay, and a seller could be expected to accept, if the asset were exposed for sale on the open market for a reasonable period of time, both buyer and seller being knowledgeable of the facts, and neither being under any compulsion to act." (visited on Dec. 14, 2012) <http://www.moneyglossary.com/?w=Fair+Market+Value>.
[234] *See* Dolzer, Rudolf: Norwegian Shipowners' Claims Arbitration in Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1997, Vol. 3, 693.

realizable form. It should be mentioned that the United States complied with the arbitral award, however, it officially denied its precedential value in international law.[235] Based on this landmark case, we can establish that *just* compensation means complete restitution of the taken property, including the lost profit.

Chorzow Factory case – 'fair' compensation. The next landmark case in the history of compensation for taken foreign property was the Chorzow Factory case in front of the Permanent Court of International Justice.[236] The subject matter of this case was the land in Chorzow on which a nitrate factory had been established. The land was originally registered in the name of Germany. However, Germany conveyed the land and the factory to Oberschlesische Stickstoffwerke AG in 1919.[237] Following the First Word War, the region of Chorzow was transferred from German to Polish control. Under the Geneva Convention, countries that took over German territory had the right to seize certain land property on these territories owned by the Government of Germany and credit the value of this property to Germany's reparation obligations.[238] Disputes arising under the Convention were to be referred to the Permanent Court of International Justice.[239] Shortly after Poland took over Chorzow, a Polish court decreed in 1922 that the land belonging to Oberschlesische Stickstoffwerke AG should be assigned to Poland, as Poland argued that the property belonged to the German State, and that it was not the private property of the above-mentioned company.[240] The dispute finally reached the Permanent Court of International Justice. The Court concluded that the land was privately owned at the time of taking, and that Poland had seized private property that was not lawful according to international law.[241] The Court stated that the rules of law governing the reparation were the rules of public international law in force between the two states concerned, and not the law governing relations between the state which committed the wrongful act and the individual who suffered damage.[242] This case sets forth the basic principles that govern reparation after the breach of an international obligation.[243] It gives priority to restitution in kind, however, if it is not possible, it turns to the solution of monetary compensation.[244] Thus, concerning the question of compensation, the Court stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that

[235] *See* Dolzer, Rudolf: Norwegian Shipowners' Claims Arbitration in Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1997, Vol. 3, at 693.
[236] *See* Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 5-24.
[237] *See id.* at 18-21.
[238] *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 643 (1998*); See* Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 18, 21.
[239] *See id.* at 26.
[240] *See id.* at 21.
[241] *See id.* at 46.
[242] *See id.* at 28.
[243] *See* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on state Responsibility,* 96 THE AMERICAN JOURNAL INTERNATIONAL LAW 833, 835 (2002).
[244] *See* Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 46, 47; Mouri calls this "restitution compensation". *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 383 (1994).

act had not been committed".[245] The Court qualified the Polish measure as "seizure of property", and in its opinion there was only one remedy for such an act, that is *fair* compensation which equals *full*[246] compensation.[247] Related to this, Dinah Shelton argues that one widely accepted form of reparation is correcting the injustice done by restoring the *status quo ante*.[248] Shelton further argues that the objective of reparation is "to place the aggrieved party in the same position as if no wrongful act had occurred, without respect to the cost or consequences for the wrongdoer".[249] This principle was also the basis of the Chorzow decision.[250] Furthermore, it is interesting to analyze issues concerning valuation raised by the Court and referred to by experts. Thus, the Court asked experts to determine the value of the property not on the date on which the Polish Treasury was registered as owner[251], but when the Treasury *de facto* took possession of the factory.[252] According to our opinion, the original owner, the German company, should have been entitled to compensation not from this date (*de facto* taking), but from the date when the Polish Treasury was registered as the owner of the factory. The reason is, that already following the registration of the Treasury as owner (without taking it *de facto*), the German owner could no longer dispose of the property (*e.g.*, could not sell it or use it as collateral). Another remarkable issue is that the Court asked for the determination of the value of the property on a very broad basis, that is to say, including even goodwill and future prospects of the factory concerned.[253] The Court also requested experts to determine financial results of the undertaking from the time of the taking until the time of the judgment, instead of determining the value of the taken property at the time of the taking along with the interest from that time.[254] It also ordered the determination of the present value plus, among others, the company's future prospects.[255] Practically, the Court was of the opinion that there should be *full* compensation (what in the Court's opinion equaled *fair* compensation), including *lucrum cessans*[256], less the amount of the maintenance of the factory.[257] All in all, the Court stated that it would fix

[245] Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 46, 47.

[246] Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission also sets forth the *full* reparation principle: "The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act." *See* art. 31 of Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) UN Info page (visited on Jan. 24, 2013) <http://www.un.org/law/ilc/texts/state_responsibility/responsibilityfra.htm>; *See also* L. C. A. Barrera, *Lack of Definition of Compensation in International Investment Disputes for Non-Expropriation Claims: Is There an Appropriate Mechanism to Determine It*, 10 Revista E-Mercatoria, 81 (2011).

[247] Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 46; RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS - A PROBLEM-ORIENTED COURSEBOOK (3d ed. 1995).

[248] *See* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on state Responsibility*, 96 THE AMERICAN JOURNAL INTERNATIONAL LAW 833, 844 (2002).

[249] *See id*.

[250] *See id.* at 845.

[251] July 1, 1922. (Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 21).

[252] *See id.* at 22, 51.

[253] *See id.* at 51.

[254] *See id.* at 51.

[255] *See id.* at 28.

[256] Ceasing gain.

[257] Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 53.

the amount of the compensation, the conditions and form of payment in a future judgment. It indicated that compensation can be paid in the form of a lump sum, and set off might be possible; However, it did not make a concrete decision on the matter.[258] Finally, the parties reached a compromise, and the Court terminated the proceedings in 1929.[259] Based on this case, we can say that *fair* or *full* compensation does not differ much from the *just compensation standard* examined in the Norwegian Shipowners' Claims case. Basically, both cases require, in the case of taking foreign property, *in integrum restitutio*, taking into consideration the lost profits of the owner of the taken property.[260] In both cases, the valuation is based on *fair market value* of the taken property. In our opinion, applying these standards, these early cases of international law already offered strong protection of foreign investment. These cases also recognized that if in kind restitution is not possible, monetary compensation is the most practical. On the basis of the before-said, we can conclude that these decisions use, in fact, different terms for the same concept. This supports our assumption that, many times, terms (expressions) in international law cannot be defined until they are tested in practice by courts or tribunals.

Hull Doctrine – 'prompt, adequate and effective' compensation. In 1938 the so-called Hull Doctrine came into existence, when the property of the citizens of the United States of America was expropriated in Mexico.[261] The doctrine was named after the United States Secretary of State Cordel Hull, who, in his famous letter to the Mexican Government, demanded *prompt*, *adequate* and *effective* compensation for the agrarian properties owned by United States citizens, and expropriated by the Mexican Government.[262] With this doctrine, new terms evolved in international law in the field of compensation, as this doctrine claimed *prompt*, *adequate* and *effective* compensation. We can define these terms based on the literature dealing with the Hull doctrine. *Prompt* means that the owner of the expropriated property has to be compensated reasonably soon after the taking, without undue delay.[263] However, in practice, it is rarely the case. A

[258] *Id.* at 64.

[259] *See* Ignaz Seidl-Hohenveldern: German Interests in Polish Upper Silesia Cases in Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 2, 550-553 at 551.

[260] For example, Sacerdoti argues that *full* restitution is in principle "reparation in the form of monetary compensation as an alternative [to *in integrum restitutio*] should cover all connected losses including *lucrum cessans* and indirect damages". *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 389 (1997).

[261]*See* Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation*, Law & Valuation. Spring 2001 (visited on Apr. 5, 2012) <www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>; Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, THE AMERICAN JOURNAL INTERNATIONAL LAW, July, 1981, at 558; On the issue of expropriation in Mexico *see*: Patrick Del Duca, The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization 51 UCLA L. Rev. 35 (2003).

[262] *See* Smith, Kevin: The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation. Law & Valuation. Spring 2001 (visited on Apr. 5, 2012) <www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>.

[263] *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 606 (3d ed. 1995; ZOUHAIR A. KRONFOL, PROTECTION OF FOREIGN INVESTMENT 42 (1972); W. M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J.

payment of compensation in installments, even if it takes years, is an accepted practice,[264] provided a considerable sum of money is paid immediately following the expropriation.[265] One of the problems related to *prompt* compensation is the lack of international enforcement mechanisms against states which are unwilling to pay the required compensation, even if it was awarded by an international tribunal. *Adequate*[266] means that the compensation is based on a fair valuation, which is basically the fair market value of the property.[267] This criterion can be equated with *full* compensation, which means that the compensation should correspond to the full value of the expropriated rights.[268] And finally, the criterion of *effectiveness* means that the compensation should be in a realizable form,[269] that is to say, it should be transferable in convertible currency or other form (*e.g.*, gold).[270] As a matter of fact, the standard laid down by the Hull doctrine is the refined version of the *just* and *fair* (or *full*) compensation standard theories, in our opinion. All three above-mentioned components of the Hull doctrine are present under the *just* compensation standard (laid down in the Norwegian Shipowners' Claims case) and the *fair* compensation standard (established in the Chorzow Factory case). It is common to all these theories that compensation should be paid *reasonably soon* in a *realizable form*, for the *full value* (including lost profits), based on *fair market value*.

The standard of the Hull Doctrine can be found today in the North American Free Trade Agreement and in bilateral investment treaties concluded by the United States.[271]

692, 694 (1984-1985); *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 107 (1988).

[264] Usually not more than ten years. *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 42 (1997).

[265] *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 42 (1997).

[266] John H. Dunning argues that until the independence of many colonies in the sixties the traditional rule in international law was that in case of taking *adequate* compensation had to be paid. However, with the appeareance of newly indepnedent states, and with the moral support of socialist countries, appeared a new, progressive theory, according to which *adequate* compensation had to be paid provided that the flow of capital and technology that foreign investment generates is beneficial to the developing country. *See* JOHN H. DUNNING, INTERNATIONAL INVESTMENT, 44 (1972). Sornaraja already in the seventies claimed that "there is little doubt that foreign investment does have beneficial effects on the host country." (M. Sornarajah, *Compensation for Expropriation*, 13 JOURNAL OF WORLD TRADE LAW, 109, 110-13 (1979). However, we are of the opinion, that there are exceptions in many cases. It would be incorrect to say that foreign direct investment is uniformly beneficial for the recipient country.

[267] *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 606 (3d ed. 1995.

[268] *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 43 (1997); In American International Group case. *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 105-07 (1988).

[269] *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 606 (3d ed. 1995).

[270] Like securities, etc., that are negotiable on the stock exchange. *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 42 (1997); *See also* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 107 (1988).

[271] *See* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 324 (2009).

In bilateral investment treaties, investors enjoy protection even exceeding the requirements of the Hull Doctrine, *e.g.*, as these treaties many times prescribe interest at a "commercially reasonably rate"[272].[273] Nevertheless, this doctrine was regarded as international only by the United States.[274] However, even the US abandoned it officially following the Second World War, when it began to propagate the *just* compensation doctrine. At the same time, the United States, as we are going to see in the part of this book dealing with the Restatement (Third) of Foreign Relations Law of the United States § 712, still interprets *just* compensation as *prompt*, *adequate* and *effective*.[275] Furthermore, Brownlie also argues that it is a common opinion in the West that expropriation is lawful if *prompt*, *adequate*, and *effective* compensation is provided for the property.[276] Contrarily to this, authors from developing countries argue that this doctrine is supported by the United States and other developed countries in order to put developing countries into a disadvantageous position.[277] Here we would agree with the German author, Professor Dolzer, who claims that this doctrine was applied, even before the de-colonization occurred, "in rational manner among and against" developed, western countries.[278] The above-examined Norwegian Shipowners' Claims case and the Chorzow Factory cases are good examples to support this assertion. At the same time, Dolzer admits that this rule is not always observed in practice (for example, sometimes there is no *prompt* payment in case of expropriation).

Calvo Doctrine. Concerning the issue of compensation, the majority of capital importing countries[279] refuse the Hull Doctrine, and refer to the Calvo Doctrine

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[272] Art. 6 (3) of the US Model Bilateral Treaty, US Department of state (visited on June 6, 2012) <http://www.state.gov/documents/organization/38710.pdf>.

[273] *See* Andrew T. Guzman, *Explaining The Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt The*, 1997 Jean Monnet Working Papers (visited on Apr. 5, 2012) <http://www.jeanmonnetprogram.org/papers/97/97-12.html>.

[274] "The argument that the *prompt, adequate* and *effective* formula is traditional international law finds little support in state practice or authoritative treaties and monographs." *See* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 33 (1993).

[275] *See* Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation.* Law & Valuation. Spring 2001 (visited on Apr. 20, 2012) <http://www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>.

[276] The Restatement defines *just* compensation as compensation that is "in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national". *See* Restatement 712 (1) (c).

See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (5th ed. 1998); Joachim Karl, *The Promotion and Protection of German Foreign Investment Abroad*, ICSID REVIEW, Spring 1996, at 3.

[277] *See O. A. Abede,* The Doctrine of Sovereign Immunity Under International Commercial Law: An Observation On Recent Trends, *17 THE INDIAN JOURNAL OF INTERNATIONAL LAW* 245, 254-55 (1977); Mohamed *Khalil, Treatment of Foreign Investment in Bilateral Investment Treaties*, ICSID REVIEW, Fall 1992, at 339.

[278] *See* Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, THE AMERICAN JOURNAL INTERNATIONAL LAW, July 1981, at 558.

[279] Francesco Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 255, 255 (1975).

instead.[280] The Calvo Doctrine was named after Carlos Calvo, an Argentine diplomat and historian. He expressed this principle in his work "International Law in Theory and Practice". According to this doctrine, in case of taking of foreign property, every state has to have the right to decide on its own future and economic development, that is to say, no state may be forced to pay *adequate*, *effective* and *prompt* compensation.[281] The doctrine also says that foreign investors may not be better treated than the citizens of the expropriating state.[282] The Calvo Doctrine also prohibits the use of diplomatic intervention as a method of enforcing private claims before local remedies have been exhausted. Hereinafter, we are going to see that this principle is reflected in many United Nations documents of the sixties and seventies.

In practice, the Calvo Doctrine is represented by the Calvo Clause. Such clauses may be part of investment contracts concluded by the host state and the foreign investor, and in them, the investor agrees in advance to submit all disputes to the local law and waives all kind of diplomatic protection. In practice, it means that, regardless of the outcome of the exhaustion of local remedies by the foreign investor, the investor will find himself in the same position as any other national of the host state.[283] All disputes between the host state and the foreign investor are exclusively reserved for the courts of the host state, ruling out any kind of international arbitration or adjudication. In our opinion, such clause can be detrimental for foreign investors and this must be the reason why the Calvo Clause is not widespread.[284] Regarding this issue, it is interesting to mention that the majority of bilateral investment treaties exclude the requirement of exhaustion of local remedies. Paul Peter in the nineties analyzed 409 BITs, and found that only five of them required exhaustion of local remedies.[285] Clauses that require the exhaustion of local remedies might deter foreign investors, as many times foreign investors are not familiar with the local legal system or are mistrustful about local judiciary and other authorities. Furthermore, the investment recipient state might have influence on these institutions. Therefore, a foreign investor might prefer international arbitration or other international dispute settlement mechanism when having disputes about compensation for taken property.

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[280] The Columbia Encyclopedia, Sixth Edition, 2001 (visited on Sep. 12, 2012) <http://www.bartleby.com/65/ca/Calvo-Ca.html>.

[281] *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 44 (1997); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 212-13 (1993).

[282] *See* SEBASTIÁN LÓPEZ ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 19 (2014); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 40 (1997); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 212-13 (1993).

[283] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 212-13 (1993); Encyclopaedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 1, 521-523 p. 522 F.V. Garcia-Amador Calvo Doctrine, Calvo Clause.

[284] Lluís Paradell argues for example that it has never attained the statues of a principle in customary international law. ANDREW NEWCOMBE LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 13-14 (2009).

[285] *See* Paul P., *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties,* 44 NETHERLANDS INTERNATIONAL LAW REVIEW 233, 234 (1997).

United Nations documents – 'appropriate' compensation. According to certain authors, the most recognized standard in international law is the *appropriate* compensation standard.[286] This view is supported by the fact that the huge majority of states accepted this standard in many international multilateral and bilateral documents. The most important international document in which this standard first appeared was the General Assembly Resolution[287] 1803 (on Permanent Sovereignty over Natural Resources) of the United Nations, passed on December 14, 1962.[288] Some authors[289] are of the opinion that in the full context of adoption of the General Assembly Resolution 1803, the expression *appropriate* compensation can only mean *prompt*, *adequate* and *effective* compensation.[290] They further argue that there is no doubt that this is a mandatory obligation under international law. Therefore, *prompt*, *adequate* and *effective* compensation has to be paid.[291] On the other hand, there are experts who do not accept this view, and argue that *appropriate* compensation is in no case equal to *prompt*,

[286] *See* RUDOLF DOLZER, EIGENTUM, ENTEIGNUNG UND ENTSCHÄDIGUNG IM GELTENDEN VÖLKERRECHT [PROPERTY, EXPROPRIATION AND COMPENSATION IN CURRENT INTERNATIONAL LAW] 63 (1985); O. A. Abede, *The Doctrine of Sovereign Immunity Under International Commercial Law: An Observation On Recent Trends*, 17 THE INDIAN JOURNAL OF INTERNATIONAL LAW 241, 245 (1977); P.J.we.M. de Waart, *Permanent Sovereignty Over Natural Resources As a Cornerstone for International Economic Rights and Duties*. 24 NETHERLANDS INTERNATIONAL LAW REVIEW 300, 304 (1977); Maarten H. Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 31, 35 (1981); Karol N. Gess, *Permanent Sovereignty Over Natural Resources*, 13 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 398, 398-99 (1964).

[287] General Assembly Resolution is defined by the Dictionary of International & Comparative Law as: "primary legislative product of the United Nations General Assembly. Generally, they are not binding, but serve as evidence of customary international law and are authoritative when they interpret the United Nations Charter.". *See* Dictionary of International & Comparative Law, Fox, James R., Oceana Publications, Inc., 1992, at 380; Resolutions of the UN General Assembly are not listed among the formal sources of law of the International Court of Justice. *See* art. 38 of the Statute of the International Court of Justice, ICJ Info page (visited on Dec. 14, 2012) <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>; However, this does not mean that they cannot be considered as source of international law. So-called western, developed countries tend to deny resolutions' normative quality, as third world countries tend to accept them as sources of international law. *See* Edward McWhinney, United Nations Law Making 44,55,56 (1984); *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 248-51 (1974).

[288] The text of the Resolution and an analytical study can be found in the article of Karol N. Gess. *See* Karol N. Gess, *Permanent Sovereignty Over Natural Resources*, 13 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 398, 444 (1964). For another analytical study on the issue *see* P. O'Keefe, *UN* Permanent Sovereignty Over Natural Resources, 8 JOURNAL OF WORLD TRADE LAW 239, 239-82 (1974); ANDREW NEWCOMBE LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 27 (2009).

[289] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 304 (1975); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 639, 646 (1998).

[290] The United States of America also held that 'appropriate' compensation could only mean 'prompt, adequate and *effective' compensation. See* Karol N. Gess, *Permanent Sovereignty Over Natural Resources*, 13 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 398, 427 (1964).

[291] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 304 (1975); Francesco Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 255, 255 (1975).

adequate and *effective* compensation.[292] Based on our research, we are of the opinion that there is still little case law to support either the former or the latter view with certainty. However, we would say that the standard of *prompt*, *adequate* and *effective* compensation is stricter standard and offers better protection, regarding the compensation of investors.

In the following, we will have a brief look at two other important United Nations documents in which the standard of *appropriate* compensation can be found. One of them is the Declaration on the Establishment of a New International Economic Order.[293] This is a resolution of the General Assembly of the United Nations. This Resolution was initiated by a group of less developed countries following the oil crisis of 1973,[294] and was the result of a so-called pseudo-consensus, that is to say, the text of the Resolution was adopted without voting.[295] The president of the General Assembly simply stated that "it is the desire of the meeting to adopt the text", and the Resolution was adopted.[296] The significance of this Resolution is in the fact that it considers unacceptable any form of sanction on a state that has expropriated property of foreign investors.[297] In theory, this provision is very important as it prevents investor states from protecting their investors through sanctions in case of expropriation of their property.

The Charter of Economic Rights and Duties of States (December 12, 1974)[298] is the other resolution of the United Nations General Assembly. This Resolution was adopted by the General Assembly with an overwhelming majority of the world's countries. Only Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States voted against the Resolution.[299] The Resolution was drafted with the support of the United Nations Conference on Trade and Development.[300] Developing countries wished to achieve several goals with this document: the freedom to dispose of natural resources, the right to adopt the economic system of their own will, subjection of foreign capital to domestic laws, and other goals.[301] Brower argues that developing countries tried to use the United Nations for their

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[292] *See* Francesco Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 255, 255 (1975); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 639, 647-48 (1998).

[293] A/RES/3201 (S-VI), United Nations Dag Hammarskjöld Library (visited on Oct. 10, 2012) <http://daccess-ods.un.org/doc/RESOLUTION/GEN/NR0/071/94/IMG/NR007194.pdf?OpenElement>.

[294] *See* JOHAN KAUFMANN, UNITED NATIONS DECISION MAKING 81, 82 (1980).

[295] *See id.* at 81,82,128.

[296] Several developed countries were opposed to the Program for a New International Economic Order that was represented by this Resolution. *See* JOHAN KAUFMANN, UNITED NATIONS DECISION MAKING 81, 81,82,128 (1980).

[297] A/RES/3201 (S-VI), United Nations Dag Hammarskjöld Library (visited on Oct. 10, 2012) <http://daccess-ods.un.org/doc/RESOLUTION/GEN/NR0/071/94/IMG/NR007194.pdf?OpenElement>.

[298] *Id.*

[299] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 295 (1975); Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 1, 561-566 at 562 (Ernst-Ulrich Petersmann: Charter of Economic Rights and Duties of States).

[300] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 295 (1975).

[301] *See id.* at 296.

economic campaign at this time.[302] Provision concerning the compensation in case of expropriation is contained in article 2 (2) (c) of the Resolution, which states that in case of taking:

> *appropriate* compensation *should* be paid by the state adopting such measures, taking into account *its relevant laws* and regulations and all circumstances that the state considers pertinent. [303] [*emphasis added*]

As we can see, the text uses the word *should* that lessens the obligatory character of this provision.[304] It is more interesting, that this appropriate compensation is determined on the grounds of domestic legislation[305], and there is no mentioning of international legal standards. However, the last part of article 2 (2) (c) which states that the expropriating state has the absolute right to decide which factors will be taken into consideration when determining compensation, makes it less objective.[306] This rejection of international law and legal standards is strengthened even more by the next sentence of the same paragraph:

> In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. [307]

In the first part of this provision we can find the above-mentioned Calvo Clause. However, the second part of the same provision gives the opportunity to parties to mutually agree on other means of conflict resolution (*e.g.*, international arbitration). The original intention of the working group that worked out the proposal of the Resolution was to make a draft that will be binding on states and be part of the "corpus of the

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[302] He also argues that behind this economic campaign stood partially political, partially economic reasons. *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 296 (1975).

[303] Art. 2 (2) (c) A/RES/3281 (XXIX), United Nations Dag Hammarskjöld Library (visited on Oct. 12, 2012)
<http://daccessods.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement>;
Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 305 (1975).

[304] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 305 (1975).

[305] According to de Waart the determination of compensation on the grounds of local law met strong opposition among western states. *See* P. J. we. M. de Waart, *Permanent Sovereignty Over Natural Resources As a Cornerstone for International Economic Rights and Duties*, 24 NETHERLANDS INTERNATIONAL LAW REVIEW 313 (1977).

[306] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 305 (1975).

[307] Art. (2) (2) (c) A/RES/3281 (XXIX), United Nations Dag Hammarskjöld Library, (visited on Oct. 12, 2012)
<http://daccessods.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement>;
Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 305 (1975).

international law".[308] However, some western authors question if it had any effect at all on international law.[309] The largest investor in the world, the United States, argued that such a document discourages rather than encourages foreign investors who are so much desirable by investment recipient countries.[310] The reason for such critic might be that the United States, being a large investor, wants to protect the interests of its own investors, and this document obviously does not serve this end because it is strongly influenced by the Calvo Doctrine. Brower argues that the biggest deficiency of the Resolution is in the lack of binding character - despite the original intent of the sponsors of the Resolution.[311] Brower also criticizes the Resolution for not stating clearly that "economic rights and duties of states are subject to international law".[312] However, we agree with Brower that this Resolution still places moral obligations on the members of the world community as it was passed by the General Assembly of the United Nations, an organization which represents the will of nations of the world.[313] Andrew T. Guzman touches the spot when he says that the relevance of the resolutions of the United Nations is not establishing new standards for expropriation in customary international law, but rather proclaiming that the countries voting for these resolutions do not consider the Hull doctrine part of customary international law.[314] Notwithstanding, it should be mentioned that these countries still sign bilateral investment protection treaties that require *prompt*, *adequate* and *effective* compensation. In spite of this, the Charter of Economic Rights and Duties has had certain effects on international law, as this standard was also applied in major expropriation cases for determining compensation.[315]

Issue of compensation under the Restatement (Third) of Foreign Relations Law of the United States of America § 712. The United States of America is the largest foreign direct investor in the world. Thus, we should examine briefly its policy regarding the issue of compensation in the case of taking foreign investment. Under the Restatement,

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[308] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 297 (1975).

[309] *See* G. W. Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 THE INTERNATIONAL LAWYER 591, 596 (1975); For example, Petersmann suggests that the Hull Doctrine represented traditional international customary law before the Charter, and says that it has no practical value in the view of recent state practice and arbitration awards. *See* Ernst-Ulrich Petersmann, Charter of Economic Rights and Duties of States, in 1 Encyclopedia of Public International Law 564 (Rudolf Bernhardt ed.) (1995).

[310] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 299 (1975).

[311] This non-binding character is supported by the following two facts according to Brower: a large number of countries with large economic power voted against or many abstained and a resolution of the General Assembly of the United Nations is not a "multilateral convention or treaty, will in any event normally have only recommendatory force". *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 301 (1975).

[312] *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 THE INTERNATIONAL LAWYER 302 (1975).

[313] *See id.* at 301.

[314] *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 639, 648 (1998).

[315] *E.g.*, TOPCO-Libyan case, Banco National case, Aminoil-Kuwait case. It is another issue, how is this standard interpreted by tribunals and courts.

there is an obvious requirement of compensation in case of taking foreign property.[316] Regarding the standards of compensation, the Restatement accepts the standard of *appropriate* compensation. However, it supplements it with the requirement of *just* compensation.[317] Thus, it requires *just* compensation in the case of taking. The Restatement defines what should be understood under *just* compensation:

> […] be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national[318]

This definition anticipates the determination of the value of the taken property, for what guidance is given in the Comment of the Restatement and the Reporters' Notes, which states that the *full value* of the property must be paid.[319] If possible, this should be determined based on the *fair market value* of the property. When determining this fair market value, the *going concern value* of the enterprise should be taken into account primarily, but the Comment does not exclude other valuation methods.[320] As to the time of payment, the Restatement states that compensation should be paid at the time of the taking.[321] It further provides that if the compensation is not paid at this moment, interest should be paid from the time of the taking.[322] However, it is required that compensation is made, in any case, within a reasonable time[323], that is to say, within at least a six months period.[324] Defining the requirement of *reasonable* time helps avoiding disputes among the parties. The Restatement also tells us about the form of payment. The payment should be made in economically usable form for the foreign investor.[325] The Comment of the Restatement specifies it as "convertible currency without restriction on repatriation".[326] Payment in bonds is also allowed under certain circumstances. The requirement is that such bonds bear interest at an economically reasonable rate and have market through which their equivalent in convertible currency can be realized.[327]

Current trends in the field of international law related to our topic can be best examined through current case law and related academic literature. Thus, we are going to scrutinize above all, the case law of the Iran – United States Claims Tribunal and the decisions of other international arbitral bodies (like that of the ICSID or NAFTA

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[316] Restatement 712 (1) (c).
[317] Restatement Comm. (c) at 198.
[318] Restatement 712 (1) (c).
[319] Comment d; Reporters' Notes, 3; *See also* Lillich, Richard B.: The Valuation of Nationalized Property in International Law. Charlottesville: The University Press of Virginia, 1973 1,2,3,4 Bd.; Bergmann, Heidi: Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen. Baden-Baden: Nomos Verl. Ges., 1997; Kratovil, Robert, Harrison, Frank J.: Eminent Domain - Policy and Concept. California Law Review. Vol. 42, 1954, at 596.
[320] Restatement, Reporters' Notes 3.
[321] Restatement 712 (1) (c).
[322] Restatement 712 (1) (c); Comment d; Reporters' Notes 3.
[323] Restatement 712 (1) (c).
[324] Reporters' Notes 3.
[325] Restatement 712 (1) (c).
[326] Comment d of the Restatement.
[327] *Id.*

arbitration) and related analytical works. We will try to find out what is the most accepted compensation standard in international law nowadays.

The case law of the Iran – United States Claims Tribunal. The work of the Iran – United States Claims Tribunal represents one of the most important body of international case law on the issue of compensation for expropriated foreign property.[328] We give as detailed analysis as possible on the work of the Tribunal in this field.[329] However, first let us see in brief the background and the history of the establishment of the Tribunal. In 1979, following the Iranian revolution and the 'hostage crisis', the Government of the United States froze Iranian assets worth over USD 12 billion.[330] With the mediation of Algeria, the parties (the United States and Iran) agreed to adhere to two accords made by the Algerian Government (General Declaration[331] and Claims Settlement Declaration[332]).[333] These documents established a tribunal that aimed to settle disputes

[328] However, it should be mentioned that some authors, like Sornarajah, are of the opinion that the decisions of the Tribunal should not have binding precedential value because such bodies and their decisions are usually result of political agreements in his opinion. *See* M. SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 202 (1986); M. SORNARAJAH, INTERNATIONAL LAW OF FOREIGN INVESTMENT 380 (1994). As opposed to Sornarajah, based on our research regarding international case law and academic writings related to investment protection, we agree with Lillich and Magraw who argue that decisions like those of the Iran – United States Claims Tribunal are observed and invoked by international lawyers. *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 37 (1998).
On the work of the Tribunal *see generally:* DAVID D. CARON & JOHN R. CROOK EDS., THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION (2000); RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY (1998); ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL (1994); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN (1997); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53 (1988); JOHN A. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1991); KHAN RATMATULLAH, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: CONTROVERSIES, CASES, AND CONTRIBUTION (1990). GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN –UNITED STATES CLAIMS TRIBUNAL (1996).
[329] On the establishment, work and procedures of the Tribunal *see* DAVID D. CARON & JOHN R. CROOK EDS., THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION (2000).
[330] *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 2-8 (1998).
[331] Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 January 1981 in IRAN – UNITED STATES CLAIMS TRIBUNAL REPORTS, 1 (Pirrie, S. R. ed.), 3-8 (1985). *See also* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 11-13 (1998).
[332] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981 in IRAN – UNITED STATES CLAIMS TRIBUNAL REPORTS, 1 (Pirrie, S. R. ed.), 9-12 (1985).
[333] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 1-6 (1994); *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 11-13 (1998).

between the parties.[334] This Tribunal applied at least five different sources of international law: (1) the Claims Settlement Declaration (and other agreements related to the Algiers Accords),[335] (2) the Treaty of Amity (Treaty) between Iran and the United States,[336] (3) other international agreements (as subsidiary means[337]),[338] (4) customary international law[339] and (5) general principles of law[340].[341] Regarding the applicable law, in the opinion of Mouri, the Tribunal was hesitant to establish it, except in a few cases.[342] Bergmann, a German scholar, opines that the basis of the decisions of the Tribunal was not the international law, but primarily the Treaty of Amity between the United States and Iran.[343] Moreover, Mouri argues that the Tribunal was generally of the opinion that, regarding the standard of compensation, in the early stages of the Tribunal's work, the international law was applied. However, later there were many awards which found that the Treaty of Amity is the applicable *lex specialis*.[344] In some cases, the Tribunal even took the standpoint, that the United Nations General Assembly Resolutions are not directly binding upon states, thus, generally are not evidence of customary law.[345] Furthermore, they set "ambiguous" standards concerning the amount of compensation.[346] The Tribunal also rejected, as guidance for customary international law, the settlement practices of states and investors (or other states) in the case of investment disputes.[347] The reason for this might be that such settlements are usually the result of bargaining and are not based on legal norms and procedures. The Tribunal mostly relied on legal writing and

[334] As the General Declaration formulates: "to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration". *See* Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 January 1981- General Principles B. in IRAN – UNITED STATES CLAIMS TRIBUNAL REPORTS, 1 (Pirrie, S. R. ed.), 3 (1985); *See also* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 13-22 (1998).

[335] *E.g.*, in cases Islamic Republic of Iran v. United States, 5 Iran-U.S. Cl. Trib. Rep. 251,266 (1984-we) and Sedco v. National Iranian Oil Company, 15 Iran-U.S. Cl. Trib. Rep. 23 (1987-II).

[336] *E.g.*, in case Amoco International Financial Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 223 (1987-II).

[337] *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 27 (1998).

[338] *E.g.*, like interpreting the 1930 Hague Convention Concerning certain questions relating to the conflict of nationality laws. *See also* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 27 (1998).

[339] *E.g.*, in case Amoco International Financial Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 223 (1987-II).

[340] *E.g.*, in case Pomeroy v. Islamic Republic of Iran, 2 Iran-U.S. Cl. Trib. Rep. 372, 380 (1983-we).

[341] *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 27 (1998).

[342] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 296 (1994).

[343] *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 64 (1997).

[344] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 297, 301, 306 (1994).

[345] In Sedco case. *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 110-11 (1988).

[346] *See id.*

[347] *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 111 (1988).

judicial and arbitral precedents.[348] On the other hand, Matti Pellonpaa and Fitzmaurice argue that the Treaty of Amity was regarded as the *lex specialis* to be followed by the Tribunal. The Tribunal maybe wanted to avoid the uncertainty of international law and to have a firm legal framework for its decisions, an international instrument that is accepted by all the parties involved in the dispute. At the same time, we might presume that the Tribunal did not want to deprive its decisions of international recognition, and therefore it obviously found that its decisions are in line with international law and standards. For example, concerning expropriation issues, the Tribunal did not conceive Treaty standards different from the standards of customary international law.[349]

The Tribunal was not unanimous concerning the issue of the standard of compensation.[350] Accordingly, concerning the issue of the standard of compensation, awards were either based on international law or on the Treaty of Amity. The former, delivered on the basis of international law, can be further categorized: awards that applied the *standard of appropriate compensation*[351] and those that applied the *full compensation*[352] *standard*.[353]

For example, in the Sola Tiles award[354], the Tribunal applied the *appropriate compensation standard*. In 1982 Sola Tiles, Inc., owner of Simat Ltd. (incorporated in Iran in 1975), filed a claim against the Government of Iran for damages and it asked for compensation of USD 3.2 million (including lost profits and goodwill) that arose from the expropriation of the assets of Simat Ltd.[355] Simat Ltd. was importing and reselling ceramic tiles.[356] The Israeli owner of Simat Ltd. established and registered Sola Tiles, Inc. in California in May 1979 with two American citizens.[357] On May 25, 1979 all the assets of Simat Ltd. were transferred to Sola Tiles, Inc.[358] The claimant alleged that from June 1979 "various steps were taken by the local Provisional Revolutionary Committee

[348] *See id.* at 112.
[349] *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 187, 208 (1998).
[350] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 351 (1994); RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 325-327 (1998).
[351] Mouri is of the opinion that "the term *appropriate* denotes that the standard should strike a balance between the interests of the expropriating and expropriated parties and be able to fairly, justly, equitably or appropriately evaluate the circumstances pertinent to each particular case, which automatically brings into play the points of view of the expropriating States, together with their expectations". *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 364 (1994).
[352] Mouri further states that "the term[s] … *full* [is] usually looked at from the point of view of the price or the value that is required by the owner to replace the property taken." *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 364 (1994).
[353] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 363 (1994).
[354] Sola Tiles, Inc. v. Islamic Republic of Iran, 14 Iran– U.S. Cl. Trib. Rep. 235 (1988).
[355] *Id.* para. 1 and 3.
[356] *Id.* para. 2.
[357] *Id.* para. 4.
[358] *Id.* para. 5.

[of Iran] to interfere with the business of Simat". According to the claimant, the interference eventually amounted to taking of control and expropriation of the company's assets.[359] Iran denied the expropriation and at the same time disputed the valuation submitted by the claimant.[360] The Tribunal accepted the argument of the claimant that its assets were expropriated. Regarding the issue of valuation, the Tribunal was of the opinion that the compensation should be based on the *fair market value* of the company.[361] Regarding the valuation method, the Tribunal opined that valuation should not be based only on the *going concern value*, but other circumstances should also be taken into account. The reason for this was an evidentiary problem, namely, the claimant had difficulties to access the complete documentation related to its property. First, the Tribunal took into consideration the estimation of physical assets and accounts receivable of Simat by business partners who wanted to acquire part of the company shortly before the revolution.[362] Actually, the opinion of these business partners was the starting point for the Tribunal's own assessment.[363] The Tribunal gave estimate of physical assets, accounts receivable and the expropriated cash.[364] The claimant claimed compensation also for the goodwill and lost future profits of the company.[365] However, the Tribunal, when deciding this issue, took into consideration the changed (deteriorated) business environment in Iran - that affected also newly established businesses - and decided not to award lost future profits or goodwill.[366] The Tribunal called the compensation awarded "a global assessment of the compensation due, representing the value of Simat's business".[367] The Tribunal also awarded interest. Although, there are many decisions of the Iran – United States Claims Tribunal in which the Tribunal awarded interest, this award is important because it explicitly tells us what standards and methods were used for the calculation of the awarded interest. The interest was calculated at a rate:

> based approximately on the amount that it would have been able to earn had it had the funds available to invest in a form of commercial investment in common use in its own state. Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source, the Federal Reserve Bulletin.[368]

According to the award, the respondent had to pay to the claimant USD 625,000 plus simple interest at the rate of 10.75 percent per annum from January 1, 1980 up to and including the date on which the escrow agent instructed the depositary bank to effect payment out of the security account, plus costs of USD 20,000.[369] In this case, the

[359] *Id*. para. 3.
[360] *Id*. para. 7.
[361] *Id*. para. 52.
[362] *Id*. para. 54-56.
[363] *Id*. para. 57.
[364] *Id*. para. 60.
[365] *Id*. para. 61.
[366] *Id*. para. 62-64.
[367] *Id*. para. 65.
[368] *Id*. para. 66.
[369] *Id*. para. 68.

Tribunal stated that *appropriate compensation standard* has a widespread use, noting, at the same time, that in its opinion the word *appropriate* in fact means *adequate*.[370]

A good example of an award requiring *full* compensation is the American International Group, Inc.[371] case. In 1979 all insurance companies operating in Iran were nationalized by a special law on nationalization of insurance companies. One of these was the Iran America Insurance Corporation which was organized under the laws of Iran in 1974. American International Life Insurance Company, a company incorporated in Delaware, and three other companies, wholly owned subsidiaries of American International Group, Inc., had 35 percent of shares in Iran America. American International Group, Inc. claimed compensation for the taken investment (USD 39 million). Regarding the issue of valuation, the Tribunal was of the opinion that it should be based on the *fair market value* of the business interest in the company of the claimant on the date of the nationalization. However, the problem that the Tribunal faced when it wanted to determine the *fair market value* was that there was no active market for the shares of Iran America. The Tribunal concluded that, in such case, the best solution is to value the company as a going concern, taking into consideration all the relevant factors, like the opinion of independent appraisers, prior changes in the "general political, social and economic conditions" that might have affect on the business prospects of the company. It took into consideration not only the net book value of the company, but also the goodwill and future prospects and profits (had the company been allowed to continue its business under its former management). Based on all these factors, the Tribunal made an approximation of the value of the company.[372] The Tribunal awarded USD 7.1 million plus 'simple interest' at the annual rate of 8.5 percent from the date of the expropriation up to and including the date on which the escrow agent instructed the depositary bank to effect payment of the award.[373] In an interlocutory award, the Tribunal concluded that, before the Second World War, customary international law required *full* compensation, that is to say, "compensation equivalent to the full value of the property taken". However, the Tribunal, at the same time, admitted that, since then, this standard has been challenged by many countries and legal commentators.[374]

The first award to support the premise that standard of compensation, as established in the Treaty of Amity, has to prevail as *lex specialis* was in the INA Corporation[375] case.[376] Following the Iranian revolution Iran took (with the law on nationalization of insurance companies) the stake of INA Corporation in Sharg insurance

[370] *Id*. para. 44-49.
[371] American International Group, Inc. v. Islamic Republic of Iran (Award No. 93-2-34) IRAN-U.S.C.T.R. 96.
[372] *Id*.
[373] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 371 (1994).
[374] This is supported for example by lump sum agreements concluded, where compensation usually amounted only to the half value or even less of the property taken, and by United Nations Resolutions of the sixties and seventies. *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 104-05 (1988).
[375] INA Corporation v. Islamic Republic of Iran (Award No. 184-161-1) 8 IRAN-U.S.C.T.R. 373.
[376] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 378 (1994).

company registered in Iran. INA claimed USD 285,000 representing what it alleged to be the "going concern value of its shares", together with interest at 17 percent. The Tribunal stated that the claimant is entitled to the *fair market value* of its shares in Sharg.[377] The Tribunal found that the price INA paid in an arm's length transaction for the shares one year before the nationalization represented the *fair market value* of the shares of Sharg as a going concern. The claimant, because of the relatively small amount of the claim, did not claim compensation for future profits (the valuation by experts would have been too costly having in mind the small amount of the claimed compensation), and the Tribunal accepted this. The Tribunal obliged Iran to pay USD 285,000 together with simple interest thereon at 8.5 percent *per annum* from the date of the expropriation up to and including the date of the award.[378] This case also shows that the Tribunal accepted, as one of valuation methods, the *going concern* valuation method.

The Treaty of Amity itself contains the *standard of just compensation*, which is defined by the Treaty as "full equivalent of the property taken". The Tribunal applied a wide property concept, meaning that, when determining the value of the property, the Tribunal took into consideration also the goodwill and the future profitability (or expected profits) of the taken enterprise[379].[380] Hence, the Tribunal applied in many instances the *standard of just compensation*, interpreting it as *full equivalent* of the property taken.[381] Good examples are cases like the case of Thomas Earl Payne[382] and Phelps Dodge Corporation.[383]

In the former case, the claimant, Payne (American citizen) had ownership interest in Irantronics and Berkeh companies. These companies were dealing with electronic equipment and they were incorporated in Iran.[384] In 1980 the management of the company was taken over by a manager appointed by the Minister of Commerce of Iran.[385] The claimant claimed compensation of USD 7.2 million for his ownership interests in Irantronics and Berkeh, plus interest and costs.[386] The Tribunal applied the *standard of just compensation*, meaning compensation for the *full* equivalent of the taken

[377] The Tribunal in this case defined *fair market value* as "the amount which a willing buyer would have paid to a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalisation itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares".
[378] INA Corporation v. Islamic Republic of Iran (Award No. 184-161-1) 8 IRAN-U.S.C.T.R. 373.
[379] *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 58 (1988).
[380] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 378 (1994); However, *see*: art. 4 (2) of the Treaty of Amity, Economic Relations, and Consular Rights, signed on 15 August 1955 and entered into force on 16 June 1957 between Iran and the United States of America. 8 U.S.T. 899, 284, U.N.T.S. No. 4132, at 933.
[381] *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 380-81 (1994).
[382] Payne v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 3 (1986).
[383] Phelps Dodge Corp. v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 121 (1986).
[384] Payne v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 3 (1986), para. 3-5.
[385] *Id*. para. 8.
[386] *Id*. para. 1 and 2.

property, based on its *fair market value*.[387] The Tribunal established that, at the time of the taking, the two companies were going concerns. Thus, it valued their shares on the *fair market value* basis. However, it took into consideration the effects of the revolution prior to the taking of the companies on the value of their shares, debts and tax liabilities.[388] The Tribunal awarded USD 900,000 plus simple interest at the rate of 11.25 percent *per annum*, calculated from the date of expropriation up to and including the date on which the escrow agent instructed the depositary bank to effect the payment out of the security account.[389]

In the latter case, the claimant, Phelps Dodge Corporation, a company from New York, became one of the founders of an Iranian company, SICAB. SICAB was established to manufacture wire and cable products in Iran.[390] Following the revolution, SICAB was expropriated, and Phelps Dodge claimed damages (USD 7.5 million) plus interest and costs.[391] When determining the compensation, the Tribunal has accepted the standard of *just* compensation which should be counted on the basis of *full* equivalent of the taken property.[392] However, based on the factual evidence presented to the Tribunal by the parties (SICAB without the support of the service companies like Phelps Dodge would have had no business prospects), the Tribunal refused to value the company as going concern (that is to say, it refused to value goodwill and future profits). It decided that the claimant, Phelps Dodge, is entitled to compensation that equals its investment and not more.[393] The Tribunal awarded USD 2,437,860 and "simple interest" at the rate of 11.25 percent per annum to the claimant, from the date of expropriation up to and including the date on which the escrow agent instructed the depositary bank to effect payment out of the security account.[394]

In both of the previous cases, the Tribunal scrutinized profoundly all the facts of the cases to determine the *just* compensation, that is to say, the *full* equivalent of the taken property based on its *fair market value*. In our opinion, it follows that there cannot be a uniform formula for determining *just* compensation. Such compensation is determined by taking into account all the circumstances of single cases.

Examining the latest award of the Tribunal in the Frederica Lincoln Riahi v. the Government of the Islamic Republic of Iran case, we can say that, in this award, the Tribunal invoked all the above mentioned milestone cases before reaching the final award.[395] In this case Frederica Lincoln Riahi filed a claim in 1982 against the

[387] *Id.* para. 29-30. The Tribunal defined *fair market value* as "amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares".
[388] *Id*. para. 31.
[389] *Id.* para. 42.
[390] Phelps Dodge Corp. v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 121 (1986), para. 1-4.
[391] *Id.* para. 29.
[392] *Id.* para. 28-29.
[393] *Id.* para. 30-31.
[394] *Id.* para. 34.
[395] Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, Iran-U.S. Cl. Trib. Rep. cite: IRAN FINAL AWARD 600-485-1, signed February 27, 2003, filed February 27, 2003.

Government of Iran in which she sought compensation for equity interests in a number of companies expropriated in 1980 by Iran.[396] Concerning the time when the claim is considered to have arisen, the Tribunal held that in its previous decisions it had been established that an expropriation claim is considered to arise on the date of the taking.[397] The claimant based some of its claims on *de facto* taking by the Government, that is to say, on creeping expropriation of Riahi's property.[398] Therefore the Tribunal has also argued that:

> In situations where the alleged expropriation is carried out through a series of measures interfering with the enjoyment of the claimant's property rights, the cause of action is deemed to have arisen on the date when the interference, attributable to the state, ripens into an irreversible deprivation of those rights, rather than on the date when those measures began. The point of time at which interference ripens into a taking depends on the circumstances of each case and does not require the transfer of legal title.[399]

Regarding the standard of compensation, in the Frederica Lincoln Riahi case, the Tribunal referred to previous decisions in which it had stated that, according to the Treaty of Amity and customary international law, taking requires compensation equal to the *full* equivalent of the value of the interests in the property taken.[400] Concerning valuation standard, in this case, the Tribunal invoked previous decisions, such as establishing that the valuation of the expropriated property should be made on the basis of the *fair market value*. This was defined in the INA case as:

> [T]he amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalisation itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares.[401]

The Tribunal stated, on the other hand, that "prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered".[402] Here, the Tribunal considered the effects of the Islamic Revolution, and acknowledged the possible influence of the turbulence on the economy, that is to say, on share prices of the company.[403] Since the shares were not traded freely on an active and free market, the Tribunal used different methods to determine the price that a reasonable buyer would be willing to pay for the company's shares in a free-market transaction.[404] In the opinion of the Tribunal, the company was a profitable, ongoing business at the time of the expropriation, and therefore it decided to value it as a going concern.[405] At this point, the Tribunal referred to the Amoco case, where it was held that "a going concern value

[396] *Id.* para. 1 and 2.
[397] *Id.* para. 42.
[398] *Id.* para. 343.
[399] *Id.* para. 344.
[400] *Id.* para. 394.
[401] *Id.*
[402] *Id.*
[403] *Id.* para. 393-394.
[404] *Id.* para. 447.
[405] *Id.* para. 448.

encompasses not only the physical and financial assets of the undertaking", but, also the "intangible valuables which contribute to its earning power", like: contractual rights, goodwill and commercial prospects.[406] The Tribunal also noted that it is a settled rule of international law that compensation for speculative or uncertain damage cannot be awarded.[407]

Based on our research and some of the most important cases of the Tribunal discussed above, we can support the opinion of scholars like Pellonpaa, Fritzmaurice and Bergmann who concluded, on the bases of the case law, that the general tendency in the decisions of the Iran Claims Tribunal is to award compensation not only for the lost material property, but, in many cases, also for the lost future profits.[408] In addition, Pellonpaa and Fritzmaurice state that the standard of *full* compensation is still the rule of customary international law.[409]

Regarding valuation methods[410], as we can see from the cases examined, the Tribunal applied various methods. One of the most widely used methods was the valuation based on *fair market value* on the date of taking in cases when the foreign investors' equity interest in an enterprise was taken.[411] *Fair market value* was defined as "the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximise his financial gain, and neither was under duress or threat".[412] Another important valuation method in the practice of the Tribunal's work was the valuation as *going concern*.[413] This was defined as the full value of the property, business or rights in question as an income-producing asset. It also includes lost future profits and goodwill as we could see above.[414] However, in some cases, other methods were also employed, such as *discounted cash flow*[415] method of

[406] *Id*. para. 448-454.
[407] *Id*. para. 450.
[408] *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 68 (1997); *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 123-26 (1988).
[409] *See id.*
[410] Valuation method is the technique of determining the value of the taken property.
[411] *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 131 (1988).
[412] *See id.*
[413] *See id.* at 134. *Going concern* is defined by Encarta World English Dictionary as "a business that is operating successfully and is likely to continue to do so, especially when considered as an asset to which a value can be assigned". (visited on Nov. 22, 2013) <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=561547195>.
Investorswords dictionary defines it as: "The idea that a company will continue to operate indefinitely, and will not go out of business and liquidate its assets. For this to happen, the company must be able to generate and/or raise enough resources to stay operational.". (visited on Nov. 22, 2013) <http://www.investorwords.com/cgi-bin/getword.cgi?2189>.
[414] *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 134 (1988).
[415] According to Investopedia Dictionary *discounted cash flow* is a valuation method used to estimate the attractiveness of an investment opportunity. It uses future free cash flow projections and discounts them to arrive at a present value, which is used to evaluate the potential for investment. Most often discounted by the weighted average cost of capital. If the value arrived at through discounted cash flow analysis is lower

valuation, methods based on *liquidation value*[416], *net book value*[417] and *replacement value*[418].[419]

As to the form of payment, *effectiveness* of payment was insured for claimants by the practice of the Tribunal. The Algerian Declaration established so-called 'security accounts' from which payments can be made to successful claimants in United States dollars.[420] Concerning the time of payment, the practice of the Tribunal suggests that *prompt* payment is not a condition of the legality of the taking, however, in general, it was of the opinion that the compensation should be paid at the time of the taking or it should be accompanied with interest from the time of the taking.[421]

We are of the opinion that the Tribunal tried to compensate the investors as much as possible for their taken property, regardless of what term was used for the standard of compensation.[422] Comparing the standard of compensation in the case law of the Iran – United States Claims Tribunal to the standard used in other international cases examined in this work, it can be said that the Tribunal offers a high standard of compensation, protecting investors who lost their property in Iran. At the same time, it should be noted that, many times, the Tribunal based its valuation on approximation of the value. The reason for this might be a tendency in the decisions of the Tribunal, according to which it tries to take into consideration all the circumstances that had effect on the taking of the property.

ICSID case law. There are many ICSID arbitration cases related to expropriation of foreign investments. Because of lack of space, we examine only the most important of these cases, where the issue of compensation was raised. One of these is the Compania del Desasarrollo v. the Republic of Costa Rica, where the claimant, a company incorporated in the Republic of Costa Rica with majority ownership of United States

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then the current cost of the investment, the opportunity may be a good one. Investopedia Dictionary (visited on Oct. 5, 2013) <http://www.investopedia.com/terms/d/dcf.asp>.

[416] According to Investorwords Dictionary, *liquidation value* is the estimated amount of money that an asset or company could quickly be sold for, such as if it were to go out of business. If the liquidation value per share for a company is less than the current share price, then it usually means that the company should go out of business (or that the market is misvaluing the stock), although this is uncommon. Investorwords Dictionary (visited on Oct. 5, 2013) <http://www.investorwords.com/2836/liquidation_value.html>.

[417] According to Investorwords Dictionary the *net value* of an asset equals to its original cost (its book value) minus depreciation and amortization. Investorwords Dictionary (visited on Oct. 5, 2013) <http://www.investorwords.com/2836/net_value.html>.

[418] According to Investorwords Dictionary replacement value is the value of an asset as determined by the estimated cost of replacing it. Investorwords Dictionary (visited on Oct. 5, 2013) <http://www.investorwords.com/4184/replacement_value.html>.

[419] *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 139, 149, 160, 163 (1988).

[420] Art. 6 and 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 January 1981 in IRAN – UNITED STATES CLAIMS TRIBUNAL REPORTS, 1 (Pirrie, S. R. ed.), 5-6 (1985).

[421] *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 131 (1988).

[422] Whenever it was possible, it valued the companies taken as going concern taking into account the goodwill and the lost future profits. It based its valuation on the *fair market value* of the taken property.

citizens, initiated arbitration in 1995 against the Republic of Costa Rica, related to an expropriation dispute.[423] The dispute was about the amount of the compensation for the expropriated property of the company. Costa Rica in 1978 expropriated a coastline property, bought by the claimant earlier for developing tourist resort, invoking environmental reasons. It offered as compensation for the expropriation USD 1.9 million, however the company did not accept it.[424] This was followed by long proceedings in front of Costa Rican Courts without any success.[425] Costa Rica was not willing to refer the matter to international arbitration until it was forced by the United States to do so (the United States threatened with non-approval of international financial aids to the country).[426] Finally, the issue was brought to ICSID arbitration. The claimant estimated that USD 41.2 million is the *fair* and *full* (based on *fair market value*) compensation for the property,[427] while the respondent's estimation of current *fair market value* was USD 2.9 million.[428] The respondent also took into consideration the 'current' environmental regulations (entered into force after the expropriation) that restricted the use of the property for commercial purposes.[429] The claimant contested that the arbitral Tribunal take into account, when estimating the value of the property, any regulation that entered into force after the expropriation decree was issued.[430] Thus, the central issue of the arbitration was to decide the amount of compensation to be paid to Compania del Desarrollo.[431] The arbitral Tribunal agreed with the parties that *fair market value* on the date of expropriation of the property should be paid as compensation.[432] Thus, the Tribunal was of the opinion that "full compensation for the fair market value of the property, *i.e.,* what a willing buyer would pay to a willing seller" has to be paid.[433] However, it stated that the environmental character of the expropriation does not affect the compensation.[434] Even so, the Tribunal had to establish the exact date of the expropriation first. Regarding this issue, the Tribunal examined different definitions of *de facto* expropriation,[435] since it was of the opinion that a property had been expropriated when the effect of the measures taken by the state "has been to deprive the owner of title, possession or access to the benefit and economic use of his property".[436] Finally, the Tribunal concluded that, notwithstanding that the claimant remained in the possession of the property, the expropriation occurred on the date when the expropriating governmental decree was issued.[437] Therefore, the value of the property on this date was taken into

[423] Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, para. 1. (ICSID Case No. ARB/96/1). The award can be found at: ICSID Info page, ICSID Cases (visited on Jan. 24, 2013 <http://www.worldbank.org/icsid/cases/santaelena_award.pdf>. *See also* CARLOS JIMÉNEZ PIERNAS (ED.), THE LEGAL PRACTICE IN INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW, 221 (2007).
[424] Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, para. 3, 15-17.
[425] *Id.* para. 19-26.
[426] *Id.* para. 22-26.
[427] *Id.* para. 29.
[428] *Id.* para. 35.
[429] *Id.*
[430] *Id.* para. 37.
[431] *Id.* para. 54.
[432] *Id.* para. 70.
[433] *Id.* para. 73.
[434] *Id.* para. 71.
[435] *See supra* the notion of *creeping expropriation.*
[436] *Id.* para. 77.
[437] May 5, 1978. *Id.* para. 80.

consideration.[438] As there were only two appraisals available to the Tribunal (one from each party from 1978), it made an approximation based on these valuations, and came to the value of USD 4.1 million.[439] This was corrected with the interest counted from the time of the expropriation. Moreover, the Tribunal did not want to use *full compound interest*[440], because the claimant remained in possession. At the same time, as the claimant could use neither the property for development purposes, nor the amount of compensation for a long time, the Tribunal did not want to award simple interest either.[441] Consequently, the Tribunal awarded compound interest "adjusted by taking into account all the relevant factors",[442] and thus, the final amount was USD 16 million.[443]

In another case, Tecmed, a company with registered seat in Spain, claimed compensation from the Mexican Government for expropriation.[444] The claimant's claim, that is to say, the estimated market value of the investment was USD 52 million, based on *discounted cash flow* calculation method.[445] The respondent objected this method, because in its opinion the investment operated for too short period of time as going business, and it requested the calculation of damages based on "the investment made, upon which the investment's market value would be determined".[446] The Tribunal also took into consideration the money paid for the investment at the tender, USD 4 million.[447] After the examination of the facts, the Tribunal also concluded that, because of the short period of operation of the investment and the lack of objective data, the discounted cash flow calculation method should be disregarded.[448] The agreement between the parties, on which the arbitration was based, stated in its article 5.2. that in the case of expropriation:

> [C]ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the time when the expropriation took place, was decided, announced or made known to the public […] valuation criteria shall be determined

[438] *Id.* para. 83.
[439] *Id.* para. 90.
[440] Merriam-Webster Online Dictionary defines the term as "interest computed on the sum of an original principal and accrued interest". (visited on Mar. 12, 2013) <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=compound+interest>; Money Glossary defines it as: "interest rate in which the interest is calculated not only on the initial principal but also the accumulated interest of prior periods." (visited on Mar. 12, 2013) <http://www.moneyglossary.com/?w=Compound+Interest>.
[441] Compania del Desarrollo para. 105.
[442] *Id.* para. 106.
[443] *Id.* para. 107.
[444] Award in Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2). ICSID web page (visited on March 16, 2013) <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>, para. 183.
[445] *Id.* under para. 185. Home Glossary defines 'discounted cash flow' as: "A method to estimate the value of a real estate investment, which emphasizes after-tax cash flows and the return on the invested dollars discounted over time to reflect a discounted yield. The value of the real estate investment is the present worth of the future after-tax cash flows from the investment, discounted at the investor's desired rate of return.". (visited on Jan. 25, 2013) < http://www.yourwebassistant.net/glossary/d7.htm#discounted_cash_flow >.
[446] *See id.*; However, the respondent did not miss to challenge the result of the discounted cash flow method with the estimation of its own expert witnesses between USD 1,8 and 2,1 million. *See id.*
[447] *Id.* para. 186.
[448] *Id.*

> pursuant to the laws in force applicable in the territory of the Contracting Party receiving the investment.[449]

Therefore, the Tribunal examined the Mexican law on expropriation that stated that the compensation shall indemnify for the "commercial value of the expropriated property, which in the case of real property shall not be less than the tax value".[450] The Tribunal interpreted this requirement as compensation based on the *market value*.[451] When determining the value of the expropriated investment, the starting point for the Tribunal was the price for which the investment was acquired at the tender.[452] Besides, it also considered additional investments made by the claimant,[453] and net income of the investment for one additional year.[454] This latter, basically covered managerial and organizational skills and goodwill.[455] Finally, the Tribunal awarded USD 5.5 million.[456] The award required *effective* and *full* payment.[457] It also prescribed compound interest (at annual rate of 6 percent) until the payment from the date of the expropriation (this is actually the date on which the license to operate should have been prolonged)[458].[459]

These cases confirmed that the *fair market value* standard is used and applied in practice. On the basis of these cases, we can also conclude that the principle *of restitutio in integrum*, in the case of taking foreign property, is accepted by international tribunals like the ICSID. In our opinion, ICSID offers an effective way to the investors to get fair (here we use the term subjectively) compensation based on *fair market value* of the property taken.

NAFTA case law. The North American Free Trade Agreement does not say explicitly that *prompt*, *adequate* and *effective* compensation is required when foreign property is taken, however, with its provisions, it covers indirectly this standard. According to the Agreement, "compensation shall be paid without delay and be fully realizable".[460] The Agreement also guarantees free transferability of the compensation, immediately on payment.[461] It contains an explicit formula - *fair market value* - for determining compensation:

> Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not

[449] *Id.* para. 187.
[450] *Id.*
[451] *Id.* 188.
[452] *Id.* para. 191; Neither the respondent nor the claimant challenged this method for determining the *fair market value*.
[453] However, it is a procedural matter. It should be mentioned that the court recognised as additional investment only investments that were supported by documentary evidence. *See id.* para. 195.
[454] *Id.* para. 194.
[455] *Id.*
[456] *Id.* para. 201.
[457] *Id.*
[458] *Id.* para. 39.
[459] *Id.* 201.
[460] Art. 1110 (3) of the North American Free Trade Agreement, NAFTA Secretariat Info page (visited on Apr. 5, 2013) <http://www.nafta-sec-alena.org/english/index.htm>.
[461] *Id.* art. 1110 (6).

> reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.[462]

The Agreement also makes precise provisions on the interest rates related to late payment, that is to say, for the period between the date of the expropriation and the payment date (because of the requirement of *prompt* payment). It provides that if the payment of compensation is done in G7[463] currency, the compensation has to bear a *commercially reasonable rate* from the date of the expropriation until the date of the actual payment.[464] If the payment is done in other than G7 currency, the Agreement provides the following, regarding the issue of the interest to be paid:

> […] the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.[465]

For example, in the Metalclad case the Tribunal stated that on the basis of its provisions,[466] NAFTA clearly supports the inclusion of interest in an award.[467] In this case, the Tribunal proceeded from the assumption that the investor completely lost its investment.[468] Both parties accepted to calculate the compensation on the basis of the *fair market value* standard.[469] However, they offered different methods for the calculation of this value. Metalclad suggested two alternative methods for the calculation of the compensation. One was the discounted cash flow analysis of future profits to establish the *fair market value*.[470] By this approach, Metalclad came up with an amount of USD 90 million.[471] The other one was the valuation of the actual investment made by the company.[472] Under this, it reached approximately USD 20 to 25 million. Mexico objected to the discounted cash flow method, claiming that it was not applicable because the expropriated company was not a going concern.[473] However, it offered a method of

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[462] *Id.* art. 1110 (2).
[463] G7 is abbreviation for "Group of Seven". It is the group of seven most industrialized countries of the world: Canada, France, Germany, Italy, Japan, the United Kingdom and the United States. Source: Encarta World English Dictionary (visited on May 20, 2013) <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=561533263>.
[464] *Id.* art. 1110 (4) (5).
[465] *Id.* art. 1110 (4) (5).
[466] *Id.* art. 1135 (1).
[467] Metalclad case para. 128.
[468] It should be noted that damages were sought under NAFTA art. 1105, however the court stated that counting damages (compensation) under the provisions of art. 1110 would be the same. *Id.* para. 113.
[469] *Id.* para. 114-116.
[470] *Id.* para. 114.
[471] *Id.*
[472] *Id.*
[473] *Id.* para. 116.

market capitalization,[474] that would result between USD 13 to 15 million.[475] At the same time, Mexico agreed with the second method proposed by Metalclad, however, referring to it as "direct investment value approach", and reaching only between USD 3 to 4 million.[476] The Tribunal rejected the first method suggested by the claimant. The investment was never operative, and therefore the Tribunal found that the application of the discounted cash flow analysis would not be appropriate. In the opinion of the Tribunal, for the application of this method, it is needed that the company operates for a sufficiently long period that gives appropriate basis for determining the estimated future profits, subject to discounted cash flow analysis.[477] In such case, the value of the goodwill of the company also has to be taken into consideration.[478] However, in the opinion of the Tribunal, this was not the case with Metalclad investment.[479] Thus, the Tribunal used the second method offered by the parties, that is to say, the *fair market value* method. When considering the issue of lost profits, it was of the opinion that they can be awarded, however the claimant had the burden of proof, that is to say, it had to provide a realistic estimate of lost profits.[480] The Tribunal also emphasized that, when making the award, it accepted the principles of the Chorzow Factory case, that is to say, that the award has to reestablish the *status quo ante*.[481] Regarding the issue of interest, the Tribunal was of the opinion that interest should be part of the compensation and it should be counted from the date when the state became "internationally responsible" for the taking.[482] In this particular case, from the date on which Metalclad's application for construction permit was "wrongly denied".[483] The court determined a six percent per annum interest rate.[484] Thus, the Tribunal finally awarded USD 16.6 million plus interests to Metalclad.[485]

Another interesting ICSID case is the S. D. Mayers case, in which, in contrast to the previous case, the Tribunal did not find that the regulation (*i.e.*, the export ban) amounted to expropriation. In addition, the Tribunal refused to apply to breaches of article 1102 ("national treatment") and article1105 ("minimum standard of treatment") the principles laid down in article 1110 of NAFTA concerning expropriation.[486] In the opinion of the Tribunal, standard of article 1110 of NAFTA, like that of *fair market value*, was "expressly attached […] to expropriations" by the drafters of NAFTA.[487]

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[474] Money Glossary defines it as: "The total dollar value of all outstanding shares. Computed as shares times current market price.". (visited on Jan. 8, 2013) <http://www.moneyglossary.com/?w=Market+capitalization>; *See also* Bloomberg Financial Glossary (visited on Jan. 8, 2013) <http://www.bloomberg.com/analysis/glossary/bfglosm.htm#market_capitalization>.
[475] Metalclad case para. 116.
[476] *Id.* para. 117.
[477] *Id.* para. 119-121.
[478] *Id.* para. 120.
[479] *Id.* para. 121.
[480] *Id.* para. 122.
[481] *Id.*
[482] *Id.* para. 128.
[483] *Id.*
[484] *Id.*
[485] *Id.* para. 131.
[486] S. D. Myers partial award para. 305, 306.
[487] *Id.* para. 307.

Furthermore, it was of the opinion, that in cases that do not involve expropriation, drafters intentionally left it open to tribunals to determine compensation standards.[488] In such cases, tribunals have to take into consideration "the specific circumstances of the case," principles of international law and the provisions of NAFTA.[489] The Tribunal did not exclude theoretically the applicability of the *fair market value* standard; however, it was of the opinion that it was not applicable for this very case.[490] It stated that the suitable international law standard for this case could be found in the Chorzow Factory case.[491] That is to say, "the compensation should undo the material harm inflicted by a breach of an international obligation".[492] In his concurrent opinion, one of the members of the panel, Bryan P. Schwartz brings on interesting arguments. He claims that "fair market value might, in some cases, be less than fair value. An investment might be worth more to the investor for various reasons, including synergies within its overall operations, than it is to third parties." He also argues that the finding that the expropriation has happened, on the other hand, should not reduce the amount of compensation that is ought to be awarded. He further states, that the cumulative principle applies within Chapter 11 of NAFTA. When a government denies to investors the protection assured by specific provisions of Chapter 11, compensation may be required above and beyond that which would apply in the ordinary case of a lawful expropriation. However, at the same time he says that:

> […] even if we had found that the export ban did amount to an expropriation under the terms of article 1110, that finding would not necessarily have provided a basis for awarding any compensation above and beyond that already recoverable under the terms of article 1102 [National Treatment].[493]

In connection with this case, we have noticed that the Tribunal placed great emphasis on factual proof of the claims when determining the amount of compensation (supporting documentation, *e.g.,* tax filing, etc.).[494]

The NAFTA case law also supports the assumption that the valuation standard of *fair market value* is the most accepted in international law, and also that the principle of *in integrum restitutio* forms the basis of awards in expropriation cases where the main issue is compensation. This proves the constantly rising standard of investment protection in the world, that might be the result of the growing importance of private property protection or simply the fact that international competition for investments got tighter with the globalization, and therefore, investment recipient countries try to offer the most in every field.

Conclusion. Examining the development of compensation theories and international case law that developed in line with it, we came to the conclusion that there

[488] *Id.* para. 309.
[489] *Id.*
[490] *Id.*
[491] *Id.* para. 311.
[492] *Id.* para. 315.
[493] Concurrent opinion of Bryan P. Schwartz. Source: Lexis database, 1 Asper Rev. Intl Busl and Trade Law at 337, 406, 407.
[494] Metalclad case, para. 124.

is neither uniform theory nor uniform practice in the field of compensation standards related to taking of foreign investment. Besides, it is not easy to establish whether the taking was lawful or not, that is to say, whether the conditions discussed in the previous chapters were fulfilled (the taking was non-discriminatory, there was an existing public purpose and there was appropriate compensation). On the basis of the studied cases we can say that, even if the first two conditions are fulfilled, but there has been no adequate compensation, the taking is considered many times unlawful, however, not always. It is also the practice of tribunals to order *in integrum restitutio*. There are a number of cases that refer to the standard of the Chorzow Factory case, in which it was stated that the reparation must reestablish the *status quo ante*. This means usually *full* compensation, based on *fair market value*, which is, in our opinion, the most objective valuation standard. In some cases, compensation is awarded for lost future profits as well, and this solution can be equitable, however, it is difficult to calculate fairly the lost profits. All in all, the examination of the case law shows that the *prompt*, *adequate* and *effective* standard prevails in practice. At the same time, we may not forget that many international conventions contain provisions that formally do not comply with the above-said, and that many countries of the world formally do not accept it.

Thus, the majority of disputes is about the standard of compensation in the case of taking of foreign property. Therefore, it would be helpful to work out a more detailed and precise system of compensation on international level. We are convinced that making clear conditions for compensation can be beneficial for all the parties.

Chapter V

Conclusion

In the first chapter of this book the most important terms related to taking of foreign property were scrutinized. It was observed that notions like *taking, expropriation* and *nationalization* are often used indiscriminately to designate the same concept. In the case of *expropriation* and *nationalization*, private property is taken by the state on permanent basis. We noted that one of the differences between these two terms is that in the case of *nationalization* compensation is many times not assumed. However, there is no evidence that it is true in general. In the case of *expropriation* the expropriating state usually provides some compensation. Other important differences are that *nationalization* is usually related to some socio-economic changes in the given society and there is a specific underlying legislation, while in the case of *expropriation* general legislation constitutes the basis of the taking. Following this, the meaning of *intervention* was examined. It was concluded that *intervention* is an action of the government, whereby it assumes control of a business (or any other foreign private property) with the intention of operating it for a limited period of time, achieving a particular goal. It is important that the property gets back to the original owner after a reasonable period of time. The owner of such property is entitled to compensation for the time he was not able to use his property. *Confiscation* was defined as taking of foreign property with no compensation. We also concluded that distinction can be made between *de jure* and *de facto* taking. The host state might take measures that in fact (*de facto*) dispose the owner of his property, but legally do not affect the ownership – this is called *creeping*, *indirect* or *de facto taking*. We found that, in practice, the biggest problem is drawing the line between *taking* and *creeping expropriation*. *Creeping expropriation* basically has the same effect on the owner of the property as taking would have: it disables the owner to exercise all his rights related to his property. Generally, at the end of the chapter, it was established that capital exporting states try to define the term *taking* (*expropriation, nationalization*) as general as possible, while capital importing states try to give as narrow interpretation to the term as possible.

The next two chapters dealt with two requirements of lawful taking of property: the existence of public interest (or purpose) and the requirement of non-discrimination when taking foreign property. It was concluded that sovereign states have the right to take foreign property if it is taken for public purpose, in a non-discriminatory manner, accompanied by appropriate compensation.[495] This is supported by international documents, as well as by international court and arbitral decisions. We established that these requirements rarely constitute basis for dispute. Thus, as we have seen *supra*, there are still few cases related to these issues in international case law. These cases supported our premise that these principles are requirements for lawful taking of foreign property.

[495] And of course, there is due process of law guaranteed for the investor.

In the fourth chapter we scrutinized the most challenging issue, the requirement of compensation in the case of taking foreign property. The standard of compensation and the form and time of payment of compensation were examined. We found that there are many disputes regarding the standard of compensation, and that the present situation in international law, regarding this issue, is not really clarified. It can be said that there are many different standards and opinions concerning this question. To get a clearer picture on the issue, the development of compensation theories was presented through the most important milestone cases. First, the Norwegian Shipowners' Claims case and the *just* compensation standard were scrutinized. Following this, we looked at the Chorzow Factory case and the standard of *fair* or *full* compensation. Based on these cases, it was concluded that the *just* compensation standard does not differ much from the *fair* or *full* compensation standard. In both cases, compensation was based on *fair market value* of the taken property and both required basically *in integrum restitutio* (if not possible, monetary compensation) including lost profits. The next step was to examine the Hull doctrine. During our research we came to the conclusion that the majority of capital exporting countries in fact support the requirements laid down in the Hull doctrine (expropriation should be *prompt*, *adequate* and *effective*), even if they usually use the expression of *just* compensation, or even accept *appropriate* compensation, interpreting it as *prompt*, *adequate* and *effective*, as the United States of America does. This interpretation is also supported by international case law. All in all, we found that capital importing states in general support the standard of *appropriate* compensation, however with different content. Related to this issue the so-called Calvo Doctrine was examined, which declares that the host country has the right to decide on the time, amount, and form of compensation, if there is no agreement to the contrary. When examining related international jurisprudence, we found that it is very colorful concerning this issue: there are mostly western authors who are of the opinion that the Hull Doctrine is too strict, and also, on other hand, there are some who claim that the Calvo Doctrine should be understood in a more flexible way. Some authors try to solve the problem with the principle of unjust enrichment ("what has the taker gained"), some would differentiate between industrialized and not-industrialized states (the latter should pay lower compensation in the case of takings), and there are some authors who would take into consideration how much did the foreign investor contributed to the development of the host state in the past. The debate during the last fifty years was mostly on the question what terminology should be used: *just*, *fair*, *prompt*, *adequate*, *effective*, *appropriate* or *full*. Concerning this, we fully agree with Professor Schachter who noticed very correctly that: "It is the definition of *appropriate* that matters, not the term itself, which might well be replaced by *fair*, *just* or a similar expression.".[496] We have also established that, in practice, developing countries, even if they hold on to classical principles of sovereignty over resources, accept the Hull Doctrine in bilateral investment treaties. In our opinion the reason for this is very simple: developing countries understand that they need foreign capital for economic development and if they are not fair when expropriating foreign

[496] *See* Oscar Schachter in Lillich, Richard B. ed.: The Valuation of Nationalized Property in International Law IV. Charlottesville: The University Press of Virginia, 1987 at vii.

investors` property, there will be no willing investor in the future who would invest in these countries.[497]

Following this historical development overview, we examined current trends in international jurisprudence regarding the issue of compensation in the case of taking foreign property. First, the case law of the Iran – United States Claims Tribunal was scrutinized. The most important finding was that the Tribunal placed the emphasis on the issue of *fair market value* of the taken property and not on the compensation standard. Thus, the Tribunal mentioned in several awards compensation standards like *just* and *full*, using the *fair market value* of the taken property at the same time. Besides the practice of the Iran – United States Claims Tribunal, some multilateral instruments and the related case law were investigated. Thus, we came to the conclusion that, regarding these multilateral instruments, the standard of compensation is *prompt*, *adequate* and *effective*.

All in all, in our opinion, investors require high standards of protection, meaning that, in the case of taking of their property, they wish to have full compensation based on the *fair market value*, as it was emphasized in most cases. Besides, it is also accepted that such compensation has to be paid *promptly* and has to be *effective*.

However, there is certain inconsistency in the practice and the position of developing countries. On the one hand, on international *fora*, these countries stand up for the principle that the issue of compensation and other issues related to taking, being under dispute, should be solely decided by the courts of the expropriating country, and that they should have right (limited only by local jurisdiction) to take foreign property, which is actually based on the Calvo Doctrine. On the other hand, they willingly sign bilateral investment treaties, in which these countries accept international legal standards as exemplified in the Hull doctrine which basically contradicts to the above said international claims.[498] The reason for this contradiction might be the huge competition for luring in foreign capital and, at the same time, the need to correspond to domestic political expectations related to the protection of national interests. However, Sornarajah explains this phenomenon, or better to say contradiction, with the following: there is uncertain protection of foreign investment in international law, so the above-mentioned countries entered to these treaties to clarify the rules of the game for the case of expropriation.[499] There is another argument that is not only supported by Sornarajah, but

[497] *E.g.*, the arbitral Tribunal (Paul Reuter, President) in Aminoil case found the fair treatment of investors correct both morally and economically: "But as regards States which welcome foreign investment, and which even engage in it themselves, it could be expected that their attitude towards compensation should not be such as to render foreign investment useless, economically. … [I]n the case of the present dispute there is no room for rules of compensation that would make nonsense of foreign investment." The Government of the State of Kuwait v. American Independent Oil Company at 1033 in International Legal Materials 1982, ed. Marilou M. Righini, American Society of International Law, 1983.

[498] *See* Kishoiyian, Bernard: The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law. Northwestern Journal of International Law and Business. Vol. 14, No. 1, Fall 1993. At 30; Guzman, Andrew T.: Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, Virginia Journal of International Law, Summer 1998-38, 642.

[499] *See* Guzman, Andrew T.: Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, Virginia Journal of International Law, Summer 1998-38, 668. [Primary source not available.]

also by Dolzer, namely that developing countries accept the *full* compensation principle, or basically the Hull doctrine, in bilateral investment treaties, because of special benefits they enjoy under such treaties.[500] We would not agree with this, as under these treaties, the host country usually, does not enjoy many benefits. The reason must be that host countries are forced to accept stricter conditions; otherwise investors would not bring their capital. At the same time, governments are frequently exposed to domestic pressure that requires stronger protection of domestic interests.

On the whole, it can be said that proper and adequate legal protection of foreign investors, especially in the case of taking of foreign investment, has positive impact on foreign direct investment inflows. At the same time, it has been concluded that sovereign states have the right to take foreign property, respecting certain principles of international law: the taking has to serve public purpose, has to be non-discriminatory and accompanied by appropriate compensation. Of course, all this should be done with the guarantee of due process. It is also a fact that investment protection standards are changing very fast in our globalizing world, and, with this process, the standard of foreign investment protection is constantly getting higher and higher. In a well functioning economy, guaranteeing full protection of foreign investment cannot be a burden for the state. Thus, generally it should not be a problem in case of taking to offer correct protection to any foreign investor who enters the country.

[500] *See id*.

Appendix I

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

Norwegian shipowners' claims (Norway v. USA)
13 October 1922
(excerpts)

NORWEGIAN SHIPOWNERS' CLAIMS
PARTIES: Norway versus U.S.A.

[…]

AWARD OF THE TRIBUNAL. Award of the tribunal of arbitration between the United States of America and the Kingdom of Norway under the special agreement of June 30, 1921.
[…]
It is common ground between the Parties to this arbitration that the fifteen claims againsL the United States are presented by the Government of the Kingdom of Norway, which Government, and not the individual claimants, "is the sole claimant before this Tribunal". L ' The claims arise out of certain actions of the United States of America in relation to ships which were building in the United States for Norwegian subjects at a time, during the recent Great War, when the demand for ships was enormous, owing to the needs of the armies and to the losses of mercantile ships. For some time before the United States declared war, the shortage of shipping was serious both in European countries and in the United States. In these circumstances, Norwegian subjects, amongst others, directed their attention to the possibilities of shipbuilding in the United States. From July 1915 onwards, various contracts were placed by Norwegian subjects with shipyards in the United States. Meanwhile, from the summer of 1916 onwards, the United States Government took a series of steps for the protection of its interests and these steps made possible the later "mobilisation for war purposes of the commercial and industrial resources of the United States". 2 Into most of these measures it is not necessary Lo enter in any detail, as they do not directly affect the merits of the claims.
The United States declared war against Germany on April 6th, 1917. Already by the United States Shipping Act of September 1916 the United States Shipping Board had been established "for the purpose of encouraging, developing and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries". 1 This Board was empowered by section 5 of the Act :
to have constructed and equipped in American shipyards and Navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels. Provided: That neither the board nor any corporation formed under section eleven in which the United States is then a stockholder shall purchase, lease, or charter

any vessel (a) Which is then engaged in the foreign or domestic commerce of the United States, unless it is about to be withdrawn from such commerce without any intention on the part of the owner to return it thereto within a reasonable time; (b) Which is under the registry or flag of a foreign country which is then engaged in war; (c) Which is not adapted, or can not by reasonable alterations and repairs be adapted to the purpose specified in this section ; (d) Which, upon expert examination made under the direction of the board, a written report of such examination being filed as a public record, is not without alteration or repair found to be at least seventy-five per centum as efficient as at the time it was originally put in commission as a seaworthy vessel.

Section 7 of the Act provided: "That the board, upon terms and conditions prescribed by it and approved by the President, may charter, lease, or sell to any person, a citizen of the United States, any vessel so purchased, constructed, or transferred." Section 9 of the Act gave the Board certain additional powers "when the United States is at war or during any national emergency the existence of which is declared by proclamation of the President." These additional powers were:

no vessel registered or enrolled and licensed under the laws of the United States shall, without approval of the board, be sold, leased, or chartered to any person not a citizen of the United States, or transferred to a foreign registry of flag. No vessel registered or enrolled and licensed under the laws of the United States, or owned by any person a citizen of the United States, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States or transferred to a foreign registry of flag, unless such vessel is first tendered to the board at the price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section ten.

A proclamation under this section of the Act was issued by the President on February 5th, 1917, and thus these emergency powers of the Shipping Board came into operation. 1 Section 11 of the United States Shipping Act of September 1916, authorized the Shipping Board to: "form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States." 2 On the day of the declaration of war by the United States (April 6th, 1917) the Shipping Board exercised this authority and formed the United States Shipping Board Emergency Fleet Corporation to carry out, in general, the purposes set forth in section 11 of the Act. All the stock of this corporation was owned by the United States. Though its certificate of Incorporation of April 16th, 1917, provided "that the existence of this corporation shall be perpetual," 3 it had been laid down in section 11 of the Act that "at the expiration of five years from the conclusion of the present European War the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved. . . . The vessels and other property of any such corporation shall revert to the board." s For some time before the declaration of war the question of requisitioning ships by the United States had been considered and the fact that early in 1917 a large proportion of the shipyards in the United States was engaged with contracts for foreign shipowners led to various proposals and negotiations into which it is unnecessary to enter here. On the 4th of March 1917 (after the severance of diplomatic relations between the United States and Germany on February 3rd, 1917), a Naval Emergency Fund Act was passed. This Act authorized and empowered the President, "in addition to all other

existing provisions of law" within the limits of the appropriation available, "to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person." Such orders were given precedence over all other orders and compliance was made obligatory. In the case of noncompliance, the President was authorized to "take immediate possession of any factory3 or of any part thereof."5 The President was furthermore empowered, under the same penalty, "to modify or cancel any existing contract for the building, production, or purchase of ships or war material," to place an order for the whole or any part of the output of a factory in which ships or war material were being built or produced, and to "requisition and take over for use or operation by the Government any factory or any part thereof." ' In all cases where these powers were exercised, provision was made for "just compensation" to be determined by the President, with the customary provision for an appeal to the courts. Then on June 15th, 1917, two months after the declaration of War, further important powers were given to the President by the Emergency Shipping Fund Provision of the Urgent Deficiencies Act. The relevant provisions of this Act are as follows :

The President is hereby authorized and empowered, within the limits of the amounts herein authorized: (a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the War and which are of the nature, kind and quantity usually produced or capable of being produced by such person. (6) To modify, suspend, cancel, or requisition any existing or future contract for the building, or purchase of ships or material. (c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output thereof in such quantities and at such times as may be specified in the order. (d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant. (e) To purchase, requisition, or take over the title to, or the possession . of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed or any part thereof, or charter of such ship. Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient. Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation

therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twentyfour, paragraph twenty, and section one hundred and forty-five of the Judicial Code. The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time, Provided: That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

Up to the date of this Act, though different proposals had been mooted, no definite action as regards requisitioning ships or contracts for ships had been taken. Negotiations were opened between the Norwegian Government and the United States authorities and these will be discussed later. Definite action, however, began on August 3rd, 1917.

II.

WAS THE CLAIMANTS' PROPERTY TAKEN?

The Fleet Corporation sent a general order of requisition by telegram to almost all the shipyards of the United States on August 3rd and 4th, 1917, but it did not send any detailed order of requisition, giving the particular ships or contracts to which the requisition was intended to apply. Nor did the Corporation state precisely to what extent each of the yards was requisitioned. The Tribunal cannot regard this notice as sufficient as regards foreign owners of shipbuilding contracts, except for the purpose of preventing any transfer to a foreign flag or to foreign ownership or any other change to the status quo which could have been detrimental from the point of view of national defence. This telegraphic order of August 3rd, sent to the shipyards Only, ordered the completion of all vessels "with all practicable despatch," and referred to a letter which was to follow. l The order contained in the letter of August 3rd expressly requisitioned not only the ships and the material, but also the contracts, the plans, detailed specifications and payments made, and it even commandeered the yards (depriving them of their right to accept any further contracts). In spite of this the United States have contended that there was no requisition, except of "physical property" and have strongly maintained that the word "contract" in the letter of 3rd August only referred to commitments for material.2 It is common ground that the United States ordered the shipyards not to accept after August 3rd, 1917, any further progress payments under the contracts from the private owners, but that subsequent progress payments were made by some of the former owners to the shipbuilders. J The United States have also proved that, for instance, on September 12th, 1917, Admiral Capps, General Manager of the United States Emergency Fleet Corporation, wrote to the Cunard Steamship Co. New York: You are informed that all shipbuilders have been directed not to accept any payments from you on account of requisitioned ships, and that in this case, where you have actually made payment, the shipbuilders will be directed to return this payment to you. You are now directed not to make any further payments or tenders of payments to any shipbuilders having under

construction ships which were requisitioned by us. You are also further informed that no reimbursement will be made to you of payments which you have heretofore made to the shipbuilders, and no other form of settlement will be made with you without securing, for the benefit of our shipbuilders, complete releases of their contract obligations to deliver ships to you in place of the ships which we have requisitioned. The foregoing is not to be considered even an additional agreement to reimburse you at this time. The whole subject of compensation to former owners is now under consideration.

To the British War Mission Admiral Capps wrote as follows, on September 13th, 1917:

I beg to acknowledge receipt of your letter of the 10th inst., in relation to the Cunard Line's action in making tenders of payment to the shipbuilders covering ships requisitioned by the Fleet Corporation. The Emergency Fleet Corporation specifically ordered the shipbuilders not to accept payments from former owners, and in similar cases has directed the owners not to make tenders of payment to the shipbuilders. This is in strict conformity with the authority vested in the Fleet Corporation and the Cunard Company has again been directed not to make any such tenders. In this connection it is of course assumed that it is not the intention of the Cunard Co., in making these tenders to place our shipbuilders in a position where they will have to deliver ships to the Cunard Line after the emergency has passed. The Fleet Corporation will necessarily take all suitable steps to protect the shipbuilders, and to prevent them from being placed in such an embarrassing position.

It is common ground that one of the progress payments was made, with the assent of the United States Fleet Corporation, by one of the Norwegian claimants to the Seattle Construction and Dry Dock Co., after August 3rd, 1917, to the amount of 70,000 Dollars, on hull No. 92 (Steamship "Sacramento" Claim No. 4) ; that this sum was due on August 2 ; that the claimants or their assignors, the former owners, had fulfilled their contracts up to the time of the requisition; that on December 3rd, 1919, the United States Requisition Claims Committee, in their award, authorized payment of these progress payments to the Norwegian claimants; that these sums have not yet been paid to the claimants, although the United States were asked repeatedly to do so; and that the formal claims were presented in 1919 on behalf of the present claimants.2 Counsel for the United States were invited by the Tribunal to prove that these payments were not credited by Ihe Shipbuilders to the United States Emergency Fleet Corporation in their reciprocal accounts and payments But no evidence was adduced to prove this; nor can it be denied that the United States Fleet Corporation debited these sums to the shipbuilders, as if they had been paid by the Corporation under the contracts3. There is an example of this in the letter to the Seattle Construction and Dry Dock Co., of May 10th, 1918. 4 Although the Corporation wrote to the shipowners at the beginning of September 1917, that the subject of compensation to former owners "was under consideration," the correspondence of the General Managers of the Fleet Corporation (as it has been submitted to the Tribunal) shows conclusively that there was at the beginning an intention—confirmed by the orders to the shipyards—of including these payments in the compensation to be paid, not by the shipbuilders, but by the Fleet Corporation, to the former shipowners, with interest from August 3rd, 1917. Thus the Board asked for "any information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking' over these ships and contracts." 1 In their correspondence of about August 20th, 1917 with the former owners of the contracts, the General Managers of the United States Emergency

Fleet Corporation, after having expressly mentioned that they were writing to them as owners, or as the representatives of the owners, of the contracts with the shipyards, expressly stated their intention of reimbursing them, promptly, so far as funds are available for the payments heretofore made to the shipbuilders, if, after the investigation of data submitted by the owner, such payments are found in order and in conformity with the contract requirements. At your further and early convenience you are requested to submit to the Corporation, a statement of such indirect expenditures as you have made on account of each vessel ; for instance the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent. It will be perceived that the Corporation presumes it is addressing this letter to the owners or responsible representatives of the owners or persons entitled to receive compensation on account of the requisition of the vessels listed above. The Corporation requests that there be included in your response to this letter all evidence of ownership, which is necessary to establish the right of those who are entitled to receive the compensation provided by law. The consummation of the orders herein and heretofore transmitted will be made the subject of later appropriate corporate action. The General Managers of the Fleet Corporation gave the following instructions to their district officers:2 You will please forward without delay the usual certificates for payments which have become due under the contract after that date, so far as practicable, certified by the former local inspector as well as yourself. These payments to the shipbuilder for the present must not exceed the actual cost of the contractor's outlay for labour, materials received since the last payment, plus the approved overhead expense, nor must the payment so determined exceed the contract payment accrued. It is the expectation of the Corporation to carry out the substance and purpose of the contract but this decision cannot be made definite until the Corporation can investigate the facts and terminology of each contract to assure proper protection of the Government. You will please furnish to the shipbuilder a copy of this letter and one copy of the enclosure, and you will request the shipbuilder to furnish you without delay, for transmission to the Corporation, a statement in detail of such payments received on account of each contract prior to August 3rd. the date of requisitioning.

After the examination of the plans, specifications and contracts, interests and names of owners, lists of their payments under the contract, and of each ship under construction, the Fleet Corporation gave further information to the shipbuilders. This was done on or about August 22nd. 1917, as regards all the present claimants, except in the cases of claims 12-15 ; in these the information was given after November 15th. 1917. x This further information was as follows:

The ships now under construction at your plant and referred to above, having been requisitioned by the duly authorized order of this Corporation and title thereto taken over by the United States and an order having been placed with you by due authority to complete the construction of said ships with all practicable despatch, you are further ordered by the President of the United States, represented by this Corporation, to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification, and survey thereof, including the meeting of the requirements of the said contract, and all

tests as to efficiency and capacity of the ship on completion and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise. All work will proceed under the inspection of such persons as have been or may hereafter, from time to time, be designated by this Corporation for that purpose. For the work of completion heretofore and herein ordered the Corporation will pay to you amount* equal to payments set forth in the contract and not yet paid; provided, that on acceptance in writing of this order you agree that on final acceptance of the vessel to give a bill of sale to the United States in satisfactory form conveying all your rights, title, and interests in the vessel, together with your certificate that the vessel is free from liens, claims, or equities, with the exception of those of the owner and then only of those set forth in the contract. Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order. This order applies only to vessels actually under construction, and in accepting it the Corporation expects you to inform it of the actual stage of construction of each vessel or the parts to be assembled therein on the date of requisitioning, August 3, 1917. The Corporation reserves the right to decide whether or not a vessel was actually under construction on August 3, 1917, on consideration of the ascertained facts. In replying to this communication please arrange to specify separately the vessels to which this order refers, and refer to the corresponding contract in sufficient terms for identification of it. Please furnish a copy of this to (name of Shipbuilder) and ask for an early reply.

It would be superfluous to mention here that a "bill of sale" in the United States is considered as the instrument of transfer of property, and that ships, although considered as a species of personal property, are subject also to special rules. A ship does not pass by delivery, nor does the possession of it prove the title to it. The next step of the Corporation was to give generally the same information to the owners of the shipbuilding contracts, and to require information whether a brokerage commission "claimed as part of the contract price of vessels" had been "paid or agreed to be paid on account of each uncompleted contract for vessels covered by the requisition order of August 3rd, 1917, giving the name of the broker and the amount paid or to be paid, and the times when payments are due, together with a copy of the brokerage agreement." Such letters were written, for instance, with reference to the ships included in claims 1 and 2 on September 18th, 1917, to the Manitowoc Shipbuilding Co. To the Columbia River Shipbuilding Co., Admiral Capps wrote as follows on November 21st, 1917: Re Completion of requisitioned hulls. Your letter of October 25, 1917, relative to vessels requisitioned by this Corporation and under construction in your yard, has been received. From information at hand the above letter is understood to apply to your hulls No. 1 to 10 inclusive. You will proceed with the completion of these hulls to meet the requirements of the contracts in force on August 3, 1917, between you and the Northwest Steel Co. As just compensation for and as a reasonable price of such completion the Corporation will pay to you a total sum equivalent to the total unpaid amounts on contracts between you and the Northwest Steel Company. Payments will be made on receipt of vouchers submitted through the district officer to this Corporation on a form to be forwarded to you and after certification by the district officer that such payments are due and warranted. The above arrangements in this letter in reference to payments are based upon the assumption that there are no unpaid brokerage fees. If there are unpaid brokerage fees on said contracts, then the total amount of such fees will be deducted from the total

unpaid amounts on the said contracts. The district officer will be instructed to continue the inspection of work and material to insure that the vessels, when completed, will be equal in all respects to what was contemplated by the requirements of the contracts in force on August 3, 1917, between you and the Northwest Steel Company, and you will provide the district officer and his representatives all facilities necessary for the performance of this duty.

This last letter refers to claim 6, where the delivery of the completed ship was expected for December 1st. It is common ground that the shipbuilders complied with these orders of the Corporation, repeating generally the words which had been suggested to them by the Corporation. The following is an example of one of the shipbuilders' replies:

Dear Sir. Re requisitioned ships. A copy of a letter dated August 22, 1917. has been delivered to us with the request that we reply to the same and give the information therein called for, and in compliance to such request we beg to say : In obedience to the order of the President of the United States, represented by the United States Shipping Board Emergency Fleet Corporation, we will execute and deliver to the United States, or to the United States Shipping Board Emergency Fleet Corporation, bills of sale of ships now under construction in our yard as they are completed and which were requisitioned on August 3, 1917, upon the following conditions : 1. The payments by you of all amounts specified in each several contract unpaid by the purchaser, said payments to be made by you pursuant to the terms of the contract. 2. The refunding to us of all customs duties paid by us upon any equipment going into the construction of hulls 80 and 81. 3. The payment to us of all extras and alterations not covered by the contract, ordered by authorized representatives. 4. The payment to us of all supplies ordered by authorized representatives furnished by this company for the outfitting of such ships. In addition to the bill of sale, which is to be in such form as will be satisfactory, we will deliver a certificate that the vessel described in such bill of sale is free from liens, claims or equities excepting only equities and rights of the purchaser under the contract under which such ships were constructed. You are further advised that on August 3, 1917, the undersigned was under contract to construct ihe following ships, above 2,500 tons deadweight capacity, which are designated by us by hull numbers as follows : Hull Nos. 80, 81. 82, 83. 86, 87, 88, 90, 91, 92, 93, 94 and 95. You are further advised that we will proceed with all practicable dispatch the complete construction of said ships.

Without entering here into further details, the Tribunal, upon the abundant evidence brought by the United States, are of opinion that not only were material, plans, specifications and other such physical or intangible property of the claimants taken, but also their money, for the United States did not refund their previous payments either to the shipbuilders or to the shipowners. The fact that the progress payments were not refunded by the United States Emergency Fleet Corporation to the shipbuilders is specially strong evidence to show that the contracts with these builders were not cancelled by the United States' orders of August, that the property of the owners was not considered as destroyed as between the Fleet Corporation and the shipbuilders, and that the Fleet Corporation took over the legal rights and duties of the shipowners towards the shipbuilders. The necessary consequence is that the Corporation took over the lights and duties of the shipbuilders towards the shipowners. It expressly required the shipbuilders to give the Corporation a bill of sale which, when delivered to it, would, in the opinion of the Tribunal, relieve the shipbuilders from any liability to the previous owners in regard

to their "liens, rights and equities" as set forth in their respective contracts. The shipbuilders were thus entirely relieved of any obligation to the former owners, for the Corporation inserted itself between the builders and the shipowners by an exercise of what is called, in the United States Law and Jurisprudence, the power of eminent domain. This action can be considered, as far as the private shipbuilders are concerned, as a case offeree majeure" or restraint of princes and rulers. In other words, the Corporation seems to have intended, in August 1917, to assume towards the Contract-owners the legal position of the shipbuilding contractor. The main obligation of such contractors was to proceed with the construction, and to deliver the ships to the owners of the contracts. Further, the fact that the United States Shipping Board Emergency Fleet Corporation kept, and has had the exclusive profit up to the present time of, the progress payments made to the shipbuilders by the claimants or their assignors, amounting to almost 21,2 million dollars, is of especial importance, not only with regard to the material consequences of such action, but also in connection with the legal aspect of the whole case. It will be seen later on that the Corporation Managers, after having taken control of the shipyards, took also the property of the claimants in such a way as to destroy it. But it should be stated at once that in connection, with the taking of the claimants' money, the Corporation, having first ordered the completion of all the 15 contracts, delayed or even cancelled the construction of the hulls for which the New Jersey Shipbuilding Co., had contracted. Claims 13, 14 and 15 are based upon contracts which, to quote the United States Case, Chart I, "were never completed but were suspended on January 31, 1919,'and cancelled on August 23rd. 1919. Before their keels were laid." As the Tribunal is of opinion that the good faith of the United States Emergency Fleet Corporation is to be presumed, the Corporation must be given the credit of having contemplated delivery of the ships to their former owners, and of having written its first letters to the shipbuilders and shipowners for the purpose of having the ships built and delivered. The first objects of the Corporation were evidently at that time to take control of the shipyards and of the contracts in order to expedite the construction of the ships, and to modify the ships, if necessary, in order to meet the war requirements. This policy was not subsequently carried out by the Fleet Corporation. There were several successive changes in the personnel of the leading technical and legal advisers of the Corporation, and among the Directors themselves and these changes apparently resulted in a change of policy. The Corporation seemed to have forgotten that it had assumed certain contractual obligations, and in particular to have ignored the fact that the retention of the money of the claimants without restoring the ships was obviously unlawful. Such action was not only contrary to international law, but also to the municipal law of the United States. The amounts of the progress payments should have been refunded at the time of the requisitioning of the ships. There can be no excuse for waiting until 1919 to make an assessment of these amounts. The Corporation could not have entertained any doubt after October 6th. 1917, that an immediate settlement of the claims was imperative. The Corporation may have intended, up to October 6th. 1917, to settle accounts with regard to these claims, namely so long as it was expected that the property of the claimants would be restored at the end of the war. More especially the Corporation should not have had any doubt with regard to claims 13 to 15 as to the legality of its action according to municipal law as well as under international law, after it had informed the shipbuilders not to go on with these contracts.

The Tribunal is therefore of opinion: 1. That, whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed. 2. That in fact the claimants were fully and for ever deprived of their property and that this amounts to a requisitioning by the exercise of the power of eminent domain within the meaning of American municipal law.

III.

THE DATE ON WHICH CLAIMANTS' PROPERTY WAS EFFECTIVELY REQUISITIONED .

The Parties have disagreed as to The date, the object and the purport of the requisition. Norway's contention is that the requisition should not be considered legally effective against the several members of the "Christiania Group"— the present fifteen claimants— until October 6th, 1917, when the negotiations between the special Norwegian Mission and the Shipping Board may be said to have been concluded by the formal notification from Mr. Hurley, Chairman of the Board, to Dr. Nansen, head of that Mission. Norway has contended that the contracts were requisitioned, and that, whatever may have been said to the claimants by the Fleet Corporation, the Tribunal has only to consider the real facts, in other words what the Fleet Corporation did; and that the action of the Corporation amounted to a taking without paying just compensation for the property so taken. The contention of the United States is, on the other hand, that the requisition became effective against the claimants on August 3rd, 1917, the day of the general order issued to the American Shipyards; that the agreement between the Department of State and the Norwegian Minister was merely to suspend the requisition of completed vessels, but not of vessels under construction and that the requisition of the latter, though anticipated, was not yet announced; and that The Emergency Fleet Corporation did not requisition contracts, but took only actual physical property, consisting of ships and materials for ships, together with commitments for material for ships, and that the property which it actually requisitioned is the only thing to be valued. ' As Counsel for the Kingdom of Norway laid considerable stress upon the negotiations which took place in 1917 between the United States Department of State and the Norwegian Minister at Washington, Mr. Bryn, it is necessary to summarise the facts as to these negotiations and to examine their influence upon the legal position of the Parties. In February 1917, as soon as the bill was introduced in the United States Senate and House of Representatives which proposed to prevent foreign owners of vessels "now being constructed or hereafter constructed in the United States" from registering their ships under foreign flags (proposals which matured on June 15 th in the Emergency Shipping Fund Provision of the Urgent Deficiencies Act), the Norwegian Minister called the attention of the Secretary of State to the fact that as said bills do not provide for compensation to foreign shipowners, the Norwegian citizens for whose account the ships are now building in American yards would suffer a tremendous loss, amounting to many millions of dollars, if said provisions should be enacted into law. The Attorney for the principal group (so called Stray Group) of Norwegian owners of Shipbuilding Contracts, and the United States Shipping Board endeavoured to reach a friendly solution of the difficulties raised by the Norwegian Government by a voluntary agreement (similar to the agreement arrived at between Great Britain and Norway), safeguarding the interests of the United States by placing these vessels at the disposal of the government during the war and for a reasonable period (six months) afterwards. The negotiations were largely conducted

through informal conferences with a special Norwegian Mission, presided over by Dr. Fridtjof Nansen. It is proved by the attitude of the United States themselves, that they complied with a formal request of Mr. Bryn to the Department of State, dated June 28th, 1917, to delay temporarily, until the arrival of the Norwegian Mission, "the executing, as far as same would involve Norwegian shipping interests, of the authority given to the President by the provisions of the Act approved June 15, 1917, which created an Emergency Shipping fund." * The United States have contended that by the Executive Order of July 11th, 1917, the President of the United States delegated to the United States Shipping Board the authority to requisition constructed vessels, and to the United States Shipping Board Emergency Fleet Corporation the power vested in him of requisitioning "vessels in process of construction." On 23rd July, 1917, the Shipping Board passed a resolution to requisition "title to and possession of all launched merchant vessels where construction is completed, and which construction was commenced in American yards under contracts which would lead to foreign documentation", on giving twenty-four hours' notice to the diplomatic representatives of the countries of which the foreign owners were citizens. On July 24th Mr. F. L. Polk, Acting Secretary of State, notified the Norwegian Minister of this resolution. As Dr. Nansen's Norwegian Mission had not yet arrived, it was agreed between them that the Norwegian "new buildings" should not be requisitioned until the Norwegian Special Mission had arrived, and had had an opportunity of taking the matter up with the American Government. The Norwegian Minister guaranteed that no vessel built in American yards for Norwegian account would be transferred to the Norwegian flag after noon on July 25th. Mr. Polk informed the Shipping Board of this arrangement, and the Board, on July 25th, resolved: "that nothing be done in connection with the requisitioning of Norwegian ships." 3 Mr. Bryn gave instructions accordingly to the Norwegian consuls in the United States, referring to the Shipping Board's resolution that "all completed ships were to be requisitioned", and these instructions were carried out. Only one new steamer, the "Dicto", was authorized by the United States to clear, and for this ship the Norwegian certificate of nationality had been issued by the Norwegian consul at San Francisco on the morning of July 25th.

On August 3rd, 1917, Mr. Hurley, the Chairman of the United States Shipping Board, informed President Wilson that "after consultation with Admiral Capps, and with his approval", the Board decided that the Emergency Fleet Corporation should proceed at once to commandeer all ships of suitable tonnage now being constructed in American shipyards, so that their completion may be expedited, and their disposition determined in the manner best adapted to the present needs of the nation. We deem it of the highest importance that this action be taken without delay. The question as to what disposition shall be made of the requisitioned ships can be determined later, after consultation with the Governments for whom, or for whose citizens a part of the ships are being built. The general requisition order was issued on the'same day, or on 4th August, by letter and telegram, to all the shipbuilders concerned with the claimants (except New Jersey Shipbuilding Company). The order to practically all of the American Shipbuilders was worded as follows: By virtue of an Act approved June 15th, 1917, and authority delegated to the Emergency Fleet Corporation by Executive Order of July 11th, 1917, all power driven cargo-carrying and passenger vessels above 2,500 tons, deadweight capacity, under construction in your yards, and materials, machinery, equipment and outfit thereto pertaining, are hereby requisitioned by the United States and will be

completed with all practicable despatch. Letter follows. ' One of the purposes of this statutory order is clear: the construction must be completed as rapidly as possible. Whether the requisition was for title or for use, and what would be the compensation etc.. was not disclosed, and the requisition letter was equally reticent, containing only a promise "that the compensation to be paid will be determined hereafter, and will include ships, material and contracts requisilioned." The Tribunal is of opinion that the Shipping Board and the Shipping Board Emergency Fleet Corporation were bona fide if they considered the order to American shipbuilders was consistent with an "agreement for the maintenance of the status quo on both sides". It is reasonable to infer that they had not rejected at that time the Norwegian suggestion of a voluntary agreement and that they did not deem it necessary to pay immediately the just compensation, nor to make even an inventory of the things taken. Their attitude may be explained by a belief on their part that future accounts would be settled by voluntary agreement. It appears from the minutes of October 4th, 1917, that at that date the Members of the United States Shipping Board, held strongly divergent views with regard to the requisitioning of foreign vessels. While the majority proposed "that the Board conform its action with reference to foreign tonnage to the action already taken by the Board with reference to the British and French ships", Vice-Chairman Stevens presented the following resolution: that vessels building for Norwegian account, commandeered by the Emergency Fleet Corporation, be transferred to American Corporations to be formed by their owners, on condition that they voluntarily charter the vessels to the Board, bare boat or time charter, at Board's option, for the period of the war and six months thereafter, at the general requisition rate established by the Board, and reimburse the Corporation for all expenditure incurred in the completion of the vessels.

The motion not being seconded, the Vice-Chairman moved "that the question is of such international importance that it be referred to the President." This motion also not being seconded, the Chairman of the Shipping Board, after having stated to the Board that the decision arrived at was to "retain the title to the tonnage for the present", wrote to Dr. Fridtjof Nansen, at Washington, D. C, on October 6th, 1917, as follows:

After careful inquiry into the present and prospective war needs of the United States and of the Allies, . . . the Board has concluded that it is its duty to retain for urgent military purposes, all vessels building in this country for foreign account, title to which was commandeered by the United States on August 3rd. The decision includes necessarily the vessels building for Norwegian account. ... I need not add that it is our intention to compensate the owners of commandeered vessels, be they American, Allied or Neutral, to the full measure required by the generous principles of American Public Law.

After stating that, while this decision of the Board covered the case of one of the Norwegian ships commandeered, the "Wilhelm Jebsen". and that the Board approved a friendly settlement with regard to the "Jeannette Skinner", Mr. Hurley added:

I greatly regret the delay that has unavoidably attended the decision of this matter, and feel certain that you will appreciate that it was due solely to our keen desire to consider fully and weigh conscientiously the arguments which the representative of the Norwegian shipowners and of your mission have placed before us.

The correspondence between Dr. Nansen and Mr. Hurley continued in December, Dr. Nansen on behalf of Norway claiming on December 8th that these vessels "are being

temporarily requisitioned by the American Government", while Mr. Hurley closed the correspondence on December 21st, 1917, by a letter stating that:

Mr. Munson has referred to me your letter to him, dated December 8, regarding insurance on vessels building in American yards for Norwegian account and commandeered by the Government of the United States. I also have your letter of December 18 on the same subject. Since these vessels have been completely and permanently taken over by the United States, it does not seem to me that the former Norwegian owners need be at all concerned over the question of insurance. The responsibility for loss or injury to the vessels is entirely in the Government of the United States, since the United States now hold title to the vessels. The former Norwegian owners have, under our Constitution and under the statutes governing the matter, a claim against the United States for just compensation, which claim I hope may be satisfactorily adjusted at an early date.

It cannot be denied, therefore, that the United States did claim in October 1917, to be the holders of the tide to the Norwegian property, and that they expressly refused every interference from the claimants. It is not necessary to examine here whether the holding of the title was valid. It is sufficient to state that the United States, in fact, did take and hold the title, the property of the claimants; that they had the "de facto" possession, enjoyment and use, and that they acted as owners of the claimants' property after the formal taking, as notified by the Shipping Board to Dr. Nansen. After a most careful examination of the evidence produced on both sides, the Tribunal has come to the conclusion that: 1st. The Requisition became effective in August 1917, as regards the American shipbuilders ; 2nd. But the requisition of the whole property of the claimants became effective only on and after October 1917. The date of October 6, 1917, may be admitted for all claimants. The general requisition order of August 3rd, 1917, as well as the previous Statutes and Presidential Orders, certainly had legal importance, as they gave power to the executive officers to prohibit the export of materials, the transfer of ships to foreign flags, etc. But the requisition order did not say, for instance, that all the property of the foreign shipowners should be taken, not even that it should be taken for title or forever. It was construed as leaving it to the competent officers' discretion whether some of the ships under construction should be requisitioned or not. In fact, till October 1917, there was, in some cases, considerable doubt as to the ultimate decision, and some orders of requisition were not given until the end of November 1917. As long as the Fleet Corporation was not following "due process of law", nor offering the "just compensation" provided for by American law for the property taken, it can be doubted whether the requisition was "effective", and the Tribunal, by admitting the date of October 6, 1917, as the date of requisition, has made ample provision for the special difficulties and the emergency invoked by the United States. Another fact must be taken into consideration, not only with regard to the duration of the effective requisition, but also to the liability of the United States Shipping Board Emergency Fleet Corporation. Without examining here whether the Corporation could have kept the use and efficient control of the claimants' ships, but not their title, during the war, the Tribunal records that its attention was specially drawn to the fact that as early as February 1919, the Emergency Fleet Corporation was giving back to their former owners some of the ships which had been needed during the war. but for which there was no further use. After the Armistice was signed, in November 1918, and before the signature of the Treaty of Peace with Germany, there were no hostilities between the United States and any other nation.

Counsel for the United States has conceded that the bulk of the American Army was demobilised in the spring of 1919 and, while the United States were still "technically at war", the reasons stated by the Shipping Board in support of its attitude had undoubtedly ceased to exist. The Tribunal is of opinion that, whatever may be said in favour of the taking for title of the claimants' property during the war, there was no sufficient reason for keeping these ships after the signature of the Versailles Treaty in June 1919. The reasons which have been given afford no legal interest which this International Tribunal could recognize as being superior to the rights of private foreign citizens in their own property.

IV.

THE LAW GOVERNING THE ARBITRATION.

[…]

V.

THE AMOUNT OF COMPENSATION.

It is common ground between the Parties that just compensation, as it is understood in the United States, should be liberally awarded, and that it should be based upon the net value of the property taken. It has been somewhat difficult to fix the real market value of some of these shipbuilding contracts. The value must be assessed ex œquo et bono. The Parties have obviously acted in a way which would not have been usual or even possible under ordinary circumstances, when peaceful shipping and shipbuilding were entirely free, and not hampered in their customary activities by the intervention of enemy or friendly Governments. The growing scarcity of ships in 1917, the risks and difficulties due to submarine warfare and to the extension of the field of hostilities, contributed to make speculative shipbuilding transactions possible and even unavoidable. Belligerents and neutrals alike were fearful for their existence. The hardships of neutrality were felt so deeply by the United States themselves that they declared war on Germany ELS the only means of defence against its "repeated acts of War against the Government and the people of the United States of America". All neutral Nations needed ships for their food, materials and other commodities. Some governments took measures to protect themselves against speculation in ships and other property; they imposed standard prices and requisitioned ships for use during the war, etc. As a rule, abnormal circumstances, speculative prices, etc., cannot form, the legal basis of compensation in condemnation awards. While fair compensation cannot be artificially increased by such methods as were adopted by one of those interested in the case and which have been brought to the notice of this Tribunal, it would be equally unjust to attach much weight to artificial reduction of hire, chartering or purchase price of ships, as fixed under compulsion, requisition or othpr e-nvf rnmental action during the war.

For the reasons already stated in Chapter IV, the Tribunal is not bound by section 3477 of the Revised Statutes of the United States, 1878 (quoted in U.S. Case Appendix page 51); nor by section 24 of the Judicial Code of the United States 1911 ; nor by section 4 of the Naval Emergency Fund Act of 4th March, 1917 ; nor by any other municipal law, in so far as these provisions restricted the right of the claimants to receive immediate and full compensation, with interest from the day on which the compensation should have been fully paid ex aquo et bono. Just compensation should have been paid to the Claimants or arranged with them on the basis of the net value of the property taken: 1. On the 6th October, 1917, for use, during the war (whenever such use was possible without

destroying the property, according to the contract, state of completion of ship, etc.), and 2. At the latest on the 1st July 1919, as damages for the unlawful retaining of the title and use of the ships after all emergency ceased; or On the 6th October, 1917, as full compensation for the destruction of the Norwegian property. Liberal compensation should be allowed in each case, inasmuch as the United States "recognizes its liability to make just compensation for the value of the property taken on August 3rd, 1917".1 The amounts offered as compensation by the United States are shown in the table set out at the commencement of this award. After careful comparative examination of the results of the two systems above described, the Tribunal is of opinion that the compensation hereinafter awarded is the fair market value of the claimants' property. In assessing the net amount of compensation, the Tribunal has taken into consideration in each case all the circumstances pertaining to the net value of the property requisitioned or taken by the United States and especially the following: the date of each contract or sub-contract between shipbuilder and shipowner; the technical characteristics and qualities of each contract (type and dead weight tonnage of the ship; its speed, etc. ; the reputation, experience, technical and financial situation of the shipyard); the legal value of the contract, namely the liens, rights and interests in each original contract, etc. ; the original contract (or sub-contract) price; the progress (and brokerage) payments made by each of the parties on the original contract price; the date of delivery promised in the contract ; the date of delivery which was expected at or about the date of the general requisition order and about the date of the effective requisition of each contract as far as these can be ascertained; the various elements pertaining to the value and degree of completion of the tangible objects of completion as: for instance, the percentage of materials ordered, and the percentage of materials on hand ; the date at which the keel was laid, before or after the general requisition; and the date when the ship was launched; the contracts, settlements, etc. made by the United States and by Norwegian or other shipowners, or by third parties, whether governments or private persons, whether with shipowners or shipbuilders, for the construction or purchase or hire of ships ; the statistics, reports and opinions of experts produced by the Parties ; the Award of the United States Claims Committee on the present claims ; the reports of the Ocean Advisory Committee on just compensation for certain American ships lost in the service of the government; etc. On the other hand the Tribunal has taken into consideration all the facts, which are exclusively or principally due to the United States' action (whether before or after the requisition of the shipyards and the effective requisition of the claimants' property), and which therefore may be considered as res inter alios acta, or as being without or of negligible influence upon the net value of property lost by the claimants.

VI.

INTEREST ON SUMS AWARDED.

The Tribunal is competent to allow interest as part of the compensation ex aquo et bono, if the circumstances are considered to justify it. So far as interest after the date of this award is concerned, the Parties decided in the Agreement of 30th June, 1921, that "any amount granted by the award rendered shall bear interest at the rate of six per centum per annum from the date of the rendition of the decision until the date of payment". As this is a case of expropriation, the Tribunal is of opinion that interest should be paid. The Parties have cited before the Tribunal the work of Nichols on "The Law of Eminent Domain" (Albany, N.Y., 1917), in which is expressed the following opinion:

"The theory of the law is that, when land is taken by eminent domain, or when it is injured in such a way as to create a constitutional right to damages, payment for the land thus affected should be co-incident with the taking or injury, and, if for any reason payment is postponed, the right to interest from the time that payment ought to have been, until it is actually made, follows as a matter of strict constitutional right. . . . When the owner is not paid the compensation until after the taking or injury is complete. ... it is well settled that he is entitled to interest, or at least to its equivalent in the form of damages for the detention of his money." (S. 216.)

Similar opinions are expressed in section 742 of Lewis' "A Treatise on the Law of Eminent Domain" (Chicago 1909), which book was also cited before the Tribunal. In coming to the conclusion that interest should be awarded, the Tribunal has taken into consideration the facts that the United States have had the use and profits of the claimants' property since the requisition of five years ago, and especially that the sums awarded as compensation to the claimants by the American Requisition Claim Committee have not been paid; finally that the United States have had the benefit of the progress payments made by Norwegians with reference to these ships. The Tribunal is of opinion that the claimants are entitled to special compensation in respect of interest and that some of the claimants are, in view of the circumstances of their cases, entitled to higher rates of interest than others. The claimants have asked for compound interest witli half-yearly adjustments, but compound interest has not been granted in previous arbitration cases, and the Tribunal is of opinion that the claimants have not advanced sufficient reasons why an award of compound interest, in this case, should be made. In view of all these circumstances, therefore, the Tribunal is of opinion that it is just to allow a lump sum to each claimant in respect of interest for a period of five years from 6th October, 1917. Such lump sums have been included in the total amounts of compensation awarded in respect of each claim. As the Tribunal is of the opinion that full compensation should have been paid, including loss of progress payments, etc., at the latest on the day of the effective taking, and as the Tribunal has assessed the net value of the property and has decided to award damages as on that date, interest should, contrary to the claim of Norway, not run before that date as previous interest is included in the estimate of the net value.

VII.

THE CLAIM OF PAGE BROTHERS.

[…]

VIII.

FOR THESE REASONS THE TRIBUNAL OF ARBITRATION DECIDES AND AWARDS THAT:

I. The United States of America shall pay to the Kingdom of Norway the following sums: In claim No. 1 by the Skibsaktieselskapet "Manitowoc" the sum of $845,000 In claim No. 2 by the Skibsaktieselskapet "Manitowoc" the sum of 845,000 In claim No. 3 by the Dampskibsaktieselskapet" Baltimore" the sum of. 1,625,000 In claim No. 4 by the Dampskibsaktieselskapet "Vard II" the sum of 2,065,000 Out of this amount of $2,065,000 the United States are entitled to retain a sum of $22,800 in order that this sum be paid to Page Brothers; In claim No. 5 by the Aktieselskapet SOrlandske Lloyd the sum of $2,045,000 In claim No. 6 by the Dampskibsaktieselskapet Ostlandet the sum of. 2,890,000 In claim No. 7 by Jacob Prebensen jun. the sum of 160,000

In claim No. 8 by the Dampskibsaktieselskapet "Tromp" the sum of. $160,000 In claim No. 9 by the Aktieselskapet "Maritim" the sum of 175,000 In claim No. 10 by the Aktieselskapet "Haug" the sum'of.... 175,000 In claim No. 11 by the Aktieselskapet "Mercator" the sum of 190,000 In claim No. 12 by the Aktieselskapet Sôrlandske Lloyd the sum of 205,000 InclaimNo. 13 by H. Kjerschow the sum of 205,000 In claim No. 14 by Harry Borthen the sum of 205,000 InclaimNo. 15 by E. & N. Evensen the sum of. 205,000 II. The claim made by the United States of America on behalf of Page Brothers is disallowed as against the Kingdom of Norway, but a sum of $22,800 may be retained by the United States as stated under claim No. 4 above. Done at The Hague, in the Permanent Court of Arbitration, October 13th, 1922.

[…]

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