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The Development of Compensation Theories in International Expropriation Law

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Abstract. The majority of states recognize the lawfulness of expropriation or nationalization of foreign property, provided the taking is non-discriminatory; there is a public purpose; compensation is paid for the taken property; and due process of law is respected. The standard of compensation paid for the taken property is the most disputed requirement. This work examines the development of compensation theories through the most important milestone cases, the Hull and Calvo doctrines, United Nations' documents and the Restatement (Third) of Foreign Relations Law of the United States.

Keywords: expropriation, nationalization, compensation, Norwegian Shipowners' Claims case, Chorzow Factory case, Hull Doctrine, Calvo Doctrine, Restatement (Third) of Foreign Relations Law.

1. INTRODUCTION

The right of sovereign states to exercise power on their territory and to take (expropriate or nationalize) foreign property is recognized in international law. The assumption is that the majority of states recognize the lawfulness of expropriation,[1] provided the taking is non-discriminatory; there is a public purpose; compensation is paid for the taken property; and due process is respected.[2] 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

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[1] 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. Téglási (2012) 176–77; Bergmann (1997) 47; Dixon (1993) 213–14; Pellonpaa et al. (1988) 53, 60. However, it should be mentioned that there are less genuine expropriation claims in developed countries as most cases are 'based on the BITs' "treatment" provisions. These cases center around state intervention into the market' etc. Nagy (2016) 11.

[2] UNCTC 70 (1988); Brownlie (1998) 535; Dixon (1993) 215; Pellonpaa et al. (1988) 53, 69. 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 (2016) link 1.), 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. Ban (1999) 132.

compensation.[3] In this work the development of compensation theories in international law is examined[4] using the two most important international landmark cases (the Norwegian Shipowners' Claim Case and the Chorzow Factory Case), the Hull and Calvo Doctrines, the documents of the United Nations related to the protection of foreign property, as well as the Restatement of Foreign Relations Law of the United States. During this study, the opinion of distinguished authors in the field of international law as well as international legal sources will be invoked. This historical overview will reveal what compensation standard is the most acceptable and recognized in international law. The discussion starts with the first landmark case in the history of the development of compensation standards in international law.

2. 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.[5] In 1917 the United States entered the First World War and 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 the United States in return for just compensation.[6] This action also affected Norwegian ship owners who were promised just compensation for the physical property taken.[7] However, Norway claimed compensation also for the affected contractual rights.[8] The Tribunal of the Permanent

[3] 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.'
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 (2016) link 2. See also Barrera (2011); Bergmann (1997) 24.

[4] The issue of compensation is closely related to the method of valuation, and to the form and the time of payment of the compensation, therefore these will be also examined.

[5] Smith (2001); 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 than the one determined by the Tribunal. Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 313–14.

[6] Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 314–18.

[7] Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 318–25.

[8] 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. Norway v. U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 313–14.

Court of Arbitration was of the opinion that not only physical property but contracts were also taken,[9] and that this taking was exercise of the power of eminent domain under the United States law.[10] The United States claimed that its municipal law should be applied while Norway was of the opinion that it was international law.[11] The Tribunal stated that the municipal law of the United States was applicable as long as international public order is not violated.[12] Concerning the issue of compensation, the Tribunal accepted that just compensation was due, however it interpreted it as follows: "*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*]."[13] 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.[14] The Tribunal, whilst discussing the amount and time of compensation, added that Norway was entitled to immediate and full compensation.[15] The Tribunal, furthermore, stated that the value of the claimants' initial property should be determined by the standard of fair market value.[16] Finally, USD 15 million was awarded, which included interest.[17] From the fact that the Tribunal ordered the respondent to pay the compensation in US Dollars it can be inferred that the form of compensation fulfilled the criterion of effectiveness – it was in a *realizable form*. The United States complied with the arbitral award, however, it officially denied its precedential value in international law.[18] Based on this landmark case, it can be established that just compensation means complete restitution of the taken property, including lost profit.

[9] '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*]" Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 332.

[10] "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." Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 325.

[11] Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 330.

[12] Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 331.

[13] Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 338.

[14] Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 338–39.

[15] Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 340.

[16] Norway v U.S. (1948) 1 Reporters of International Arbitral Awards (UN) 340. InvestorWords Dictionary defines *fair market value* as follows: "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." InvestorWords Dictionary (2016) link 3. Money Glossary defines it as follows: "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." Money Glossary (2016) link 4.

[17] Dolzer (1997) 693.

[18] Dolzer (1997) 693.

3. 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.[19] The subject 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.[20] Following Word War I, the region of Chorzow was transferred from German to Polish control. Under the Geneva Convention concerning Upper Silesia (1922), 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.[21] Disputes arising under the Convention were to be referred to the Permanent Court of International Justice.[22] 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 it was not the private property of the above-mentioned company.[23] 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.[24] 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.[25] This case sets forth the basic principles that govern reparation after the breach of an international obligation.[26] It gives priority to restitution in kind, however, if not possible, it turns to the solution of monetary compensation.[27] 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 act had not been committed".[28] The Court qualified the Polish measure as "seizure of property", and in its opinion there was only one remedy for such an act, fair compensation which equals full[29] compensation.[30] Related to this, Dinah Shelton argues that one widely accepted form of reparation is

[19] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 5–24.

[20] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 18–21.

[21] Guzman (1998) 643*;* Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 18, 21.

[22] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 26.

[23] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 21.

[24] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 46.

[25] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 28.

[26] Shelton (2002) 833, 835.

[27] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 46, 47. Mouri calls this "restitution compensation". Mouri (1994) 383.

[28] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 46, 47.

[29] Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission also set 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 (2016) link 2. See also Barrera (2011) 81.

[30] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 46; Folsom et al. (1995).

correcting the injustice done by restoring the *status quo ante*.[31] 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'.[32] This principle was also the basis of the Chorzow decision.[33] 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,[34] but when the Treasury *de facto* took possession of the factory.[35] It is the opinion of the authors that 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 as 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., it 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.[36] 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.[37] It also ordered the determination of the present value plus, among others, the company's future prospects.[38] Practically, the Court was of the opinion that there should be full compensation, the Court's opinion equaled *fair* compensation, including *lucrum cessans,*[39] less the amount of the maintenance of the factory.[40] The Court stated that it would fix 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.[41] Finally, the parties reached a compromise and the Court terminated the proceedings in 1929.[42] Based on this case, there is not much difference between fair or full compensation and the just compensation standard examined in the Norwegian Shipowners' Claims case. 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.[43] In both cases, the valuation is based on fair market value of the taken property. It is the authors' opinion that by applying these standards, these early cases of international law have already offered strong protection of foreign investment. These cases also recognized that if in kind

[31] Shelton (2002) 833, 844.
[32] Shelton (2002) 833, 844.
[33] Shelton (2002) 845.
[34] July 1, 1922. (Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 21.)
[35] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 22, 51.
[36] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 51.
[37] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 51.
[38] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 28.
[39] Ceasing gain.
[40] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 53.
[41] Germany v Poland (1928) P.C.we.J. (ser. A) No. 17, 64.
[42] Seidl-Hohenveldern (1995) 550–53.
[43] 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'. Sacerdoti (1997) 389.

restitution is not possible, monetary compensation is the most practical. It can be concluded that these decisions use different terms for the same concept. This supports the assumption that, many times, terms (expressions) in international law cannot be defined until they are tested in practice by courts or tribunals.

4. HULL DOCTRINE – 'PROMPT, ADEQUATE AND EFFECTIVE' COMPENSATION

In 1938, the Hull Doctrine came into existence when the property of United States of America citizens was expropriated in Mexico.[44] 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.[45] With this doctrine, new terms evolved in international law in the field of compensation, as this doctrine claimed prompt, adequate and effective compensation. These terms can be based on and defined by 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.[46] However, in practice, it is rarely the case. A payment of compensation in installments, even if it takes years, is an accepted practice,[47] provided a considerable sum of money is paid immediately following the expropriation.[48] 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[49] means that the compensation is based on a fair valuation, which is basically the fair market value of the property.[50] This criterion can be equated with full compensation, which means that the compensation should correspond to the full value of the expropriated rights.[51] The criterion of effectiveness means that the compensation

[44] Smith (2001); Dolzer (1981) 558. On the issue of expropriation in Mexico see: Del Duca (2003) 35.

[45] Smith (2001).

[46] Folsom et al. (1995) 606; Pellonpaa et al. (1988) 53, 107.

[47] Usually not more than ten years. Bergmann (1997) 42.

[48] Bergmann (1997) 42.

[49] 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 independent 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. Dunning (1972) 44. Sornaraja already in the seventies claimed that 'there is little doubt that foreign investment does have beneficial effects on the host country.' Sornarajah (1979) 109, 110–13. 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.

[50] Folsom et al. (1995) 606.

[51] Bergmann (1997) 43. In American International Group case. Pellonpaa et al. (1988) 53, 105–07.

should be in a realizable form,[52] it should be transferable in convertible currency or other form, e.g., gold.[53] The standard laid down by the Hull doctrine is the refined version of the just and fair (or full) compensation standard theories. 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.[54] In bilateral investment treaties, investors enjoy protection even exceeding the requirements of the Hull Doctrine, e.g., these treaties, numerous times, prescribe interest at a 'commercially reasonable rate.'[55, 56] Nevertheless, this doctrine was only regarded as international by the United States.[57] However, even the US officially abandoned it following the Second World War, when it began to propagate the just compensation doctrine. At the same time, the United States still interprets just compensation as prompt, adequate and effective.[58] 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.[59] However, 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.[60] The authors 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.[61] 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, e.g., sometimes there is no *prompt* payment in case of expropriation.

[52] Folsom et al. (1995) 606.

[53] Like securities, etc. that are negotiable on the stock exchange. Bergmann (1997) 43; Pellonpaa et al. (1988) 53, 107.

[54] Salacuse (2009) 324.

[55] Art. 6 (3) of the US Model Bilateral Treaty. US Department of State (2016) link 5.

[56] Guzman (1997).

[57] 'The argument that the *prompt, adequate* and *effective* formula is traditional international law finds little support in state practice or authoritative treaties and monographs.' Kishoiyian (1993) 33.

[58] Smith (2001).

[59] 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 also Brownlie (1998) 3.

[60] Abede (1977) 245, 254–55; Khalil (1992) 339.

[61] Dolzer (1981) 558.

5. CALVO DOCTRINE

The majority of capital importing countries[62] rejected the Hull Doctrine, and refer to the Calvo Doctrine, named after Carlos Calvo, an Argentine diplomat and historian, with respect to the issue of compensation.[63] In 'International Law in Theory and Practice', Calvo expressed his views that 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.[64] The doctrine also says that foreign investors may not be better treated than the citizens of the expropriating state.[65] The Calvo Doctrine also prohibits the use of diplomatic intervention as a method of enforcing private claims before local remedies have been exhausted. 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 kinds 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.[66] 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 a clause can be detrimental for foreign investors and this must be the reason why the Calvo Clause is not widespread.[67] Regarding this issue, it is interesting to mention that the majority of bilateral investment treaties (BIT) 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.[68] 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 mechanisms when having disputes about compensation for taken property.

6. UNITED NATIONS DOCUMENTS – 'APPROPRIATE' COMPENSATION

According to certain authors, the most recognized standard in international law is the appropriate compensation standard.[69] This view is supported by the huge majority of states that accepted this standard in many international multilateral and bilateral documents. The most important international document in which this standard first appeared was the General

[62] Francioni (1975) 255.

[63] Columbia Encyclopedia (2016) link 6.

[64] Bergmann (1997) 44; Dixon (1993) 212–13.

[65] López Escarcena (2014) 19; Bergmann (1997) 40; Dixon (1993) 212–13.

[66] Dixon (1993) 212–13; Bernhardt (1995) 521–23.

[67] Lluís Paradell argues for example that it has never attained the statues of a principle in customary international law. Newcombe & Paradell (2009) 13–14.

[68] Paul (1997) 233, 234.

[69] Dolzer (1985) 63; Abede (1977) 241, 245; de Waart (1977) 300, 304; Muller (1981) 31, 35; Gess (1964) 398, 398–99.

Assembly Resolution[70] 1803 (on Permanent Sovereignty over Natural Resources) of the United Nations, passed on December 14, 1962.[71] Some authors[72] 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.[73] 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.[74] However, there are experts who do not accept this view and argue that appropriate compensation is in no case equal to prompt, adequate and effective compensation.[75] Based on our research, there is still little case law to support either the former or the latter view with certainty. However, 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 briefly look at two other important United Nations documents in which the standard of appropriate compensation can be found. The first is the Declaration on the Establishment of a New International Economic Order[76] and 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,[77] and was the result of a pseudo-consensus – the text of the Resolution was adopted without voting.[78] 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.[79] The significance of this Resolution is that it considers unacceptable any form of sanction on a state that has expropriated property of foreign investors.[80] 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)[81] is the other important resolution of the United Nations General Assembly. This Resolution was

[70] General Assembly Resolution is defined by the Dictionary of International & Comparative Law as the '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'. Fox (1992) 380. Resolutions of the UN General Assembly are not listed among the formal sources of law of the International Court of Justice. Art. 38 of the Statute of the International Court of Justice. ICJ Info page (2016) link 7. 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. McWhinney (1984) 44, 55, 56; O'Keefe (1974) 239, 248–51.

[71] The text of the Resolution and an analytical study can be found in the article of Karol N. Gess. Gess (1964) 398, 444. For another analytical study on the issue see O'Keefe (1974) 239; Newcombe & Paradell (2009) 27.

[72] Brower (1975) 304; Guzman (1998) 639, 646.

[73] The United States of America also held that 'appropriate' compensation could only mean 'prompt, adequate and *effective*' *compensation.* Gess (1964) 398, 427.

[74] Brower (1975) 304; Francioni (1975) 255.

[75] Francioni (1975) 255; Guzman (1998) 639, 647–48.

[76] A/RES/3201 (S-VI). United Nations Dag Hammarskjöld Library (2016) link 8.

[77] Kaufmann (1980) 81, 82.

[78] Kaufmann (1980) 81, 82, 128.

[79] Several developed countries were opposed to the Program for a New International Economic Order that was represented by this Resolution. Kaufmann (1980) 81, 82, 128.

[80] A/RES/3201 (S-VI), United Nations Dag Hammarskjöld Library (2016) link 8.

[81] A/RES/3201 (S-VI), United Nations Dag Hammarskjöld Library (2016) link 8.

adopted by the General Assembly with an overwhelming majority of the world's countries. Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States voted against the Resolution.[82] The Resolution was drafted with the support of the United Nations Conference on Trade and Development.[83] 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.[84] Brower argues that developing countries tried to use the United Nations for their economic campaign at this time.[85] 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.[86]

The text uses "should" which lessens the obligatory character of this provision.[87] It is more interesting that this appropriate compensation is determined on the grounds of domestic legislation[88] 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.[89] 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.[90]

In the first part of this provision there is 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

[82] Brower et al. (1975) 295; Bernhardt (1995) 562.

[83] Brower et al. (1975) 295.

[84] Brower et al. (1975) 296.

[85] He also argues that behind this economic campaign stood partially political, partially economic reasons. Brower et al. (1975) 296.

[86] Art. 2 (2) (c) A/RES/3281 (XXIX). United Nations Dag Hammarskjöld Library (2016) link 8.; Brower et al. (1975) 305.

[87] Brower et al. (1975) 305.

[88] According to de Waart, the determination of compensation on the grounds of local law met strong opposition among western states. De Waart (1977) 313.

[89] Brower et al. (1975) 305.

[90] Art. (2) (2) (c) A/RES/3281 (XXIX). United Nations Dag Hammarskjöld Library (2016) link 8. See also Brower et al. (1975) 305.

will be binding on states and be part of the "corpus of the international law".[91] However, some western authors question whether it had any effect at all on international law.[92] 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.[93] The reason for such criticism 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.[94] Brower also criticizes the Resolution for not stating clearly that "economic rights and duties of states are subject to international law".[95] However, the authors 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.[96] Andrew T. Guzman hits the nail on the head 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.[97] 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.[98]

7. 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 and thus its policy regarding the issue of compensation in the case of taking foreign investment should be briefly examined. Under the Restatement, there is an obvious requirement of compensation in case of taking foreign property.[99] Regarding the standards of compensation, the Restatement accepts the standard of appropriate compensation. However, it is

[91] Brower et al. (1975) 297.

[92] Haight (1975) 591, 596. 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. Petersmann (1995) 564.

[93] Brower et al. (1975) 299.

[94] 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, [it] will in any event normally have only recommendatory force". Brower et al. (1975) 301.

[95] Brower et al. (1975) 302.

[96] Brower et al. (1975) 301.

[97] Guzman (1998) 639, 648.

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

[99] Restatement 712 (1) (c).

supplemented with the requirement of just compensation.[100] Thus, it requires just compensation in the case of taking. The Restatement defines just compensation as follows,

> (…) 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.[101]

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.[102] 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.[103] As to the time of payment, the Restatement states that compensation should be paid at the time of the taking.[104] It further provides that if the compensation is not paid at this moment, interest should be paid from the time of the taking.[105] However, it is required that compensation is made, in any case, within a reasonable time,[106] within at least a six months period.[107] Defining the requirement of reasonable time helps avoiding disputes among the parties. The Restatement also described the form of payment. The payment should be made in an economically usable form for the foreign investor.[108] The Comment of the Restatement specifies it as 'convertible currency without restriction on repatriation'.[109] 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.[110]

8. CONCLUSION

There are different opinions concerning the issue of standard of compensation in international law. Based on the first two milestone cases, the Norwegian Shipowners' Claims case ('just' compensation standard) and the Chorzow Factory case (standard of 'fair or full' compensation) it was concluded that the just compensation standard does not differ much from the fair or full compensation standard. In both cases compensation is based on the fair market value of the taken property, and both require basically *in integrum restitutio* (if not possible, monetary compensation) including lost profits. The next step was to examine the Hull doctrine, which led to the conclusion that the majority of capital exporting

[100] Restatement Comm. (c) at 198.
[101] Restatement 712 (1) (c).
[102] Comment d; Reporters' Notes, 3; See also Lillich (1973); Bergmann (1997); Kratovil (1954) 596.
[103] Restatement, Reporters' Notes 3.
[104] Restatement 712 (1) (c).
[105] Restatement 712 (1) (c); Comment d; Reporters' Notes 3.
[106] Restatement 712 (1) (c).
[107] Reporters' Notes 3.
[108] Restatement 712 (1) (c).
[109] Comment d of the Restatement.
[110] Comment d of the Restatement.

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 accept appropriate compensation, interpreting it as prompt, adequate and effective, like the United States of America. This interpretation is also supported by international case law. It was found that capital importing states in general support the standard of appropriate compensation, however with different content.

The 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. Related international jurisprudence is very interesting as there are mostly western authors who are of the opinion that the Hull Doctrine is too strict, and, 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 the taker gained'), some would differentiate between industrialized and non-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 the foreign investor contributed to the development of the host state in the past. The debate during the last fifty years mostly concerned the question what terminology should be used: just, fair, prompt, adequate, effective, appropriate or full.

The authors fully agree with Professor Schachter, who correctly noticed 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'.[111] In practice, developing countries, even if they hold on to classical principles of sovereignty over resources, accept the Hull Doctrine in bilateral investment treaties. There is a simple reason for this as developing countries understand that they need foreign capital for economic development, and if they are not fair when expropriating foreign investors` property, there will be no willing investor in the future who would invest in these countries.

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[111] Schachter (1985) 422.

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