

Chapter 3

International Law of Expropriation

The international law of expropriation has been the subject of fierce divisions between the developed and developing world. The statement of the United States Supreme Court that “[t]here are few 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”¹ is just applicable today as it was when made in 1964.

Viewpoints on expropriation often seem to be politically motivated. This is not surprising, since beneath the question of the right of a state to expropriate lies a clash between the values of Western capitalist democracies and the developing world. The West’s prosperity depends in part upon respect for individual rights, property rights, and the sanctity of contract. Under these principles, a concession granted to an investor should be respected by the host state. The developing world, on the other hand, demands the right to self-determination and control over its natural resources, arguing that the collective interests of society outweigh the interests of individuals such as private investors.

This chapter discusses the international law of expropriation. The first part discusses the history of the international law of expropriation, including the traditional standard, the challenges to that standard by Third World countries in the 1960s, and the interpretation of the law by judicial and arbitral bodies. The role that treaties and state practice have had in shaping the law of expropriation is also addressed.

The current state of the international law of expropriation is also discussed, including a discussion of the “full compensation” standard and methods of valuation of expropriated property. We also examine the relevance of the distinction between “legal” and “illegal” takings and the requirement that a taking be nondiscriminatory and for a public purpose.

This chapter also discusses a related topic, the international law of breach of contract by states. In many cases, an expropriation of property by a host state will also involve breach of a contract between the host state and the investor. This breach of contract may give rise to a cause of action under international law, separate from but related to the cause of action arising from the taking of property.

The conclusions reached in this chapter may be summarized as follows: A state may expropriate the property of aliens within its borders,² but must compen-

1 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964).

2 Regarding expropriation by a state of property outside of its borders, F.A. Mann stated that “there is no doubt that a State lacks international jurisdiction to take property situated outside its territory and such takings are, therefore, necessarily ineffective.” F. A. Mann, *The Consequences of an International Wrong in International and National Law*, 48 BR. Y.B. INT’L L. 1, 46 (1977).

sate the alien for the full value of the property taken. If the international law of expropriation has changed at all from the 19th century, the change is primarily that it is currently unlawful under international law for one state to use force against another state to remedy or prevent a taking of property by the host state.

A. History and Sources of the Law of Expropriation

1. Expropriation and Standards of Compensation Prior to World War II

Because expropriation was relatively rare prior to the twentieth century,³ legal standards of compensation did not evoke much discussion or debate.⁴ Cases that did address expropriation routinely held, however, that states may “appropriate private property for public use,”⁵ but upon such expropriation, the state had an obligation to pay full compensation.⁶ In fact, this principle was so well settled that in treaties among the advanced nations of Europe, compensation for expropriated property was almost never mentioned—it was taken for granted.⁷

The seminal pre-World War II case regarding the international law of expropriation, the *Chorzów Factory* case,⁸ arose from Poland’s expropriation of a nitrate factory in Upper Silesia that had been owned by German nationals. Germany brought a claim before the Permanent Court of International Justice, which ruled that the expropriation was in violation of the German-Polish Geneva Convention

3 J.E.S. Fawcett, *Some Foreign Effects of Nationalisation of Property*, 27 BR. Y.B. INT’L L. 355, 356 (1950). Fawcett cites a series of 19th century instances of expropriation, and states that they were “for the most part settled by the application of standards based on freedom of contract, the sanctity of private property, and the duty of the state to compensate the owners of property taken for the public use.” *Id.* at 357.

4 Halliburton Fales, *A Comparison of Compensation for Nationalization of Alien Property with Standards of Compensation under United States Domestic Law*, 5 NORTH-WESTERN J. INT’L L. & BUS. 871, 876 (1983).

5 *Uptan Case (U.S. v. Venez.)*, 9 R.I.A.A. 234, 236 (1905).

6 For a discussion of the early law of expropriation, see ISA FOIGHEL, NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW (1957) (“compensation must be adequate or just, i.e., corresponding to the loss that results from the dispossession” (p. 115-16)); Alexander P. Fachiri, *Expropriation in International Law*, 6 BR. Y.B. INT’L L. 159 (1925) (“expropriation is only permissible for public purposes and then only on payment of full compensation by the state.” (p. 169-70)); and FREDERICK S. DUNN, THE PROTECTION OF NATIONALS (1932). For a contrary view, see John Fischer Williams, *International Law and the Property of Aliens*, 9 BR. Y.B. INT’L L. 1 (1928).

7 See Fales, *supra* note 4, at 872.

8 *Factory at Chorzów (Ger. v. Pol.) (Indemnity)*, 1928 P.C.I.J. (ser. A) No. 17.

concerning Upper Silesia.⁹ Regarding the compensation owing for an “illegal”¹⁰ expropriation, the court stated:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear [must be made].¹¹

The court went on to state in *dicta* that a lawful expropriation does not require actual restitution (i.e., return of the property taken), but only payment of “the just price of what was appropriated” measured as “the value of the undertaking at the moment of dispossession, plus interest to the day of payment.”¹² This was, essentially, an affirmation of the principle that even in the case of a “lawful” expropriation, the proper level of compensation is the value of the property taken—that is, full compensation is owing for both legal and illegal expropriations.

International cases and arbitrations both prior to and following the *Chorzów Factory* case support the proposition that the proper level of compensation following an expropriation is the full value of the property taken. Examples of cases earlier this century in which full compensation was ordered are the *Delagoa Bay* arbitration,¹³ *Spanish Zone of Morocco* arbitration,¹⁴ the *Goldenberg Case*,¹⁵ the

9 *Certain German Interests in Polish Upper Silesia and the Factory at Chorzów (Ger. v. Pol.) (Judgment No. 7) (Merits)*, 1926 P.C.I.J. (ser. A) No. 7.

10 See discussion in Section B.3, *infra*, regarding the relevance of the distinction between illegal and legal takings under international law.

11 *Chorzów Factory*, P.C.I.J. No. 17 at 47.

12 *Id.* This statement of the court in *Chorzów Factory* in *dicta* regarding the level of compensation that must be paid by a state following an expropriation has been criticized by Professor Higgins (now Judge on the International Court of Justice), who has stated “I do not believe that a central element in the law of compensation should be resolved by making deductions from an *obiter dictum* over the Permanent Court 40-5 years previously, when it was addressing only (and was only *thinking* about) a different situation—an unlawful taking.” ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 144 (1994).

13 *Delagoa Bay and East African Railway Co. (U.S. and Great Britain v. Portugal)*, reprinted in 3 M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW, 1694-1703* (1943).

14 *British Properties in Spanish Zone of Morocco (Spain v. U.K.)*, 2 R.I.A.A. 615 (1925).

15 *Goldenberg Case (Ger. v. Rom.)* 2 R.I.A.A. 901 (1928).

De Salba Claim,¹⁶ the *Selwyn Case*,¹⁷ the *Norwegian Shipowners' Claim*,¹⁸ and the *Lena Goldfields* arbitration.¹⁹

In *Delagoa Bay*, for example, Portugal cancelled an 35-year railway concession that had been granted to a British company. In an arbitral proceeding agreed upon by the interested states, the tribunal stated that

Even if the present case should be regarded as one of legal expropriation, the fact remains that the effect was to dispossess private persons from their rights and privileges of a private nature conferred upon them by the concession, and that . . . the State, which is the author of such dispossession, is bound to make full reparation for the injuries done by it.²⁰

In the *Norwegian Shipowners' Claim* case, a number of Norwegian nationals entered into contracts with U.S. shipyards for the shipyards to build ships for use by Norway in the First World War. Following its declaration of war on Germany, the United States expropriated these ships for its own use. Norway brought suit before the Permanent Court of Justice, which, in its ruling, stated that it was not bound by United States 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 aequo et bono*,”²¹ that is, in accordance with principles of equity. The tribunal then awarded the claimants the fair market value of the property taken.

The principle of full compensation has been affirmed many times over. In one study of sixty international claims tribunals that were set up between 1840 and 1940 to deal with disputes arising from injury by host states to aliens, many arising out of takings of alien property,²² none of the tribunals “held that the appropriate measure of compensation was less than the full value of the property taken, and many specifically affirmed the need for full compensation.”²³

16 *De Salba v. Panama (U.S. v. Pan.)*, 6 R.I.A.A. 358 (1933).

17 *Selwyn Case (G.B. v. Venezuela)* 9 R.I.A.A. 380 (1903).

18 *Norwegian Shipowners' Claims (Norway v. U.S.)*, 1 R.I.A.A. 307 (1922).

19 *Lena Goldfields, Ltd. v. Russia* (1930), reprinted in 56 CORNELL L.Q. 42, 51-52 (1950).

20 *Delagoa Bay, 3 Dam. Int'l L.* at 1698.

21 *Norwegian Shipowners' Claim*, 1 R.I.A.A. at 340.

22 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 521 (1990).

23 Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM.J. INT'L L. 474, 477 (1991). *But see* C.F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 INT'L. & COMP. L. Q. 22, 23 (1992), who states:

“[I]t may be noted that at the time the rule of full compensation is alleged to have come into existence and later in the nineteenth century the expropriations that took place

The principle of full compensation was vigorously asserted in 1938 by the U.S., when Secretary of State Cordell Hull, in a letter to the Mexican government regarding the nationalization of certain agrarian and oil properties, stated that expropriation of foreign owned property must be accompanied by “prompt, adequate, and effective” compensation.²⁴ This statement is usually referred to as the “Hull formula,” and it has been interpreted to require compensation in the amount of the full fair market value of an investment as a going concern.²⁵

Not only was full compensation following expropriation a requirement under international law, but if such compensation were not paid, the investor’s state sometimes used force in retaliation.²⁶ Professor Wortley point out that in the mid-19th century,

British and many European and American investors[, following expropriation of their property,] could expect their Governments to make use, if need be, of such measures as embargo, or pacific blockade, or naval demonstrations, and generally to use the same means as from time to time were used to obtain specific restitution.²⁷

An example of the use of force by states to protect the property of its nationals abroad can be seen in Britain’s threat of naval intervention with respect to claims of its citizens against the government of Sicily in 1836.²⁸ Thus, not only did traditional international law require that an alien be fully compensated for the taking of its property, but it also allowed the use of force by the alien’s home state to protect such rights.²⁹

were almost entirely of an individual nature. There were no complications emanating from, e.g., the nature of state economies, which were at that time all based on *laissez-faire* principles.”

24 Norton, *supra* note 23, at 476; Green H. Hackworth, 3 DIGEST OF INTERNATIONAL LAW 658 (1942).

25 Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 VA.J. INT’L L. 615, 641 (1994).

26 IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 289 (1963).

27 B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 58 (1959).

28 “British naval guns were brought to bear in the *Sicilian Sulphur Monopoly* case.” Fawcett, *supra* note 3, at n2.

29 For further discussion of the use of force under international law, see Chapter 8, Section E.

2. Challenges to the Traditional Standard

a. Latin American States

As early as the 19th century, a number of Latin American states challenged the traditional international law standards discussed above, arguing that (1) aliens whose property was expropriated were entitled only to the same treatment given by the expropriating state to its own nationals, and no more; and (2) that they had no obligation to recognize claims of the home state of investors following expropriations.³⁰ This view of expropriation is consistent with past policies of Latin American states that were hostile to foreign investment.³¹

Many of these countries have insisted upon the inclusion of what has come to be known as “Calvo Clauses” in investment contracts, in which the investor agrees that in the event of a dispute, it will submit itself to the jurisdiction of the courts of the host state, and will not seek diplomatic protection of its own state.³² This so-called Calvo Doctrine has been weakened (if not totally eliminated) in recent years, as Latin American states have increasingly accepted the standard of full compensation following expropriation and the settlement of investment disputes through international arbitration.³³

b. Nationalization in the 20th Century

Many states nationalized the property of both their own citizens and foreign investors without compensation earlier this century following what were often

30 See Orrego Vicuna, *The International Regulation of Valuation Standards and Processes: A Reexamination of Third World Perspectives*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 131-48 (Richard B. Lillich ed., 1975).

31 Some of the constitutions of Latin American states, for instance, have prohibited ownership of real property by United States entities. Robert B. Shanks, *Insuring Investment and Loans Against Currency Inconvertibility, Expropriation, and Political Violence*, 9 HASTINGS INT'L & COMP. L. REV. 417, 432 (1986).

32 Brice M. Clagett, *Present State of the International Law of Compensation for Expropriated Property and Repudiated State Contracts* in PRIVATE INVESTORS ABROAD §12.02 (1989). The validity of such clauses is questionable, because an agreement in a private contract cannot deprive a state of its right of diplomatic protection. Brownlie, *supra* note 22, at 546. While the United States has refused to recognize the validity of such clauses because it is not a party to them, Clagett believes that such clauses may be effective in a proceeding in which the expropriated alien, rather than its home state, is a party. For a discussion of the Calvo doctrine, see Greer H. Hackworth, *Digest of International Law* § 530, 635 (1943), and Stanley D. Metzger, *Property in International Law*, 50 VA. L. REV. 594, 598-600 (1964).

33 See, e.g., Chapter 4, Section B.1, discussing the standards of compensation for expropriation provided in the North American Free Trade Agreement (“NAFTA”).

Marxist and socialist revolutions.³⁴ The Marxist states arising from these revolutions often had no respect for the sanctity of private property.³⁵ They argued that international standards requiring full compensation following expropriation were a “tool used by ‘imperialist’ powers,”³⁶ and that such standards are created by, and for the interests of, Western States.³⁷

Some states in which this occurred were the Soviet Union in 1917,³⁸ Mexico in 1938,³⁹ Bulgaria, Czechoslovakia, Hungary, and Poland between 1945 and 1948, China in the 1940s and 50s,⁴⁰ Bolivia in 1952, and Egypt in 1956.⁴¹ For example, both the Soviet Union and Cuba, following their respective revolutions in 1917 and 1959,⁴² attempted to abolish the institution of private property, and refused to

34 F.N. Burton & Hisashi Inoue, *Expropriations of Foreign-Owned Firms in Developing Countries: A Cross-National Analysis*, 18 J. WORLD TRADE L. 396, 396-397 (1984), found that, between 1960 and 1977, seven countries accounted for 72.5% of the total number of expropriations. These countries were Algeria, Chile, Cuba, Ethiopia, Sri-Lanka, Uganda, and Venezuela. *Id.* at 413. For further discussion, see Edith Penrose, George Joffe, & Paul Stevens, *Nationalization of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation*, 55 MOD. L. REV. 351 (1992).

35 This fact in part explains the high percentage of expropriation directed against the perceived leaders of both democracy and capitalism, the United States and Great Britain. In a 1984 study, Burton and Inoue examined 1,857 cases of expropriation, intervention, forced sales, and forced contract renegotiation between the years 1960 and 1977. The study showed that United States and British firms accounted for 90% of all expropriated properties. Burton & Inoue, *supra* note 34, at 402.

36 JAMES C. HSIUNG, LAW AND POLICY IN CHINA'S FOREIGN RELATIONS 141 (1972).

37 Chew, *supra* note 25, at 642.

38 See Fawcett, *supra* note 3, at 357-63.

39 For further discussions of the expropriations by the government of Mexico following the Mexican revolution of 1910-20, see Tali Levy, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Affectedive" Standard*, 31 STAN. J. INT'L L. 423 (1995); Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COL. L. REV. 223 (1995); and ERIC N. BAKLANOFF, EXPROPRIATION OF U.S. INVESTMENT IN CUBA, MEXICO, AND CHILE (1975).

40 For further discussion, see Chew, *supra*, note 25, at 625. Nationalization in China was a slow process, but by 1957, there was virtually no foreign direct investment left.

41 The Suez Maritime Canal Company was nationalized on July 26, 1956. See Foighel *supra* note 6, at 25.

42 Cuba began expropriating foreign-owned property in 1959, but most of the expropriations occurred in the second half of 1960. Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 219-224 (1995); for further discussion, see MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY 69-108 (1976) and Baklanoff, *supra* note 39. See also Chapter 8, Section D.3, discussing the Cuban Liberty and Democratic Solidarity Act, which has been proposed in the U.S. Congress.

pay any compensation to expropriated investors.⁴³ Cuba expropriated the property of approximately 450 United States companies with assets valued at over two billion dollars.⁴⁴

Expropriations due to political change continued into the 1970s. Uganda, for instance, nationalized property of foreign investors beginning in 1970 when the Obote government moved to acquire a 60% ownership in all commercial banks and major foreign firms and manufacturing, mining, agriculture and transport. Although this percentage was reduced to 49% following General Amin's military coup in 1971, 500 British firms were expropriated several years later in 1973. In 1974, Ethiopia began massive expropriation when the provisional military government took power. Although compensation was promised, none was paid. In Algeria, expropriation focused on the petroleum and mining industries; in Venezuela it focused on the petroleum industry, where compensation was paid.⁴⁵

Nationalization programs were also implemented by the newly-independent and newly wealthy states in the Middle East, Asia and Africa in the 1950s, 60s, and 70s,⁴⁶ usually involving the expropriation of petroleum rights from Western multinationals operating pursuant to concession agreements. Takings by these states often resulted not so much from Marxist or socialist ideology as from the desire of these states to profit more from their petroleum reserves at the expense of investors to whom concessions had been granted in those same oil reserves.

While some expropriations were driven by ideological revolution, as discussed above, some were motivated, at least in part, by specific political events. For ex-

43 Clagett, *supra* note 32, at §12.02. These expropriations contributed to the tensions of the Cold War. Following a series of expropriations by the Soviet Union of private property of foreign nationals, a number of countries, including the United States, withheld diplomatic recognition of the Soviet government. After the expropriation of property of United States nationals in Cuba, the United States not only withdrew diplomatic recognition of Cuba, but also terminated diplomatic and consular relations with Cuba. Adeoye Akinsanya, *International Protection of Direct Foreign Investments in the Third World*, 36 INT'L & COMP. L. Q. 58, 61 (1987).

44 Burton, *supra* note 34, at 413.

45 See Burton, *supra* note 34, at 413-14.

46 Many of these states grew from impoverished nations to wealthy nations due to the discovery and exploitation of oil resources in a short period of time. Libya, for example, when it gained its independence in 1951, was a very poor country with a sparse and uneducated population. As a result of its entry into the oil industry, by 1979, Libya's income from oil exports was estimated to exceed \$16 billion. Its per capita income had risen from \$40 in 1951 to \$6500 in 1977. Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 477 (1981). See also Clagett, *su-*

ample, the expropriations by Libya giving rise to the *British Petroleum*,⁴⁷ *TOPCO*,⁴⁸ and *LIAMCO*⁴⁹ arbitrations were motivated in part by the refusal of Great Britain to react to the occupation by Iran of three islands in the Persian Gulf, which were then nominally under the protection of Great Britain.⁵⁰ Another example of a politically motivated expropriation occurred in 1973, when the government of Libya nationalized the interests of the Nelson Bunker Hunt Oil Company in Benghazi, Libya. The expropriation was in retaliation for the United States' support of Israel in the Arab-Israeli confrontations.⁵¹

c. The Third World's Justifications for Expropriation and the U.N. Resolutions Regarding Permanent Sovereignty

Following many of these expropriations, the offending states offered various arguments to justify their right to expropriation without the traditional requirement to pay full compensation.⁵² Some, especially in the Middle East and Africa, argued that they were tied to long-term contracts that were negotiated between Western investors and the former colonial authorities, and that now, despite independence, they had little or no control over their economies.⁵³ These states argued that contracts that they did not negotiate had left others in control of their natural resources.⁵⁴ They then claimed that their right to "economic self-determination" was *inalienable*, and concluded that the requirement of full compensation following expropriation would render any major economic restructuring impossible.⁵⁵

pra note 32, at §12.02.

47 *British Petroleum Exploration Company (Libya) Limited (BP) v. Government of the Libyan Arab Republic (1973/1974)*, 53 I.L.R. 297 (1973).

48 *Texaco Overseas Petroleum Company and California Asiatic Oil Company (TOPCO) v. Government of the Libyan Arab Republic (1977)*, 53 I.L.R. 389 (1977), 17 I.L.M. 1 (1978).

49 *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic (1977)*, 62 I.L.R. 141, 20 I.L.M. 1 (1981).

50 Von Mehren, *supra* note 46, at 483.

51 *New York Times*, July 8, 1973, Section 4 at 2, column 4.

52 For further discussions of the colonialization and self determination, see Higgins, *supra* note 12, at ch. 7 ("Self-Determination").

53 Norton, *supra* note 23, at 496.

54 Penrose *et al.*, *supra* note 34, at 353.

55 Brownlie, *supra* note 22, at 536; *see also* Dawson & Weston, "Prompt Adequate and Effective": A Universal Standard of Compensation?, 30 *FORDHAM L. REV.* 727, 738 (1962), who state: "To assert, as do some, that states lacking sufficient gold reserves, foreign exchange or other financial resources should not undertake social and economic reforms, which may necessitate enacting extensive deprivation laws is both unrealistic and patronizing . . . extensive deprivations may be of such absolute and relative magnitude as to render 'full' compensation truly impossible."

These views are reflected in a series of United Nations General Assembly Resolutions passed, for the most part, by developing states. Although United Nations Resolutions are non-binding and do not have the force of law, they are often cited as evidence of international custom.⁵⁶

The first of these resolutions,⁵⁷ and the only one that received support from both Western nations and Third World nations, is the 1962 General Assembly Resolution 1803 (XVII), the Declaration on Permanent Sovereignty Over Natural Resources.⁵⁸ This resolution stated:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules enforced in the State taking such measure in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

Eighty-seven states supported General Assembly Resolution 1803, two opposed it, and twelve abstained. Ten of the abstaining states were communist.⁵⁹ While this resolution affirmed the requirements that states act “in accordance with

56 Chew, *supra* note 25, at 642; Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137 RECUEIL DES COURS 419, 434-518 (1972 III). See also Erik Suy, *Innovations in International Law-Making Processes*, THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 187, 190 (1978); F. Blaine Sloan, *The Binding Force of a “Recommendation” of the General Assembly of the United Nations*, 25 BR. Y.B. INT’L L. 1 (1948); D.H.N. Johnson, *The Affect of Resolutions of the General Assembly of the U.N.*, 32 BR. Y.B. INT’L L. 97 (1955); and ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

57 Foreshadowing these Resolutions was a draft article adopted by the Third Committee of the General Assembly of the United Nations, which states:

“The people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may the people be deprived of its own means of subsistence.”

General Assembly Resolution 626 (VII).

58 G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Agenda Item 39 at paragraph 4, U.N. Doc. A/RES/1803 (XVII) (1962), reprinted in 2 I.L.M. 223 (1963).

59 Chew, *supra* note 25, at 643; See also Stephen M. Schwebel, *The Story of the U.N.’s Declaration on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463 (1963).

international law” and that compensation be paid following an expropriation, it sparked widespread debate over the meaning of the phrase “appropriate compensation.” The United States voted in favor of Resolution 1803 because, in its view, the term “appropriate” compensation was equivalent to “prompt, adequate, and effective” compensation.⁶⁰ Many developing states disagreed, arguing that the “appropriate compensation” standard allowed them to pay less than full compensation following an expropriation. Subsequent arbitral decisions, discussed below, almost unanimously affirm the interpretation of the United States.

In 1973, the United Nations, without the support of Western states, adopted General Assembly Resolution 3171, which attempted to further erode international law standards of full compensation following an expropriation. This resolution stated that in the event of an expropriation,

each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which may arise should be settled in accordance with the national legislation of each State carrying out such measures.⁶¹

Under this resolution, the expropriated investor is not guaranteed compensation, but only “possible compensation,” no reference is made to the appropriate level of compensation (except that the matter should be settled in accordance with the legislation of the host state), and no reference is made to international law. Thus, under this standard the host state has full discretion of determining the amount of compensation, if any, and is not bound by any external, objective principles such as those provided under international law.

The next year, the United Nations General Assembly passed Resolution 3201, “The Declaration on the Establishment of a New International Economic Order,” again without the support of Western states. This rather ominously-entitled resolution extolled the right of each state to exercise control over and exploit its natural resources, “including the right to nationalization or transfer of ownership to its nationals.”⁶²

In 1974, the General Assembly passed the Charter of Economic Rights and Duties of States (Resolution 3281), which asserted that states have “permanent sovereignty over their natural wealth and resources” and that the definition of com-

60 *Schwebel, supra* note 59.

61 G.A.Res. 3171 (XXVIII), U.N. GAOR, 28th Sess. at ¶ 3, UN doc. A/9030 (XVIII) (1973).

62 G.A.Res. 3201 (S-VI), U.N. GAOR, Sixth Special Sess., agenda item 7 at ¶ 6, UN doc. A/RES/3201 (S-VI) (1974), *reprinted in* 13 I.L.M. 715 (1974).

compensation was the responsibility of the expropriating state.⁶³ The resolution stated that each state has the right to

nationalize, expropriate or transfer ownership of private property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled 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 this operand equality of States and in accordance with the principle of free choice of means.

One hundred twenty states voted in favor of this resolution, six states opposed it, and ten states abstained.⁶⁴ This resolution was voted against by Belgium, Denmark, The German Federal Republic, Luxembourg, the United Kingdom, and America. Again, no reference is made to international law. However, this resolution does require a state to pay “appropriate compensation.”

Based in part on these resolutions, developing states have argued that the expropriating state, rather than an objective international standard, should determine the rules governing compensation.⁶⁵ These resolutions, however, do not reflect the state of customary international law with regard to compensation following expropriation.⁶⁶ The Charter of Economic Rights and Duties of States, in fact, “has a strong politically and programmatic flavour and does not purport to be a declaration of pre-existing principles.”⁶⁷

General Assembly Resolution 1803 does, however, more closely reflect the state of current international law regarding expropriation. As sole Arbitrator Dupuy stated in the *TOPCO* arbitration,

Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary law existing in this field. Indeed, on the occasion of the vote on a resolution

63 Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Agenda Item 48, U.N. Doc. A/RES/3281 (XXIX) (1974), reprinted in 14 I.L.M. 251 (1975). See also Andres Rozental, *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 16 VA. J. INT'L L. 309 (1976); F.V. García Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AMERICAS-U. MIAMI J. INT'L L. 1 (1980).

64 Chew, *supra* note 25, at 644.

65 *Id.* at 645.

66 Gillian White, *A New International Economic Order?*, 16 VA. J. INT'L L. 323, 330 (1976); Edward McWhinney, *The International Law-Making Process and the New International Economic Order*, 14 CAN. Y. B. INT'L L. 57, 67 (1976).

67 Brownlie, *supra* note 22, at 542.

finding the existence of a customary rule, the States concerned clearly expressed their views.⁶⁸

The traditional rule of international law that an alien must be paid the full value of the property taken following an expropriation has also been attacked by some international law scholars. Some of these scholars have argued that in the modern era, private property rights must be balanced against the rights of the public, especially in the case of large-scale nationalizations with the stated purpose of “reform.”⁶⁹ This “balancing” allows the state to take private property or repudiate contracts with aliens, without the obligation to pay full compensation.⁷⁰

Early drafts by the American Law Institute of the sections regarding expropriation in the Restatement of Foreign Relations Law of the United States also appeared to support a lesser standard of compensation following expropriation.⁷¹ These drafts stated that “just compensation” would *ordinarily* be equal to the value of the investment. This implies that in some circumstances, just compensation would not be equal to the value of the investment. In addition, the comments to the drafts of the Restatement implied that one of the requirements to find creeping expropriation was a finding that the offending state *intended* to expropriate the property of the investor (rather than intending merely to regulate its economy for the “common good”). This would be very difficult, if not impossible, for an investor to prove.⁷² The final version, as discussed below in Section B, firmly adopts the traditional statement of the law.⁷³

3. Arbitral Awards After World War II

Despite contrary assertions by developing states and from some scholars, judicial and arbitral decisions following World War II lend support to the proposition that international law requires that an expropriating state fully compensate the alien for the value of the property taken. Examples of early arbitrations following World War II in which full compensation was awarded are the *ARAMCO*,⁷⁴

68 *TOPCO*, 17 I.L.M. at para. 87.

69 Brownlie, *supra* note 22, at 536.

70 Norton, *supra* note 23, at 493. For a common sense rebuttal, see Clagett, *supra* note 32, at §12.04[2], who states, “If a man steals \$10 from me and gives me back \$4, he has still stolen \$6. I am not able to understand why similar conduct by governments should be viewed any differently.”

71 Clagett, *supra* note 32, at §12.02.

72 Shanks, *supra* note 31, at 424.

73 Clagett, *supra* note 32, at §12.03[5].

74 *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)* (1958), 27 I.L.R. 117 (1963).

Sapphire,⁷⁵ *Abu Dabi*,⁷⁶ *Quatar*,⁷⁷ and *Lighthouses*⁷⁸ arbitrations. As discussed by Patrick Norton, in each of these arbitrations, “the tribunal held the concessionaire state to the terms of its concession, or to damages for its breach, largely on the basis of this body of international precedent.”⁷⁹ All of these arbitrations support the proposition that international law requires that an expropriating state pay to an alien the full value of the property taken.⁸⁰

The arbitrations based upon the Libyan nationalizations of its oil industry in the 1970s also support (with the exception of *LIAMCO*) the standard of full compensation for expropriation. Between 1971 and 1974, Libya nationalized its oil industry, sparking three widely discussed arbitrations on the legality of these expropriations under international law. Two of these arbitrations, *BP* and *TOPCO*, imply that full compensation is the appropriate standard under international law. In *BP*, Arbitrator Lagergren referred to reparation as a vehicle for establishing the amount of compensation, implying that full compensation is the appropriate standard following an expropriation.⁸¹ In *TOPCO*, Arbitrator Dupuy ordered restitution from Libya.⁸² It can be inferred that had he ordered damages, he would thus have ordered damages in the full amount of the value of the concession. The *LIAMCO* case, however, relied upon a lesser “equitable compensation” standard.⁸³ Even in the *LIAMCO* case, however, Sole Arbitrator Mahmassani awarded the claimants the reasonable value of the property taken.⁸⁴

A subsequent case, *AMINOIL*,⁸⁵ concerns Kuwait’s expropriation in 1977 of a petroleum concession held by the American Independent Oil Company. Kuwait admitted to owing compensation, but wanted to value the property using a book value method, while the company insisted upon a more realistic method of valuation. The parties then agreed to arbitrate the issue.⁸⁶ The tribunal applied interna-

75 *Sapphire International Petroleum Limited v. National Iranian Oil Co.*, 35 I.L.R. 136 (1953).

76 *Petroleum Development Limited v. Sheik of Abu Dabi*, 18 I.L.R. 144 (1951).

77 *Ruhr of Quatar v. International Marine Oil Co.*, 20 I.L.R. 534 (1953).

78 *Lighthouses Arbitration (France v. Greece)*, 23 I.L.R. 299 (1956).

79 Norton, *supra* note 23, at 477.

80 *Id.* at 478.

81 *BP*, 53 I.L.R. at 347.

82 *TOPCO*, 17 I.L.M. at 32.

83 *LIAMCO*, 62 I.L.R. at 210.

84 *Id.* at 211-15.

85 *Government of Kuwait v. American Independent Oil Company (AMINOIL)*, 21 I.L.M. 976 (1982).

86 *AMINOIL*, 21 I.L.M. at 1031-36.

tional law, as chosen by the parties, to resolve the dispute.⁸⁷ The tribunal then found that the appropriate level of compensation was “appropriate compensation” for a “lawful expropriation,” which was to be determined by an inquiry into all the circumstances surrounding the case.⁸⁸ This value, however, was determined by the tribunal to be the depreciated replacement value of the fixed assets and the going concern value of the enterprise, all adjusted with interest and for inflation.⁸⁹ In other words, the tribunal pronounced that the standard of compensation under international law is “appropriate compensation,” then interpreted “appropriate compensation” to mean, at least in the case at hand, full compensation.

Some of the arbitral opinions from the Iran-US Claims Tribunal are also evidence of the state of the international law of expropriation.⁹⁰ Many of the opinions concerning expropriation turned on the following paragraph from article 4, paragraph 2 of the US-Iran Treaty of Amity:⁹¹

[Property of investors] shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively revisable form and shall represent the full equivalent of the property taken.⁹²

While the opinions of many of the arbitrators turn on the requirements of this paragraph, because the applicability of this treaty is in question, many opinions also consider customary international law. All of the opinions that have considered international law require the payment of full compensation.⁹³

87 *Id.* at 1032.

88 *Id.*

89 *Id.* at 1040-42.

90 The Iran-U.S. Claims Tribunal was established on January 19, 1981, to resolve, among other things, disputes between U.S. nationals and the government Iran arising from expropriations of property of such U.S. nationals. 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), 1 IRAN-U.S. C.T.R. 9 (1983). The Iran-U.S. Claims Tribunal has jurisdiction over disputes between U.S. nationals, including citizens of the United States and corporations at least fifty percent owned by the U.S. citizens and formed under the laws of the United States, and the government of Iran, which includes any agency, political subdivision, instrumentality, or controlled entity thereof. Also, the dispute must have been outstanding as of January 19, 1981. Claims Settlement Declaration, art. VII, 1 IRAN-U.S. C.T.R. at 11-12.

91 Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed 15 Aug. 1955, entered into force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 900 [hereinafter, Treaty of Amity].

92 Treaty of Amity, August 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93.

93 *Shahin Shaine Ebrahimi (Shahin) v. Islamic Republic of Iran*, Iran Awd. 560-44/46/47-3, 177 (1994).

In the first two expropriation cases before the Iran-U.S. Claims Tribunal, the tribunals each referred to customary international law as the applicable law. In two of the cases, *Tippets*⁹⁴ and *American International Group*,⁹⁵ the tribunals found that international law required that full value be paid for expropriation. In *Tippets*, the Tribunal determined the value of the expropriated company, and awarded the U.S. claimant the full value of its 50% interest in the company.⁹⁶ In *American International Group*, the tribunal stated that

it is a general principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken.⁹⁷

The court concluded that the proper method of valuation is the “fair market value . . . at the date of nationalization,” or, if that is not available,

The appropriate method is to value the company as a going concern, taking into account not only the net book value of its assets but also such elements as good will and likely future profitability, and the company been allowed to continue its business under its former management.⁹⁸

A third case, *AIG*, concerned an insurance company 35% owned by U.S. nationals. The tribunal did not discuss a particular standard of compensation, but did use the going concern method of valuation to value the investor’s interests, which computes the full value of the enterprise.⁹⁹

In another case, *INA Corporation*,¹⁰⁰ the court applied the Treaty of Amity which required full compensation equal to the fair market value of the expropriated property. In *dicta*, however, the opinion suggested that “at least as far as ‘large scale nationalizations of a lawful character [are concerned], international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any “full” or “adequate” . . . compensation standard.”¹⁰¹ Arbitrator

94 *Tippets, Abbett, McCarthy, Stratton (Tippets) v. TAMS-AFFA Consulting Engineers of Iran*, Awd.No. 141-7-2, 6 IRAN-U.S. C.T.R. 219 (1984).

95 *American International Group, Inc. (AIG) v. The Islamic Republic of Iran*, Award No. 92-2-3 (19 Dec. 1983), 4 IRAN-U.S. C.T.R. 96 (1983).

96 *Tippets*, 6 IRAN-U.S. C.T.R. at 225-8.

97 *AIG*, 4 IRAN-U.S. C.T.R. at 105, 6.

98 *Id.*

99 See Section B.4, *infra*.

100 *INA Corporation v. The Government of the Islamic Republic of Iran*, Awd. No. 184-161-1, 8 IRAN-U.S. C.T.R. 373 (1985).

101 *INA*, 8 IRAN-U.S. C.T.R. at 378. In another case, *AGIP SpA v. Government of the People’s Republic of the Congo*, 8 Y.B. COMM. ARB. 133 (1983), the tribunal also stated in *dicta* that the “principle of full compensation for losses is limited in certain circumstances.”

Lagergren echoed this sentiment in a separate opinion,¹⁰² to which Arbitrator Holtzman responded, in a separate opinion, that Judge Lagergren's separate opinion was only his personal view and was *dicta*, and that while a few arbitral tribunals had stated that they were using an "appropriate compensation" standard, they had actually awarded full compensation.¹⁰³

Thus, each case that has ruled on the issue of compensation for expropriation under customary international law has affirmed that full compensation is also the standard under customary international law.¹⁰⁴ Arbitrator Allison, in a separate opinion in the *Shahin* case, summarized the opinion of the Iran-U.S. Claims Tribunal regarding the customary international law of expropriation:

In sum, there is virtual total uniformity in the Tribunal's rulings on the standard of compensation under international law. Every decision rendered by this Tribunal, whether based upon the Treaty of Amity or customary international law, or both of them, has concluded that compensation must equal the full value of the expropriated property as it stood on the date of taking. Moreover, every award rendered by this Tribunal, including the Award in the instant Cases, has provided claimants what the Tribunal determined to be the *full value* of their interest in the property taken, *regardless of whether the taking was lawful or unlawful* or whether the parties relied on the Treaty of Amity or customary international law.¹⁰⁵

Finally, several arbitrations conducted under the rules of the International Center for the Settlement of Investment Disputes¹⁰⁶ have also considered the international law of expropriation. Two of these cases involve the expropriation of investments in The Peoples Republic of the Congo.¹⁰⁷ In the first, *AGIP Co.*, the Congolese government nationalized the interests of a corporation owned 90% by Italian nationals. The choice of law of the parties was Congolese law supplemented by international law.¹⁰⁸ The second case, *Benvenuti*, involved the expropriation of a Congolese company in which Italian nationals held a 40% equity interest. Various actions of the Congolese state, culminating in the occupation of

102 *Id.* at 390.

103 *Id.* at 393, 401.

104 See e.g., *BP*, *supra* note 47; *TOPCO*, *supra* note 48; *Amoco International Finance Corp. (Khemco) v. Government of Iran*, 15 IRAN-U.S. C.T.R. 189, 266 (1987); *Sola Tiles, Inc. v. Government of the Islamic Republic of Iran*, Awd. No. 298-317-1 14 IRAN-U.S. C.T.R. 223 (1987); and *SEDCO, Inc. v. National Iranian Oil Company*, Awd. No. ITL 59-129-3, 10 IRAN-U.S. C.T.R. 180 (1986).

105 *Shahin*, *Supra* n. 93, Separate Opinion of Richard C. Allison, at para. 36 (emphasis added).

106 See Chapter 7, Section D.

107 *Benvenuti et Bonfant v. Peoples Republic of Congo*, 21 I.L.M. 740 (1982) and *AGIP Co. v. Popular (sic) Republic of the Congo*, 21 I.L.M. 726 (1982).

108 *AGIP Co.*, 21 I.L.M. at 727.

the company's plant by the Congolese army, precipitated the arbitral proceedings. Because the agreement between the investors and the state did not contain an express choice of law clause, the arbitrators, under Article 42(1) of the ICSID Convention,¹⁰⁹ applied Congolese law supplemented by principles of international law.¹¹⁰ In both of these cases, the arbitrators applied Congolese law supplemented by international law, and awarded full compensation.

In a third case, the *LETCO* arbitration,¹¹¹ the Tribunal applied Liberian law, but stated that Liberian law was in conformity with international law, and that "according to international law . . . LETCO is entitled to compensation for damages for both its lost investments and its foregone future profits."¹¹² Another case, *AAPL*,¹¹³ also awarded the "full value of the investment lost as a result of said destruction and the damages incurred as a result thereof."¹¹⁴

Thus, with the exception of *LIAMCO*,

every recent arbitral tribunal that has considered the issue has affirmed that the customary international law requires a state expropriating the property of a foreign national to pay the full value of that property, measured, where possible, by the market price. Although no tribunal has expressly invoked the Hull formula, the result has been the same.¹¹⁵

4. Treaties as Evidence of Customary International Law

One of the sources of customary international law is the practice of civilized nations, as evidenced by treaties. As stated by one commentator:

A series of recurrence of treaties laying down a similar rule may produce a principle of customary international law to the same effect. Such treaties are thus a step in the process whereby a rule of international custom emerges.¹¹⁶

109 See Chapter 7, Section D.

110 *Benvenuti*, 21 I.L.M. at 752.

111 *Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia*, 26 I.L.M. 647 (1987), *mod.* in Rectification of the Award Dated 31 Mar. 1986, 26 I.L.M. 677 (1987).

112 *Id.* at 658, 670.

113 *Asian Agricultural Products Limited (AAPL) v. Democratic Socialist Republic of Sri Lanka*, 30 I.L.M. 577 (1991).

114 *Id.* at 565.

115 Norton, *supra* note 23, at 488. For further discussion of full compensation, see Section B.2, *infra*.

116 J.G. Starke, *Treaties as a "Source" of International Law*, 23 BR. Y.B. INT'L L. 341, 344 (1946). "[T]reaties . . . can provide evidence of a general conception of international customary law." Foighel, *supra* note 6, at 41. See also Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BR. Y.B. INT'L L. 127 (1937).

Most bilateral investment treaties (BITs) in effect today provide that full compensation should be paid following an expropriation. For example, Article III of the United States-Russia BIT provides that investments shall not be expropriated, directly or indirectly, unless the expropriation is for a public purpose, is performed in a nondiscriminatory manner, and upon payment of prompt, adequate, and effective compensation.¹¹⁷ The same is true, for example, with respect to BITs concluded between Australia and Vietnam,¹¹⁸ Germany and Poland,¹¹⁹ Panama and the United Kingdom,¹²⁰ and China and Japan.¹²¹ The expropriation provisions in these treaties are set forth in detail in Chapter 4, Section B.

It has been argued that these treaties, and the protections that they offer to foreign investment, are evidence of customary international law. Professor Brownlie has stated that

[i]t is a fact that a considerable number of hosts to foreign capital are willing to conclude treaties for the protection of investments which commonly contain a provision for the payment of ‘prompt, adequate, and effective’ compensation in cases of expropriation. While these are negotiated deals, the pattern of agreements surely constitutes evidence of an international standard based upon the principle of compensation.¹²²

F.A. Mann also believed that “these treaties establish and accept and thus enlarge the force of traditional conceptions of the law of state responsibility for foreign investment.”¹²³ Mann argued that states that argue on the one hand that the customary international law allows states to choose the level of compensation following expropriation, and on the other hand, accept full compensation as the correct standard following expropriation in BITs, are not acting in good faith and are

117 Treaty Concerning the Encouragement and Reciprocal Protection of Investment, June 17, 1992, U.S.-the Russian Federation, S. TREATY Doc. NO. 102-33, 102d Cong., 2d Sess. For further discussion of BITs, see Chapter 4.

118 Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments, Mar. 5, 1991, 30 I.L.M. 1064 (1991).

119 Treaty Between the Federal Republic of Germany and the People’s Republic of Poland Concerning the Promoting and Reciprocal Protection of Investments, Nov. 10, 1989, 29 I.L.M. 333 (1990).

120 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of Investments, Oct. 7, 1983, 23 I.L.M. 708 (1984).

121 Agreement Between the People’s Republic of China and Japan Concerning the Encouragement and Reciprocal Protection of Investment, Aug. 27, 1988, 28 I.L.M. 575 (1989).

122 Brownlie, *supra* note 22, at 545 (citations omitted).

123 F. A. Mann, *British Treaties for the Promotion and Protection of Investment*, 52 BR. Y.B. INT’L L. 241, 249 (1981).

taking inconsistent positions.¹²⁴ Thus, the presence of a web of bilateral investment treaties that nearly uniformly provide for full compensation following expropriation is evidence that full compensation is the correct standard under customary international law.

5. Negotiated Settlements

Many expropriation claims are settled by lump sum payments from the expropriating host state to the home state of the investor whose property was expropriated. The investor's home state then awards the compensation to the investor.¹²⁵ In many of these settlements, less than full compensation is agreed upon.¹²⁶

One example of a lump sum settlement for less than the full value of the property expropriated was made between the United States and China in 1979. In an attempt to normalize relations with China, the United States agreed to settle outstanding claims for a lump sum of \$80.5 million,¹²⁷ which was substantially less than the estimated value of the claims of U.S. investors.¹²⁸ U.S. investors received approximately fourteen cents on the dollar on a principal-plus-interest basis.¹²⁹ A more recent lump sum settlement was negotiated between the United States and Germany regarding East Germany's expropriation of assets of U.S. nationals. This settlement included the payment of simple interest from the time that the U.S. properties were taken.¹³⁰

Some commentators have argued that the results of these lump sum settlement negotiations between states (i.e., the payment of less than full compensation) create international custom, which is one of the sources of international law,¹³¹ and thus should be viewed as evidence of the international law of expropriation.

124 *Id.* For a counterargument, see Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 N.W.J. INT'L L. & BUS. 327 (1994).

125 See discussion of the United States Foreign Claims Settlement Commission in Chapter 8, Section F.

126 See, e.g., *Chew*, *supra* note 25, at 648.

127 Agreement Concerning the Settlement of Claims, May 11, 1979, U.S.-P.R.C. 30 U.S.T. 1958, reprinted in 18 I.L.M. 551 (1979).

128 *Chew*, *supra* note 25, at 629.

129 Clagett, *supra* note 32, at §12.05[3][a].

130 Travieso-Diaz, *supra* note 42, at 226.

131 Statute of the International Court of Justice, Art. 38(1) (1945).

The existence of lump sum settlements for less than full value of the property taken cannot be seen, however, in and of themselves, as evidence of customary international law. The tribunal in *Khemco*¹³² stated that

as a rule, a State practice as reflected in settlement agreements cannot be considered as giving birth to customary rules of international law, unless it presents specific features which demonstrate the conviction of the State's parties that they were acting in application of what they consider to be settled law. The provisions of such an agreement, indeed, are the outcome of negotiations in which many motivations other than legal ones may have prevailed. This is especially true here, where certain commercial advantages given to companies (even if they were not expressly detailed in the agreements) produced the concessions that they accepted on the standard of compensation.

This position has also been taken by U.S. courts.¹³³ The Second Circuit Court of Appeals has stated that

the notion that, merely because a negotiated settlement will not result in full payment, a victim of expropriation has no right to more than partial compensation simply confuses adjudication with compromise . . . we should no more look to the outcome of such a process to determine the rights and duties of the parties in expropriation matters than we would look to the results of settlements in ordinary tort or contract cases to determine the rules of damages to be applied.¹³⁴

International law thus considers the difference between negotiations that were expressly based upon common practices followed because the negotiators believed that they were international law, and negotiations based upon other factors, such as business and political factors.¹³⁵ The former considerations would be evidence of international law, while the latter would not. Because almost all negotiated settlements are based on a variety of motivations, it is impossible to conclude that such negotiations are evidence of customary international law.

B. Current State of the Law of Expropriation

Many commentators, relying on the history and sources of law discussed above, draw the following conclusion concerning the international law of expropriation: A state may always expropriate property of investors within its borders; however, for such an expropriation to be “legal,” it must not be discriminatory against the investor, it must be for a public purpose, and it must be accompanied by full compensation, which must be prompt, adequate, and effective.¹³⁶ Thus, an ex-

132 *Khemco*, 15 IRAN-U.S. C.T.R. at 266.

133 *See, e.g., Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, (2d Cir. 1981).

134 *Id.* at 892.

135 *Khemco*, 15 U.S. C.T.R. at 266.

136

propriation that is non-discriminatory and for a public purpose is legal, but the requirement of compensation rule makes this legality conditional.¹³⁷ An expropriation not meeting these requirements is “illegal.”¹³⁸ Expropriations that are discriminatory or not for a public purpose, on the other hand, are considered illegal *per se*, whether or not compensation is paid.¹³⁹ This view of the law of expropriation has received considerable support from state practice and the jurisprudence of international tribunals.¹⁴⁰

Thus, under customary international law, a state is sovereign within its territory, which allows the state to take property of an alien. This sovereignty, however, exists within the framework of international law, which requires that the taking be for a public purpose and nondiscriminatory, and requires that the state pay compensation in the full amount of the value of the property taken.¹⁴¹ Professor Wortley explains:

Because a sovereign State may control and expropriate property in its territory, this does not mean that it can, at will, disregard the claims made, by virtue of public international law, to restitution or to just compensation, or that it may always insist on its own conception of private property.¹⁴²

An expropriation in violation of a treaty will also be illegal. Foighel, *supra* note 6, at 49. In this case, however, the illegality will arise from the breach of the treaty (in addition to possible illegality arising from the expropriation in violation of rules of customary international law).

137 Brownlie, *supra* note 22, at 533. Brownlie also discusses “[t]he practical distinctions between expropriation unlawful *sub modo*, i.e. only if no provision is made for compensation, and expropriation unlawful *per se*” *Id.* at 538-39.

138 Professor Brownlie cites other conditions that may make an expropriation “unlawful.” Brownlie, *supra* note 22, at 441, 537-39.

139 Professor Brownlie contends that an expropriation is also illegal if “it includes seizures which are a part of crimes against humanity or genocide, involve breaches of international agreements, are measures of unlawful retaliation or reprisal against another state . . . or concern property owned by a foreign state and dedicated to official state purposes.” Brownlie, *supra* note 22, at 538.

140 See the sources discussed in Section A of this Chapter. See also Brownlie, *supra* note 22, at 533.

141 Wortley, *supra* note 27, at 12. See also von Mehren & Kourides, *supra* note 46, at 516, 517; *TOPCO*, 53 I.L.R. at paras. 59-62; Kissam & Leach, *Sovereign Expropriation of Property and Abrogation of concession Contracts*, 28 *FORDHAM L. REV.* 177, 224 (1959); Abdel-Waheb, *Economic Development Agreements and Nationalization*, 30 *U. CINCINNATI L. REV.* 418, 440 (1961).

142 Wortley, *supra* note 27, at 12. Professor Wortley continues: “What, indeed, does the state acquire by its act of expropriation? Simply a title by its own *national* law that other States may not recognize if they think that the title has been acquired in a manner not recognized by *international* law.” *Id.* at 16. See the discussion of invalidation of title in Chapter 8, Section D.

The state of customary international law discussed above is reflected in the *Restatement (Third) of the Foreign Relations Law of the United States*, Section 712, which provides in part:

- A state is responsible under international law for injury resulting from:
- (1) A taking by the state of the property of a national of another state that
 - (a) is not for a public purpose, or
 - (b) is discriminatory, or
 - (c) not accompanied by provision for just compensation.¹⁴³

The Restatement provides that for compensation to be “just,” it “must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national.”

Customary international law is also reflected in the Guidelines on the Treatment of Foreign Direct Investment (“Guidelines”)¹⁴⁴ promulgated by the World Bank in 1992, which is not legally binding, but is based on a survey by the World Bank of existing legal instruments.¹⁴⁵ As pointed out in the Introductory Note to the Guidelines,¹⁴⁶ the Guidelines were the result of an attempt to “establish legal—or quasi-legal—guidelines or standards for the treatment of foreign direct investment.” The Guidelines were “based upon consideration of other pronouncements in the field, such as bilateral investment treaties,” but do not have the force of law such as does a treaty. However, the rules codified in the Guidelines, because of the process of their adoption and the sources utilized in formulating its norms, ought to “have considerable credibility,” and the status of the Guidelines “would seem to approach more closely the status of an international agreement.”¹⁴⁷

Regarding expropriation, the Guidelines state:

[A] State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, ex-

143 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Section 712 [hereinafter, the Restatement].

144 The Guidelines are reprinted in Appendix II.

145 The events leading to the drafting of the Guidelines are briefly discussed in Ibrahim F. I. Shihata & Antonio R. Parra, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID REV.-FOR. INV. L.J. 191 (1994).

146 Seymour J. Rubin, *Introductory Note* [to the World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment], 31 I.L.M. 1363 (1992).

147 *Id.*

cept . . . against the payment of appropriate compensation . . . Compensation for a specific investment taken by the State will, according to the details provided below, be deemed “appropriate” if it is adequate, effective, and prompt.¹⁴⁸

The specific requirements of customary international law for an expropriation to be “legal,” that it be for a public purpose and non-discriminatory and that full compensation is paid to the investor, are discussed in further detail below.

1. Public Purpose and Non-Discrimination

As discussed above, an expropriation must be for a “public purpose” to be considered “legal” under international law. “Public purpose” has been defined as “reasons of public utility, judicial liquidation and similar measures.”¹⁴⁹ General Assembly Resolution 1803 concerning permanent sovereignty of natural resources mentions the public purpose requirement, although the 1974 Charter of Economic Rights and Duties of States does not.¹⁵⁰ No decision of which we are aware has turned on whether an expropriation was for a “public purpose.”¹⁵¹ This may be because it is very easy for an expropriating state to couch any taking in terms of some “public purpose.” A challenge to an expropriation based on a claim that the expropriation was not for a “public purpose” would possibly be effective in the case of a dictator seizing property clearly for his or her personal use.¹⁵²

An expropriation must also be “nondiscriminatory” to be considered “legal” under international law. A discriminatory taking is a taking one that unreasonably singles out a particular person or group of people. General Assembly Resolution 1803 does not mention non-discrimination. The arbitrator in *LIAMCO*, however, argues that a discriminatory expropriation would be unlawful.¹⁵³ Like the “public purpose” requirement, the “nondiscrimination” requirement is not extensively discussed in the literature or ruled upon by international tribunals. As with the “public purpose” requirement, this may be because a violation of this requirement would be difficult to prove.¹⁵⁴ The Restatement says that

[C]lassifications, even if based on nationality, that are rationally related to the

148 IBRAHIM F.I. SHIHATA, *LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES* 161 (1993), reprinting the Guidelines.

149 *Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J., Series A, No. 7, p. 22. *But see LIAMCO*, 62 I.L.R. at 194, stating that “it is the general opinion in international theory that the public utility principle is not a necessary requisite for the legality of a nationalization.”

150 *See* discussion, *supra*, Section A.2.c.

151 *See also* Clagett, *supra* note 32, at §12.01[1].

152 Restatement, *supra* note 143, at Sec. 712, com. (f), at 200.

153 *LIAMCO*, 62 I.L.R. at 194.

154 Shaw, *supra* note 162, at 528.

state's security or economic policies might not be unreasonable.¹⁵⁵

This is echoed by Professor Brownlie:

The test of discrimination is the intention of the government: the fact that only aliens are affected may be incidental, and, if the taking is based on economic and social policies, it is not directed against particular groups simply because they own the property involved.¹⁵⁶

If this standard were used by a tribunal to determine whether a taking were discriminatory, it would be difficult for an expropriated investor to prove that this standard had been violated, unless, for example, an investor's property were taken in retaliation for acts of its home state. Thus, it may be difficult for an investor to rely for protection upon the requirements of nondiscrimination and public purpose. (Additional problems with these requirements are discussed in Section B.3, below.) Reliance upon compensation, discussed next, is likely to be an investor's most fruitful remedy.

2. Compensation

a. Full Compensation as Standard under International Law

As Professor Brownlie notes, "it is significant that the right to compensation on whatever basis, is recognized in principle."¹⁵⁷ It can hardly be doubted, then, that compensation, in *some* amount, is required following an expropriation, whether legal or illegal.¹⁵⁸ As discussed in the sections on the history and sources of the international law of expropriation above, international law requires that a state that expropriates the property of an investor pay to the investor the *full* value of the property taken. In a case involving a concession, there is a duty following expropriation to compensate not only for the loss of tangible property, but also for the loss of the contractual rights.¹⁵⁹ Evidence of this can be found in the decisions of international tribunals,¹⁶⁰ the provisions of many investment treaties,¹⁶¹ and in the writings of scholars.¹⁶² As Professor Norton has observed,

155 Restatement, *supra* note 143, §712, com. (f), at 200.

156 Brownlie, *supra* note 22, at n1 (citations omitted).

157 *Id.* at 543.

158 The validity of the legal/illegal distinction is questioned in Section B.3, *infra*.

159 Amerasinghe, *supra* note 23, at 37.

160 See Section A.3, *supra*.

161 See Section A.4, *supra*, and Chapter 4.

162 See, e.g., CHARLES HYDE, INTERNATIONAL LAW (1949), Vol. III at 710-27; Alexander P. Fachiri, *International Law and the Property of Aliens*, 10 BR. Y.B. INT'L L. 32 (1929); Chandler P. Anderson, *Title to Foreign Confiscated Property*, 20 AM. J. INT'L L. 528 (1926); and Fawcett, *supra* note 3.} {\plain \b{f1 } {\plain \f1 But see Penrose, *supra* note 34, at 352: "That the state should pay compensation for the takeover of pri-

Recent international tribunals have consistently affirmed a requirement under international law that full compensation be paid for expropriations of foreign property. A theoretical debate persists over the scope of possible exceptions to that standard, but the recent decisions suggest that only truly extraordinary circumstances would be likely to support such exceptions.¹⁶³

The “full compensation” requirement may also be stated as a requirement that compensation for expropriation must be “prompt, adequate, and effective.”¹⁶⁴ In this context, “prompt” means that at or before the time of the taking, either compensation has been paid or provision has been made for a determination of the amount of compensation to be paid, with interest from the time of the taking.¹⁶⁵ “Effective” means that compensation must be made in a useful currency. This precludes forms of payment such as soft currency, unmarketable bonds, and I.O.U.s.¹⁶⁶

“Adequate” compensation, as discussed above, means that the investor is paid the full value of the property taken, which in the case of an on-going business, will normally be the going-concern value.¹⁶⁷ Valuation should be made at the time of the taking, but the investor should be indemnified by the state for a depression in value due to the threat of expropriation prior to the time of the actual expropriation.¹⁶⁸ Reductions in value caused by government action, including revolution, not specifically targeting the investor, however, should not be taken into account.¹⁶⁹

The Restatement suggests that “exceptional circumstances” may justify less than full compensation in the event of expropriation.¹⁷⁰ It suggests two such ex-

vate assets is not questioned, and, in general, both international and domestic law hold that in most circumstances the government is obliged to pay to the owner of property it nationalized a compensation that is fair/just/full/adequate/appropriate/effective. These terms are imprecise, can easily have different ethical, economic and legal implications, and are clearly not interchangeable.” *See also* Williams, *supra* note 6162. For further discussion, *see, e.g.*, M.N. SHAW, *INTERNATIONAL LAW* 516-24, 528 (1991); Brownlie, *supra* note 22, at 538, 542-43, 544 n23, 548; Higgins, *supra* note 12, at 142; Derek William Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BR. Y.B. INT’L L. 49, 59 (1988). For arguments that international law requires the payment of “appropriate” compensation rather than full compensation in some circumstances, *see* Amerasinghe, *supra* note 23.

163 Norton, *supra* note 23, at 503.

164 *See id.* at 476.

165 Clagett, *supra* note 32, at §12.01[1].

166 *Id.*

167 *Id.*

168 *Id.* at §12.01[2].

169 *Id.*

170 Restatement, *supra* note 143, §712, com. (d), at 199.

ceptional circumstances: national programs of agricultural land reform and war.¹⁷¹ It then states, however, that the lesser standard of compensation would not be justified for land reforms if the property taken is used in a business enterprise authorized or encouraged by the state, the property was a going concern, taken for operation by the state, the taking was discriminatory against aliens, or the taking otherwise violated certain principles of international law.¹⁷² Despite these suggested exceptions to the requirement of full compensation, the better position under international law is that full compensation is always required following expropriation.

Commentators have suggested other exceptions to the “full compensation” rule. Ian Brownlie states that the most widely accepted exceptions are as follows:

under treaty provisions; as a legitimate exercise of police power, including measures of defense against external threats; confiscation as a penalty for crimes; seizure by way of taxation or other fiscal measures; loss caused indirectly by healthy and planning legislation and the concomitant restrictions on the use of property; the destruction of property of neutrals as a consequence of military operations, and a taking of enemy property as part payment of reparation for the consequences of an illegal war.¹⁷³

Brownlie also suggests that an expropriation is not illegal if it is in connection with the nationalization of a major industry, and compensation is paid “on a basis compatible with the economic objectives of the nationalization, and the viability of the economy as a whole.”

Finally, jurists in several cases have argued in *dicta* that less than full compensation was payable following expropriation in certain circumstances. In *INA*, for example, Arbitrator Lagergren argued that in the case of large scale nationalizations, full compensation may not be payable.¹⁷⁴

Thus, the circumstances in which commentators have argued that a state need not be paid full compensation can be divided into three categories: in connection with agreements to the contrary between states, such as treaties; in connection with exercises of police power, both internal and external, such as taxation, regulation, confiscation for crimes, and as a result of war; and in connection with large-scale nationalization for the purpose of reform.

While the first two propositions, agreement between states and police power, may be legitimate, the final exception, regarding large-scale nationalizations, is not supported by the majority of commentators, the practice of arbitrators, or by

171 See also Brownlie, *supra* note 22, at 536.

172 *Id.*

173 *Id.* at 535. Brownlie also notes, at p. 464: “There is some debate as to the possibility of penal damages in international law.”

174 See note 100, *supra*, and accompanying text.

reason and sound principles of law and economics, as discussed in further detail in the following subsection.

b. Justifications for Full Compensation

While the previous subsection discusses the fact that “full” or “prompt, adequate, and effective” compensation is the proper standard of compensation under international law, this subsection digresses slightly into a discussion of *why* such a standard is proper. In a nutshell, an investor is harmed by having its property taken, and can only be compensated by having the actual value—or the “full” value—of the property repaid to it. The state benefits in an amount equal to the value of the property taken, so should pay that amount to the investor.

With regard to arguments that only partial compensation should be paid in the case of a “large scale nationalization,” it makes little difference to an investor *why* his property was taken, for the damage done to him regardless of the motivation for the taking can only be measured by the (full) economic value of the property. This point is cogently made by Brice Clagett:

[T]here remains a significant body of opinion, even including some Western scholars, arguing that when a particular expropriation is part of a broad-scale nationalization of an entire industry or segment of the economy, something less than full compensation—partial compensation—is all that is required. . . . I call [this theory] the “partial confiscation” theory. If a man steals \$10 from me and gives me back \$4, he has still stolen \$6. I am not able to understand why similar conduct by governments should be viewed any differently. And I have never seen any suggestion of a principled—or even an unprincipled—basis on which “partial” compensation might be measured or calculated.¹⁷⁵

Finally, consider the fact that a nationalization that is truly legal, nonarbitrary, nondiscriminatory, and for a public purpose still requires at least some amount of compensation. The “good” motivation of the government does not *excuse* it from paying compensation. The quite proper rationale behind this is that an investor is harmed just because its property is taken, and the good motive of the government is irrelevant. But similarly, if motive, intent, and purpose are irrelevant in determining *whether* harm is done to the investor, it should be irrelevant in determining *how much* harm was done to the investor. No worse harm is done to the investor if the taking is motivated by benevolence, spite, or even malice.¹⁷⁶ The harm done is still the same and can be adequately compensated for by awarding damages equal to the full value of the property taken.

175 Clagett, *supra* note 23, at § 12.04[2], pp. 12-15 to 12-16, citing Judge Lagergren’s concurrence propounding this theory in *INA Corporation v. Government of the Islamic Republic of Iran*, Awd. No. 184-161-1, 8 IRAN-U.S. C.T.R. 373 (1985).

176 See also Brownlie’s discussion of the relevance of intention and motive with regard to state responsibility, at Brownlie, *supra* note 22, at 441-42; *LIAMCO*, 62 I.L.R. at 194 (discussing the relevance of a government’s intent in expropriating).

3. The Requirements of Nondiscrimination and Public Purpose: Concepts of Limited Significance

As explained above, it is widely accepted that it is “against” international law for a host state to expropriate a foreign investor’s property if the expropriation is a discriminatory one, is for a non-public purpose, or is made without sufficient compensation. Worded differently, there is said to be a *requirement* under international law that such international expropriations be (1) nondiscriminatory, (2) for a public purpose, and (3) accompanied by full compensation. Action directed against persons of a particular nationality or race is an example of discriminatory action. Action which lacks a normal public purpose—such as the purely private purpose of a government official or dictator—is sometimes also referred to as “arbitrary.”¹⁷⁷ Under this view of international law, some expropriations are legal, while some are illegal. However, there are some theoretical arguments for the proposition that this distinction is of doubtful validity and limited significance. One such argument is briefly outlined below.

Are nondiscrimination and public purposes properly referred to as “requirements” of a “legal” expropriation under international law? Does it make sense to refer to an expropriation that violates these requirements as “illegal”—even if full compensation is paid? What are the consequences for breaching these requirements that do not flow from an otherwise-legal expropriation, that differentiate such an “illegal” taking from a legal one?

It is perfectly reasonable to focus on the consequences that flow from state actions in deciding whether a given classification or distinction is sensible. As John Locke pointed out long ago,

For the law of Nature would, as all other laws that concern men in this world, be in vain if there were nobody that in the state of Nature had a power to execute that law, and thereby preserve the innocent and restrain offenders . . .¹⁷⁸

Similarly, it is a common legal observation that a right without a remedy is hollow¹⁷⁹—i.e., not a real right at all. Thus, a purportedly unlawful act that has consequences no different in kind or in principle from those of a lawful act should not be termed an unlawful act, for the distinction is misleading and misdescriptive.

Professor Bowett, who accepts the traditional distinction between “unlawful” and “lawful” takings, acknowledges that

177 Brownlie, *supra* note 22, at 548.

178 JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* ¶ 7 (Prometheus Books ed., 1986) (1690).

179 See, e.g., Higgins, *supra* note 12, at 16 n42, 53, 99.

There would seem to be little value in making the distinction between a lawful and an unlawful taking unless consequences flowed from it: and it would be extraordinary if the distinction was of no consequence.¹⁸⁰

Bowett maintains that the distinction *does* affect the remedies available following an expropriation, and thus the distinction is sensible, from his point of view.¹⁸¹ If, however, there are no such consequences, then there is no meaningful, significant distinction between takings lawful or unlawful. If this is the case, then non-discrimination and public purpose are empty phrases, and should not be recognized as requirements by international lawyers.

There are indeed practical consequences flowing from classifying an expropriation as illegal, such as invalidation of title and exceptions to foreign sovereign immunity. One would think that the most significant consequence that could flow from classifying a taking as legal or illegal, however, would be a difference in the amount of damages. Another significant consequence would be if an unlawful expropriation was considered to justify an armed or other forceful response against the host state by the investor's home state.

But as we have pointed out, full compensation must accompany any taking, whether legal or illegal, and nations no longer have the right to use force against host states in response to so-called "illegal" takings. Thus, the distinction between lawful and unlawful takings is today of limited significance. Further, even if legal and illegal takings called for kind standards of compensation, the difference would seem to be one of degree rather than one of kind since there would seem to be little justification for characterizing differently two expropriations, both of which merely obligate the host state to pay a certain sum of money.

For these reasons, then, the requirements of nondiscrimination and public purpose would seem to be of at least limited significance, and perhaps of doubtful legitimacy.¹⁸²

180 Bowett, *supra* note 162, at 59.

181 *Id.* at 63. Bowett maintains that there may be three standards of compensation, (1) for an unlawful taking, (2) for a lawful *ad hoc* taking, and (3) for a lawful, general act of nationalization. *Id.* at 73. *See also* Brownlie, *supra* note 22, at 538-39, stating that:

"The practical distinctions between expropriation unlawful *sub modo*, i.e. only if no provision is made for compensation, and expropriation unlawful *per se*, would seem to be these: the former involves a duty to pay compensation only for direct losses, i.e. the value of the property, the latter involves liability for consequential loss (*lucrum cessans*); the former confers a title which is recognized in foreign courts (and international tribunals), the latter produces no valid title." [Footnotes omitted.]

182 The reader is cautioned that the views set forth in this regard are speculative and theoretical, rather than a more black-letter description of existing law and legal practices.

4. Valuation

It is well settled under international law that the proper level of compensation following expropriation is full compensation. The method of determining the amount of compensation, however, presents a different issue. For example, should full compensation be determined based on the book value of the investor's expropriated assets? Should modern methods of valuation, such as the "discount cash flow" method, be used? Are "future profits" part of the value of the investor's property? What about intangibles, such as goodwill? Various methods for valuation are discussed in this subsection.

a. Methods for Determining Value

The proper method for determining the value of an asset depends upon the nature of the asset. For tangible assets for which there is a well developed market, such as drilling equipment or a plot of land, the most accurate method to determine value is the market value. "Market value" refers to a property's value as it is, or would be, determined on an open market consisting of unconstrained buyers and sellers.¹⁸³ In some situations, especially those involving unique assets, there is no ready market in which to determine value. It is possible, nevertheless, to determine the market value of an asset in the absence of a market, based on perceptions of potential buyers and sellers.

If the expropriated asset is an ongoing enterprise, or a "going concern," there may not be a well developed market to be used for determination of the "market value" of the asset. In this case, the most accurate method of determining value is the discount cash flow (DCF) method.¹⁸⁴ This method of valuation is "almost universally used and accepted by both the business and academic communities in valuing capital assets."¹⁸⁵ The following is a brief explanation of the DCF method:

[T]he DCF method involves first calculating the cash receipts expected in each future year, and then subtracting that year's expected cash expenditure. The result is the net cash flow for the year. Because cash to be received in the future is worth less than the same amount of cash received today, the net cash flow for each future year is then discounted (i.e., reduced) to determine its value on the valuation date, which is usually referred to as its "present value" as of that date. This discounting is accomplished through the application of a discount factor

183 William C. Lieblich, *Determining the Economic Value of Expropriated Income-Producing Property in International Expropriations*, 8 J. INT'L ARB. 37, 63 (1991). United States courts have held that fair market value is "the price which would be agreed upon by a willing seller and a willing buyer under usual and ordinary circumstances, after consideration of all available uses and purposes, without any compulsion upon the seller to sell or the buyer to buy." *Poole v. N.V. Deli Maatschappij*, 243 A.2d 67, 70 (Del. 1968).

184 Lieblich, *supra* note 183, at 70; Clagett, *supra* note 32, at §12.04[3].

185 Lieblich, *supra* note 183, at 70.

derived from a discount rate that reflects the time value of money, expected inflation, and any risks attached to the cash flows . . . the sum of the present values of the net cash flows for all future years is the value of an asset or enterprise as determined by the DCF method.¹⁸⁶

This method of valuation reflects the reality that the economic value of an enterprise to its owner is equal to its ability to generate a cash flow.¹⁸⁷ The focus of the DCF method is on cash, rather than profits. Lieblich has noted that, “if future profits (or, more correctly, future cash flows) may not be taken into consideration in determining the value of expropriated property, it is not possible to determine its value at all.”¹⁸⁸ As Lieblich further explains,

[C]ash is the proper focus of any method that is used to measure economic value. Profits, in contrast, are an accounting construct that is designed to provide information concerning the allocation of the business’ cash receipt and outlays over time . . . but profits do not necessarily accurately reflect a firm’s actual net cash flows in a specific period, and therefore are not the appropriate object of an inquiry into the firm’s economic value.¹⁸⁹

Some commentators have objected that the DCF method is too “speculative,” because it is impossible to select the discount rate with any accuracy. Any determination of value, however, to be accurate, must inquire into the future. “The only way to escape uncertainty in awarding compensation is to employ methods—such as book value—that are irrelevant to economic value because they focus on the past and not the future.”¹⁹⁰

Another argument often heard is that, at least with respect to a “legal” expropriation, it is not appropriate to award “future profits”; the DCF method of valuation is based upon future profits. Many tribunals and commentators draw a false dichotomy between the value of hard assets (net book value) and the “profits” that the assets will produce. Just as the arguments for “partial” compensation are groundless, this dichotomy is also nonsensical, as “the value of income-producing assets depends entirely on the cash that they are expected to generate in the future.”¹⁹¹

186 William C. Lieblich, *Determinations by International Tribunals of the Economic Value of Expropriated Enterprises*, 8 J. INT’L ARB. 37, 38-39 (1990).

187 See Lieblich, *supra* note 186, at 61 (“That the economic value of an asset is determined by the asset’s expected capacity to generate revenues is by no means a recent insight.”).

188 *Id.* at 76.

189 *Id.* at 62.

190 *Id.* at 77.

191 *Id.* at 67.

It is generally recognized that in calculating the value of expropriated property, a tribunal must exclude diminution in value caused by the fact of the taking. In the *INA* arbitration,¹⁹² for example, the Tribunal held that

“Fair market value” may be stated as the 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.¹⁹³

Net book value has been suggested by some commentators and international tribunals as the proper method for determining the value of assets. The term “book value” or “net book value” means the difference between the investor’s assets and liabilities as shown on a balance sheet and determined in accordance with generally accepted accounting principles.¹⁹⁴ “Book value” and “net book value” are merely accounting terms, however, and are not appropriate as methods of valuation.¹⁹⁵ The major problem with “book value” is that it does not value the right to receive a portion of the revenues from the business which is, in itself, an asset. “Book value” assumes that there is a “real” value to property, to which an ephemeral concept of “profits” is added. As Judge Rosalyn Higgins has stated, however, “[t]here is no ‘real’ value of property, to which the estimate of profits is then added.”¹⁹⁶

b. Damages or Lost Profits?: An Irrelevant Question

One common theme found in many international arbitral discussions of valuation of ongoing enterprises is discussion of the fallacious concepts of *damnum emergens* and *lucrum cessans*. These are Latin terms which mean, roughly, “damage suffered” and “profits lost.” Many commentators and some arbitral tribunals¹⁹⁷ make a distinction that in the case of unlawful expropriations both *damnum emergens* and *lucrum cessans* should be awarded to the injured party, while in the case of lawful expropriations, only *damnum emergens* should be granted to the injured party. *Damnum emergens* is equated with the value of the tangible assets expropriated, separated (somehow) from their ability to generate

192 *INA, supra*; see also Charles N. Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT’L LAW. 639, 665 (1987).

193 *INA*, C.T.R. at 380.

194 Lieblich, *supra* note 183, at 64.

195 Eli Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, J. ENERGY & NAT. RESOURCES L. 241, 245-46 (1990).

196 Higgins, *supra* note 12, at 144.

197 Arbitral tribunals discussing the concepts of *damnum emergens* and *lucrum cessans* include *LIAMCO*, *AGIP*, and *Khemco*.

revenues. *Lucrum cessans* is equated with the ability of the assets to generate revenues, i.e., the “lost profits.”

These concepts may be appropriate in certain contract and tort disputes, but not in determining value for expropriated property, as explained by Lieblich:

In a typical breach of contract case in which [the principals of *damnum emergens* and *lucrum cessans*] are applied, the injured party, in reliance on the other party’s promise to perform his contractual obligations, has incurred expenses while placing himself in a position to perform his own obligations. When the other party fails to adhere to his obligations, the injured party may claim damages to recover the expenses he has incurred (*damnum emergens* representing the reliance interests) and the profits he would have earned had the contract been performed in accordance with its terms (*lucrum cessans* representing the expectation interests).

In such a situation, a distinction between *damnum emergens* and *lucrum cessans* may be appropriate. For one thing, the loss sustained by the injury [sic] party (i.e., the expenses he incurred) is usually easy to determine, whereas the profits he would have gained from performance of the contract may be difficult to establish, especially when little or no performance had taken place by the time of such breach. Furthermore, in some cases there may be a significant disproportion between the nature of the breach and the size of the damages under the *lucrum cessans* head. Finally, the profits lost to the injured party may not correspond to the benefits that the breaching party gained by failing to perform.¹⁹⁸

Thus, while in a breach of contract or tort situation it may be appropriate to distinguish between damage suffered and loss of profits in order that the injured party not be placed in a position better than if the contract had not been performed,¹⁹⁹ the only appropriate question in an expropriation case is, what is the value of the expropriated assets?²⁰⁰ The concepts of *damnum emergens* and *lucrum cessans* draw a distinction divorced from reality, because the value of an ongoing enterprise is its potential to generate revenues. This potential to generate revenues is best determined by the “discount cash flow” method of valuation (discussed below), which takes into account both *damnum emergens* and *lucrum cessans*.

198 Lieblich, *supra* note 183, at 67-68.

199 Another situation in which the distinction between damages and profits is useful is international sales contracts. In arbitration of such contracts, a distinction is usually drawn between actual loss for expenses such as labor, material, resale cost, and administrative costs, and anticipated profits. In such cases, it is often the case that “the aggrieved party recovers only its actual losses resulting from the breach on the grounds that it can make a substitute sale or purchase on the open market and prevent further losses. To the extent that an injured party loses profit by not resorting to the market, it cannot hold the other party responsible for the loss.” Felix Praendl, *Measure of Damages in International Commercial Arbitration*, 23 STANFORD J. INT’L. L. 263, 287 (1987).

200 Lieblich, *supra* note 183, at 68.

Lauterpacht perceptively notes that the distinction between *damnum emergens* and *lucrum cessans* is invalid, and that “lost profits” of course must be taken into account when determining the value of an economic asset.²⁰¹ Thus, as the validity of separating *lucrum cessans* from the value of property is called into question, the view that “legal” expropriations give rise to only *damnum emergens* but not *lucrum cessans* is similarly called into question. Lieblich has also noted that, “if future profits (or, more correctly, future cash flows) may not be taken into consideration in determining the value of expropriated property, it is not possible to determine its value at all.”²⁰²

Judge Higgins concludes that “the issue of the contemporary place of *damnum emergens* and *lucrum cessans* presents us with an ideal case for resolution by policy analysis of alternatives, rather than by poring over a 1928 dictum of debatable economic reality.”²⁰³ She continues:

the value of the property does not change by virtue of the lawful or unlawful nature of its taking; and it is loss of confidence, rather than ‘penal’ valuation, that will provide the incentive to states to expropriate lawfully, in accordance with international law.²⁰⁴

c. Arbitral Decisions

Unfortunately, despite overwhelming support for “market value” and DCF methods of valuation in both the business and academic communities,²⁰⁵ there is not a consistent acceptance of these methods by international arbitral tribunals. Methods of valuation employed by tribunals range from the DCF method to modified “book value” methods to unintelligible discussions of *lucrum cessans* and *damnum emergens*, concepts that have no place in a discussion of the value of assets. A survey of valuation methods used by various international arbitral tribunals is provided below.

(1) Tangible Property

Where the expropriated property is movable or immovable assets, but not a going concern, many tribunals correctly use the “market value” approach to valuation. For example, in the *SEDCO*²⁰⁶ case, the tribunal found that Iran had expropriated, among other things, certain oil rigs belonging to SEDCO. In this

201 Lauterpacht, *supra* note 195, at 245.

202 Lieblich, *supra* note 183, at 76; *see also* Higgins, *supra* note 12, at 144 (“There is no ‘real’ value of property, to which the estimate of profits is then added.”).

203 Higgins, *supra* note 12, at 144.

204 *Id.* at 145.

205 Lieblich, *supra* note 183, at 70.

206 *SEDCO, Inc. v. National Iranian Oil Company, et al.*, Awd. No. 309-129-3, 15 IRAN-U.S. C.T.R. 23 (1987).

case, only assets, rather than a going concern, had been expropriated. The tribunal stated that the claimant should be compensated for

the fair market value of the properties, i.e., what a willing buyer and a willing seller would reasonably have agreed on as a fair price at the time of the taking in the absence of coercion on either party.²⁰⁷

The oil rigs were valued at “liquidation value,” which was determined as the fair market value of the rigs on the open market. The tribunal also valued an expropriated parcel of land at market value using a cost comparison analysis (the cost was based on the price paid for a similar parcel of land one year earlier), and another parcel of land using “current cost accounting” (the book value of land was increased using a price index).

(2) Business Enterprises—Going Concern

Where a business enterprise that is a going concern has been expropriated, some tribunals have applied the DCF method of valuation. The DCF method has been explicitly applied in at least two recently published arbitral decisions of the Iran-U.S. Claims Tribunal, and two ICSID decisions.²⁰⁸

In the *Phillips* arbitration, regarding a claim by U.S. nationals for expropriation of their interests in an Iranian joint venture for the operation of oil fields in the Persian Gulf, the tribunal stated that the valuation of a going concern must be based upon its ability to generate revenues, and adopted the DCF method to make this determination. The tribunal also had an expert value the assets using a so-called “underlying asset valuation” method, which involved determining the depreciated value of the tangible assets and adding an “intangible asset” value, based on historic income. The DCF method gave a value of approximately \$55 million, while the latter method gave a value of approximately \$60 million. The award was based upon the DCF valuation.

In a later case, *Starrett*, the tribunal used the discount cash flow method in valuing the claimant’s rights in a venture for the construction of an apartment complex. The tribunal required payment of fair market value, which was determined to be the going-concern value, which was determined by substantially adopting a discount cash flow valuation developed by a tribunal-appointed expert. The tribunal,

207 *SEDCO*, 15 IRAN-U.S. C.T.R. at 35.

208 See *Phillips Petroleum Co. Iran v. Iran*, Awd. No. 425-39-2, 21 IRAN-U.S. C.T.R. 79 (1989) [Phillips]; *Starrett Housing Corp. v. Iran*, Awd. No. 314-24-1, 16 IRAN-U.S. C.T.R. 112 (1987); *Amco Asia Corp., Pan American Development Ltd., and P.T. Amco Indonesia v. Republic of Indonesia*, (1st Award), 24 I.L.M. 1022 (1984), annulled on other grounds, 25 I.L.M. 1439 (1986) (regarding the expropriation of contract rights to manage a hotel enterprise) [hereinafter *Amco #1*]; *Amco Asia Corp., Pan American Development Ltd., and P.T. Amco Indonesia v. Republic of Indonesia* (2nd Award), 5 INT’L ARB. REP. D-5 (1990) [hereinafter *Amco #2*].

however, reduced the award by over ninety percent from the value determined by the expert using the DCF method based on the vague concept of “equity.”²⁰⁹

In the *Amco Asia* arbitrations, both decided under the auspices of the ICSID Convention, both tribunals adopted the DCF method of valuation. These cases involved the seizure of a hotel complex belonging to American investors by the Indonesian army. The first tribunal stated

Now, while there are several methods of valuation of going concerns, the most appropriate one in the present case is to establish the net present value of the business, based on a reasonable projection of the foreseeable net cash flow during the period to be considered, said net cash flow being then discounted in order to take into account the assessment of the damages at the date of the prejudice.²¹⁰

The DCF method was also accepted in the *LIAMCO* arbitration,²¹¹ but only as a method to value the “future profits” portion of an award. As discussed above, a distinction between “value of assets” and “future profits” is fallacious. This case arose out of Libya’s nationalization of the *LIAMCO*’s oil concessions in 1973 and ‘74. After determining that the company was owed “appropriate” compensation, the arbitrator concluded that *LIAMCO* should receive the “*damnum emergens*,” or the value of the tangible nationalized property, but that

the controversial question in this connection is the scope of compensation and the manner of its determination as regards the incorporeal property of the concession rights *per se* and whether or not that determination should include the loss of profits (*lucrum cessans*).²¹²

The arbitrator thus divided *LIAMCO*’s enterprise into its tangible asset and its capacity to generate revenue. This is a fallacious division, as the value of the tangible assets to *LIAMCO* was derived from their ability to generate revenues. The arbitrator then valued seventy oil wells based on the cost to construct the oil wells, adjusted for depletion, amortization, and depreciation. Regarding the nationalized concession, *LIAMCO* submitted two analyses, both apparently calculated using the DCF method. One valued the property prior to the nationalization decrees at approximately \$186 million, and the other took into account higher taxes and royalty rates imposed by Libya following the expropriation and valued the property at approximately \$56 million. The arbitrator, based on the “measure of equitable

209 *Starrett*, 16 I.L.M. at 138-77.

210 *Amco #1*, 24 I.L.M. at 1037.

211 *LIAMCO*, 20 I.L.M. at 1.

212 *Id.* at 132.

compensation,”²¹³ awarded \$66 million without further explanation.²¹⁴

The Iran-U.S. Claims Tribunal has also adopted the approach of LIAMCO on occasion. In *AIG*, for example, concerning the nationalization of an insurance company, the award indicated that full market value of the claimant’s interest (35% of the stock) was due, that the enterprise should be calculated as a going concern, and that any effects of nationalization should not be considered in arriving at the value. The tribunal stated that it must

value the company as a going concern, taking into account not only the net book value of its assets, but also such elements as goodwill and likely future profitability, had the company been allowed to continue its business under its former management.²¹⁵

The parties submitted estimates of what they considered the enterprise to be worth, which were widely disparate. The tribunal chose a figure that was approximately 25% of what the claimant requested, and five or six times higher than the value proposed by the government.

Thus, the DCF method has been embraced by some tribunals as the proper method to value a going concern, and at least begrudgingly accepted by others as a method to measure future profits (which, although a flawed approach, at least allows the investor to present to the tribunal a more accurate financial view than net book value, for example). The investor should be aware, however, that there is also precedent for completely rejecting the DCF method. The *Khemco* case deserves special mention for its confused reasoning in this regard. This case arose from Iran’s expropriation of the claimant’s interest in an oil venture. The tribunal rejected the DCF method, stating that

[The DCF method] is instead a projection into the future to assess the amount of the revenues which would possibly be earned by the undertaking year after year, up to 18 years later in this Case. These forecasted revenues are actualized at the time by way of a discounting calculation, and capitalized as the measure of the compensation to be paid, as well as the alleged market value of the enterprise. With such a method, *lucrum cessans* becomes the sole element of compensation.²¹⁶

The tribunal does not understand that the value of the assets of a going concern is the ability of those assets to generate revenue. This confusion stems from the attempt to separate the value of the enterprise into its tangible and intangible components. The tribunal also rejected the “book value” approach suggested by the state,

213 *LIAMCO*, 20 I.L.M. at 159-60.

214 The arbitrator did not award compensation for a second, less profitable concession. *Id.* at 162.

215 *AIG*, 4 IRAN-U.S. C.T.R. at 109.

216 *Khemco*, IRAN-U.S. C.T.R. at 258-59.

and instead adopted what it termed the “going concern” value. It asked the parties to submit statements relating to various tangible and intangible components of the enterprise, from which it would derive the value of the enterprise as a whole.

(3) Business Enterprises—Not a Going Concern

When it is not clear whether an enterprise is a going concern, tribunals are often reluctant to use the DCF method of valuation (or any other method of valuation that takes “future profits” into account). Several cases decided under the auspices of the ICSID Convention have taken this approach. In the *Benvenuti* arbitration,²¹⁷ the tribunal refused to apply the DCF method of valuation because it did not believe that the expropriated water bottling plant was a going concern. Instead, it awarded the amount originally invested into the project by the investors. In the *AAPL* arbitration,²¹⁸ the tribunal refused to apply the DCF method of valuation regarding the expropriation of shares and fixed assets in a shrimp farm, holding that the shrimp farm was not a going concern. The tribunal awarded the net book value instead.²¹⁹

Cases decided by the Iran-U.S. Claims Tribunal have also taken this approach. In *Phelps Dodge*,²²⁰ involving a copper tubing factory that was under construction when it was expropriated, the tribunal refused include elements of “lost profits” and “goodwill” in its award. It reasoned that because the enterprise had not become a going concern when it was expropriated, “any conclusions [regarding lost profits and goodwill] would be highly speculative.”²²¹ In *Sola Tiles*,²²² even though the enterprise was a going concern, the tribunal did not award compensation for “goodwill” or “lost profits” because the tribunal was not convinced that the company, which sold luxury tiles, would have been able to continue in business after the revolution, due to the nature of the changes in Iran brought about by the revolution. The tribunal instead awarded book value. Similar reasoning was used and a similar result was reached in the *Thomas Earl Payne* arbitration,²²³ involving a motion picture film distribution company.

217 *Benvenuti & Bonfant v. Government of the People’s Republic of the Congo*, 67 I.L.R. 345 (1984).

218 *AAPL*, 6 ICSID REV.-FOR. INV. L.J. at 567.

219 *Id.*

220 *Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran*, Awd. No. 217-99-2, 10 IRAN-U.S. C.T.R. 121 (1986).

221 *Id.* at 132-3.

222 *Sola Tiles, Inc. v. Islamic Republic of Iran*, Awd. No. 298-317-1, 14 IRAN-U.S. C.T.R. 223 (1987).

223 *Thomas Earl Payne v. The Government of the Islamic Republic of Iran*, Awd. No. 245-335-2, 12 IRAN-U.S. C.T.R. 3 (1986).

In the *INA Corporation* case,²²⁴ involving the expropriation of an insurance company, the tribunal awarded the full amount that the claimant had invested in the enterprise approximately one year before the expropriation took place.

In the *Tippets*²²⁵ case, the tribunal, at the request of the claimant, determined the value of the business based on the “dissolution value,” which was described as the value of the enterprise after the collection of all assets and the discharge of all obligations.

d. Equitable Considerations

Unfortunately, despite the fact that international tribunals have almost universally upheld the traditional international law principles of full compensation following any expropriation, and despite the increasing willingness of tribunals to apply modern methods of valuation (most notably, the DCF method), some tribunals have drawn on the ephemeral concept of “equity” to reduce compensation awards.

In *LIAMCO*, as discussed above, LIAMCO submitted two calculations of the value of “future profits” of an oil concession. The arbitrator inexplicably awarded an amount between the two numbers based on “measure of equitable compensation.”²²⁶

In *Khemco*, the court stated:

The choice between all the available methods must rather be made in view of the purpose to be attained, in order to avoid arbitrary results and to arrive at an equitable compensation in conformity with the applicable legal standards.²²⁷

The first proposition in this passage is self-evident—the tribunal should seek to avoid arbitrary results. The second proposition, however, is problematic. To paraphrase, the Tribunal suggests that the valuation method should be chosen in order to ensure that the dollar figure meets a vague concept of “equity.” It would seem, rather, that the valuation method used should be chosen in an attempt to accurately determine the value of the assets. Then, based on the principles of customary international law discussed above, this amount should be awarded to the claimants.

The *Phillips* case also makes reference to “equity.” In paragraph 112, the tribunal states that “the need for some adjustments is understandable, as the determination of value by a tribunal must take into account all relevant circumstances, including equitable considerations.”

224 *INA*, IRAN-U.S. C.T.R. 373.

225 *Tippets*, 6 IRAN-U.S. C.T.R. 219.

226 *LIAMCO*, 20 I.L.M. at 159-60.

227 15 IRAN-U.S. C.T.R. at 256.

Norton states that in many arbitrations, the tribunals, “after elaborate analysis of the law, seemingly pluck the amount of an award out of thin air.”²²⁸ Norton then gives several examples:

The AMINOIL award, for example, indicates no basis whatsoever for its calculations Similarly, in LIAMCO, Mahmassani chose a figure between those offered by the parties and gave no explanation at all Much the same can be said of many of the decisions of the Iran-U.S. Claims Tribunal.²²⁹

e. Conclusions

The only conclusions that can be drawn is that, although it is generally agreed under customary international law that an expropriating state must pay full compensation following a taking, there is no similar agreement regarding the method of valuing property to arrive at full compensation. This conclusion has also been reached by Professor Amerasinghe:

Full compensation has been arrived at by a variety of methods, depending on a variety of factors, including the nature of the property or interests taken and other circumstances relating to the property taken. No preference has been shown for a particular method, such as the discounted cash flow method It would seem that the assessment of full compensation is at the present time filled with variables and is certainly not a very scientific process.²³⁰

C. Breach of Contract

Expropriation by a state will entail breach of the investor-state contract²³¹ (if one exists) pursuant to which the investor operates its enterprise or owns its assets in the host state. Conversely, when a state repudiates the investor-state contract pursuant to which the investor is operating its assets, the purpose is often to expropriate the assets or enterprise of the investor in the host state.²³² Many of the investor’s rights in the host state, such as the right to operate for a period of years, are often contained in the investor-state contract. Thus, expropriation of an investor’s enterprise or assets and repudiation of an investor-state contract are usually inseparably intertwined.

It has been established in this Chapter that the remedy for expropriation by a state is payment to the investor of the full value of the property taken. Since con-

228 Norton, *supra* note 23, at 495.

229 *Id.*

230 Amerasinghe, *supra* note 23, at 64.

231 In many cases, the investor-state contract has been “internationalized” in the manner discussed in Chapter 2, so that the relationship between the parties is subject to international law and the state cannot unilaterally terminate the agreement.

232 See, e.g., *BP*, *supra* note 47; *Texaco*, *supra* note 48; and *LIAMCO*, *supra* note 49.

tract rights are property rights,²³³ compensation to the investor must include the value of the contract rights that are repudiated by the state. To go one step further, the proper valuation of an expropriated asset or enterprise will, necessarily, take into account the value of the contract rights. The valuation of an ongoing enterprise using the DCF method, for example, calculates future cash flows of the enterprise, which depend, in part, upon the contract rights associated with the enterprise.

It has been argued by some that the breach of an internationalized contract by a state is a wrong under international law, apart from the wrong of expropriation without the payment of full compensation.²³⁴ Judge Higgins concludes that “the distinction between mere breach of contract and a taking of property will have relevance for the determination of any compensation.”²³⁵ From an investor’s standpoint, however, what is important when contract rights have been expropriated is the same issue that arises from an expropriation of any other property: the payment of compensation in the full amount of the value of the property taken.

233 It is generally accepted under international law that contract rights are property. Higgins, *supra* note 12, at 140. See also *Case Concerning German Interests in Polish Upper Silesia* 1926 P.C.I.J. Ser. A, No. 17, and *Norwegian Shipowners Claims*, *supra*.

234 Brownlie, *supra* note 22, at 548.

235 Higgins, *supra* note 12, at 140.