INTERNATIONAL LAW AND THE OIL EXPROPRIATIONS IN CEYLON

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Nationalization, though it may have its own *economic* justification in an appropriate context, creates problems of a serious and controversial character in *international law*. The problems arise for international law when State A nationalizes property or business belonging to the nationals of State B in the territory of State A. International law is not at the present moment concerned with the protection of property of nationals of State A against State A itself.[1] Clearly, the present conception of the right of State B to demand that certain standards be observed in regard to the expropriation of property belonging to its nationals in State A by State A arises from the right that State B has against State A to protect its own nationals abroad. The right belongs in international law to State B and not to the nationals of State B. As Judge Badawi Pasha stated the position.

> "En reconnaissant á l' État le droit de réclamer les reparations des ces dommages le droit international ne le fait pas parce qu' il considère que l' État est un représentant legal de la victime mais parce qu' il estime que l' État fait valoir *son doit propre*, le droit qu' il a de faire respecter en la personne de ses ressortissants le droit international".[2]

In regard to expropriation the main question is what is the substantive content of the right that State B has in regard to the treatment of the property of its nationals by State A. Seen as the product of a relation between State A

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1. See Oppenheim-Lauterpacht, *International Law*, Vol. 1, (8th ed. 1954) at 288 and 682.
2. Italics added. *Reparations for Injuries Suffered in the Service of the United Nations*. 1949. I.C.J. Reports 174 at 206.

   Translation: "International law recognises that the state has the right to claim reparation in respect of this damage, not because it considers that the state is a representative of the victim, but because it holds that the State is asserting *its own right*, the right which it has to ensure, in the person of its subjects, respect for the rules of international law".

   This was stated in a dissenting opinion but on this point the court was in agreement with the learned judge when it said:

   > "In the third place, the rule rests on two bases, The first is that the defendant state has broken an obligation towards the national state in respect of its nationals". *Id.* at p. 181.

   See also *The Mavrommatis Palestine Concessions Case* (*Jurisdiction*), P.C.I.J. Reports, Series A, No. 2, at 12, and *The Panavezys-Saldutiskis Railway Case* (*Preliminary Objection*), Series A/B No. 76 at 16.

and State B, the law on this matter acquires a background which is different from the background in which it might be set, were it seen purely as a relation between State A and an individual. This factor requires that the whole question be viewed as an incident in the relations between states and not as a matter to be determined entirely by the economic, political or legal conceptions of State A, the expropriating State. It demands a consideration of the realities of the international situation in which is inherent the conflict of interests between States as economically and politically viable entities especially in the context of the modern conflict of economic ideologies.[3] The issue of expropriation has become particularly prominent in virtue of the prevalence of a comparatively modern conception, namely socialism, which postulates State ownership as a basic factor in the organization of an economy and the presence in many of the states, which have adopted this economic theory, of large foreign owned business ventures, particularly in the more important areas of the economy. It cannot be said that the older economic theory which recognizes the sanctity of private ownership of property, if not as an absolute value, yet as a basic assumption has much in common with the newer socialism which sees property merely as a means to improved conditions which are best achieved by State ownership especially of the means of production. A modern international law of expropriation should seek to find a *modus vivendi* between these two economic ideologies so as to resolve conflicts that are likely to arise between states which try to organize their economies on socialist lines in some respects, if not in every respect, and those states which are intent on protecting their own economic position which is dependant on the security of their nationals holding property abroad whom they naturally regard as elements in their own economy. The law in this field relates to economies and is not to be seen purely as a weapon for the assertion of political prestige by members of either school of economic thought. It is a question of resolving economic conflict in a developing world.

The law relating to expropriation is particularly relevant to the recent nationalizations in Ceylon and it is proposed here to consider that law in relation to these nationalizations. The facts of the nationalizations and the present position can be briefly stated.

By the Ceylon Petroleum Corporation Act of May 29, 1961, the Ceylon Petroleum Corporation was created and powers were given to the Minister of Trade and Commerce to vest in the Corporation any "movable or immovable property, other than money, which had been, or is being or is or was intended to be used for

(*a*) the importation, exportation, storage, sale, supply or distribution of petroleum

3. On this point, see De Visscher, *Theories et Réalités en Droit International Public* (1953) at 235.

(*b*) the carrying on of such other business as may be incidental or conducive to the purposes referred to in paragraph (*a*) "[4]

In April, May and June 1962 properties belonging to the oil companies operating in the country, namely Shell, Esso and Caltex, were so vested. The three companies maintain that the total value of the property so expropriated is in the neighbourhood of Rs. 40 million ($8 million), while of this amount the two American companies claim Rs. 20 million ($4 million) approximately, More recently Act No. 5 of 1963 passed on 22nd August 1963 states that after January 1st. 1964 the Corporation will have the exclusive right to import, sell, export or distribute most petroleum products.[5] The three oil companies estimate that the total losses incurred by them as a result of their being put out of business would amount to Rs. 100 million (about $20 million).

The Government of Ceylon takes the view unofficially that the property so far taken over is not worth as much as is claimed and that the compensation due when the oil companies go out of business will not be as much as Rs. 100 million. The amount of compensation to be paid has not been agreed upon by the parties nor has any compensation been paid, up to date, although the procedure under the legislation for the payment of compensation has been set in motion.

On 7th February 1963 the United States Government suspended aid to Ceylon under the Hickenlooper Amendment and issued a statement in which it said *inter alia*,

> "The Government of the United States did not then and does not now contest the right of Ceylon as a sovereign state to nationalize private property. However, when such property belongs to a citizen or a company of a foreign country the payment of prompt, adequate and effective compensation is required by international law".[6]

It was also stated that the Government of Ceylon had not taken appropriate steps to pay compensation because it did not ensure the prompt payment of compensation representing the full value of the property as required by international law.

The Ceylon Government replied in a communique issued on the 8th February 1963 that "it was at all times ready and willing to pay compensation to the oil companies and that, in fact, provision for that purpose already existed in the Ceylon Petroleum Corporation Act".[7] Chapter IV, sections 44 to 54 of that Act, concedes the *right* to compensation of those whose property had been expropriated according to the municipal law.

4. Section 3 (4)
5. Section 5B
6. United States Information Service Bulletin of 8th February 1963 as reported in the *Times of Ceylon* of 9th February 1963.
7. *Times of Ceylon* of 9th February 1963.

From the legal point of view, an analysis of the present situation presents the following problems :

1. Was Ceylon in breach of its international obligations in vesting the property of the oil companies and enacting the legislation described above?

2. Do the provisions for the legislation violate any requirements of international law?

3. Particularly do they violate the international law of compensation, whatever that may be?

4. Can an international tribunal be validly seized of the dispute between Ceylon and the Oil Companies at the present stage?

(1) The Right to Expropriate:

The answer to the first question has never been seriously contested. The sovereign right of a state to take property belonging to aliens has always been recognized in modern international law.[8]

(*a*) The capital-exporting countries which go farthest in recognizing the sanctity of private ownership of property have always conceded this right. Thus, during the Mexican Agrarian Reforms of 1938, Secretary of State Hull was quite explicit on behalf of the U.S. Government.

> "My Government has frequently asserted the right of all countries freely to determine their own social, agrarian and industrial problems. This right includes the sovereign right of any government to expropriate private property within its borders in futherance of public purposes".[9]

In 1953 on the expropriation of the subsidiary of the United Fruit Company by Guatemala, the United States conceded, "The Government of the United States does not controvert in the slightest the proposition that the Act of Congress of the Republic of Guatemala constitutes an act of sovereignty inherent in Guatemala".[10]

More recently the Governments of France, the United Kingdom and the United States of America stated in regard to the nationalization of the Suez Canal Company,

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8. For a brief history of this idea, see White, *Nationalization of Foreign Property* (1961) at 32, and the literature there cited. Mann, "Outlines of the History of Expropriation", 75 L.Q.R. (1959) 188 is particularly useful.

9. Briggs, *Law of Nations* (1953) at 556 cites the U.S. letter containing this statement.

10. 29 Dept. of State Bulletin (1953), at 360.

"They do not question the right of Egypt to enjoy and exercise all the powers of a fully sovereign and independant nation, including the generally recognized right, under appropriate conditions to nationalize assets . . . which are subject to its political authority".[11]

In 1959 the U.S. Government recognized the right of the Cuban Government to nationalize the property of American nationals.[12]

In the case of the Ceylon oil expropriation too the U.S. Government has not contested this right of a state. "The Government of the United States did not then and does not now contest the right of Ceylon as a sovereign state to nationalise private property".[13]

(*b*) The General Assembly of the United Nations implicitly affirmed this sovereign right in its resolution of December 2, 1952, in which it said that "the right of peoples freely to use and exploit their cultural wealth and resources is inherent in their sovereignty".[14]

In December 1962 the General Assembly was more explicit in recognizing "the inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests" and "the economic independence of states".[15]

This last resolution was carried by a vote of 87 to 2 with 12 absentions. What is more, in regard to the previous resolution, when it was debated in the Second Committee, the view that every state possessed this sovereign right was almost unanimously supported.[16] Although a resolution of the General Assembly does not generally create law as such,[17] the voting in these two cases shows that it is the general opinion of the community of nations that states have this sovereign right. These resolutions are good and clear evidence of the practice of states on this matter.

(*c*) Needless to say, it has always been maintained by the nationalising states that this right is an exercise of their sovereign power.[18]

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11. *The Suez Canal Conference (Selected Documents) Egypt No.* 1 (1956) Cmd. 9853 at 3.
12. See White *op. cit.* note 8 at 36-37.
13. *Loc cit.* note 6.
14. Resolution 626 (VII).
15. Resolution 1803 (XVII).
16. UN. Year-Book 1952 at 387.
17. For the effect of General Assembly resolutions see Blaine Sloan, "The Binding Force of a Recommendation of the General Assembly of the United Nations", 25 Brit. Y.B. Int'l L. (1948) and *The U.N. Expenses Case*, 1962 I.C.J. Reports 151 at 163, *The Corfu Channel Case* (Competence) 1948 I.C.J. Reports 1 at 31, per seven Judges in a separate opinion, *Reservations to the Genocide Convention* 1951, I.C.J. Reports 1 at 53 per Judge Alvarez in a dissenting opinion.
18. See the statement of the Iranian Minister of Finance in the *Anglo-Iranian Oil Co. Case*, I.C.J. Pleadings, Oral Arguments and Documents (1951) at 40.

This evidence of the practice of states is over-whelming[18a] and it must be conceded that the right of a state to expropriate foreign property is recognised by international law as a well established rule.[19]

(2) **Limitations of International Law:**

In the dispute between the United Kingdom and Iran over the nationalization of the Anglo-Iranian Oil Company, the Government of Iran maintained that,

> "the nationalization of the oil industry which is based on the enforcement of the right of sovereignty of the Persian people, is not, subject to arbitration and no international authority is qualified to investigate this matter".[20]

The United Kingdom took the view that there were certain principles of international law to be observed in this matter.[21]

Similarly in the Dutch-Indonesian dispute in regard to the oil expropriations, the Indonesian government asserted that no controls could be imposed on it in regard to the nationalization of alien property while the Dutch Government insisted on the obligations of the nationalizing state under international law.[22]

18a. It is significant that even in the municipal law of states which have adopted free economies to a greater or lesser degree, this sovereign right of the state is fully conceded whether it be couched in terms of the doctrine of "eminent domain" as in the United States or formulated as an emanation of the sovereignty of Parliament as in the United Kingdom.

19. Law emanates from a source in the sense of law creating agencies. In the international community the law creating agencies are as stated in Act 38 (1) of the Statute of the International Court of Justice.

"(*a*) International conventions, whether general or particular establishing rules expressly recognized by the contesting states;

(*b*) international customs as evidence of a general practice accepted as law;

(*c*) the general principles of law recognised by civilised nations;

(*d*) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law".

In the present discussion all these sources are relevant except, perhaps source (*a*) as a direct source and source (*c*) because there cannot be said to be such general principles relating to the matter under consideration. Source (*b*) is perhaps the most significant in the present connection : the requirements for the formation of a custom creating law are briefly (i) a material element, the *corpus*, which may be described as a general, continuous and consistent practice and (ii) the psychological element or *animus*, i.e. the *opinio sive iuris sive necessitatis* or the conviction that the action is done because it is obligatory or in accordance with law. See e.g. Koppelmenas "Custom as a Means of the Creation of International Law." 18 Brit. Y.B. Int. '1 L. 127 (1937), Guggenheim, "Les Deux Éléments de la Coutume en Droit International" in *La Technique et les Principles du Droit Public— Etudes en l' Honneur de Georges Scelle* I, 275 (1950).

20. *Loc. cit.* note 18.

21. *Id.* at 385.

22. See 54 Am.J. Int'l. L. 485 at 485 (1960).

The nationalizing state in these instances maintained the doctrine of an absolute sovereign right, while. the capital-exporting state was asserting its right that the treatment of its nationals be subject to international law.

As soon as the property rights of nationals are affected by nationalisation, expropriation acquires an international significance. Though a state may be exercising a sovereign right it is not a right that is not uncontrolled by international law. International law does afford a measure of protection to foreign states in regard to the treatment of the property of their nationals.

It is significant that the Ceylon Government in its communique to the U.S. Government did not assert that the right of the Ceylon Government to expropriate alien property was absolute. Indeed, although it did not explicitly state what exactly the limitations imposed by international law were, it admitted that

> "it was at all times ready and willing to pay compensation to the oil companies, and that, in fact, provision for that purpose already existed in the Ceylon Petroleum Corporation Act".[23]

The same attitude was expressed in the official statement made by the Minister of Finance in Parliament.[24]

It is a correct view of the law that international law does impose certain limitations in regard to the expropriation of alien property. The General Assembly resolution 1862 (XVII) recognizes in paragraph 4 that there are certain limitations.

Limitations can, of course, be by treaty between the nationalizing state and the national state or states of the aliens concerned, as is demonstrated by the *Case of Certain German Interests in Polish Upper Silesia* (*Merits*), where the Permanent Court of International Justice held that the action of Poland in taking certain properties of German nationals was contrary to the provisions of Head III of the Geneva Convention of 1922 between Poland and Germany which prohibited such takings and, therefore, contrary to international law[25].

The question of limitation by contract between the alien and the expropriating state as in the case of a concession is more difficult. It is submitted that a contract of this kind is not of a specially limiting character.[26]

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23. *Times of Ceylon* of 9th February 1963.

24. Hansard (House of Representatives) 20th February 1963 at 1636-1637.

25. P.C.I.J. Reports series A No. 7.

26. See the present writer's "State Breaches of Contracts with Aliens and International Law" to be published in a future issue of the Am. J. Int. L. Jennings, "State Contracts in International Law", 37 Brit. Y.B. Int. 'l. L. 156 (1961) takes a somewhat more modified view. See also for slightly different views, Mann "State Contracts and State Responsibility" 54 Am. J. Int. 'l. L. 572 (1944) and Schwebel, "International Protection of Contractual Arrangements", 1959 Proc. A.S.I.L. 266.

But limitations of the above character are not in issue under the present circumstances, where there are no contracts or treaties involved. Of relevance here are limitations that are imposed by customary international law.

Much of the customary law can be discussed in terms of the suggested theoretical justifications such as the doctrine of acquired rights,[27] the concept of international community[28] and the principle of national treatment,[29] but the present article is not intended to be an exhaustive examination of the doctrinal foundations of the law but rather a discussion of the movement of the law in actual practice.

(*a*) One of the cardinal requirements of international law as traditionally understood is that the expropriation must be for a public purpose. This principle has been stated by International Tribunals. In the *Affaire David Goldenberg*, the arbitrator said *obiter*,

> "La requisition militaire est une forme sui generis de l' expropriation pour cause d' utilité publique. Cette dernière est une derogation admise au principe du respect de la propriété privéé"[30]

In the *Arbitrage entre la Portugal et L' Allegmagne* the tribunal said, *obiter*, "Le droit des gens impose le respect de la propriété privée mais il reconnait a l' État le droit de deroger à ce principe, lorsque son interest supérieure l' exige".[31]

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27. See for instance, Fachiri, "Expropriation and International Law", 6 Brit. Y.B. Int. '1. L. 159 (1925); Verdross, "Les Regles Internationales Concernant le traitement des Etrangeres", 37 Hague Recueil 355 at 358 (1931), S. Friedman, *Expropriation in International Law*, at 120 (1953) and literature there cited.

28. See for instance, Schwarzenberger, "The Province and Standards of International Economic Law", 2 I.L.Q. 402 (1948); W. Friedmann, "The Growth of State Control over the Individual and its effect upon the Rules of International Responsibility", 19 Brit. Y.B. Int' l. L. 118 (1938) ; S. Friedman, *op. cit.* at 115 and literature there cited.

29. See for instance, Fauchille, *Traité de Droit International Public vol.* 1 *part* 2, at 400 (1926), Schwarzenberger, *International Law, vol.* 1, at 98, (1949), Decenciére-Ferrandiere, *La Responsabilité Internationale de* l' *État à Raison des Dommages Subis par Etrangers*, at 91 (1923); S. Friedman, *op. cit* at 127 and literture there cited.

30. (1928) 2 U.N. Reports of International Arbitral Awards 901 at 909. Translation: "Military requisition is one form *sui generis* of expropriation for the purpose of public utility. This latter is a permitted derogation from the principle of respect for private property".

    See also the *Radio Corporation of America Case* (1936) 30 Am. J. Int. '1. L. 523 at 531.

31. (1930) 2 U.N. Reports of International Arbitral Awards 1035 at 1039. Translation. "International law demands respect for private property but it recognizes the right of a state to derogate from this principle where the higher interest of the state recognizes it". See also *The Walter E. Smith Case* (1929) in Whiteman 2 *Damages in International Law* at 1408 (1937), *Norwegian Shipowners Claim* (*Norway v U.S.A.*) (1922) 1 U.N. Reports of International Arbitral Awards 309 at 322.

But in the *Shuffeldt Case*, which concerned the cancellation of a concession, the arbitrator seems to have taken a contrary view, virtually recognizing that there were no limitations of purpose[32].

During the Mexican oil expropriations, the British and U.S. Governments insisted on this requirement while the Mexican Government asserted that "public interest may be determined by every state at its own discretion".[33]

There is difficulty, then, on the authorities in accepting this principle. In any event it is doubtful whether it is of any use in the context of modern nationalizations. In its meaning of aim and purpose such as would benefit the community as a whole rather than any particular person it may have been relevant to the taking of property outside a scheme of general economic reform but it is doubtful whether it can either have a specific content or a useful place in the law relating to nationalization. It may be argued that in general nationalization is in the 'public interest', whatever that may mean. Of course, it may be said that the nationalizing state must be *bona fide*, but this aspect pertains more to another requirement, that of non-discrimination, and can be considered under that head.

It is significant that the idea of public purpose has not been stressed in connection with the post-war nationalizations. It would seem that because of the considerable importance of economies based on the principle of public ownership to a greater or lesser degree, nationalization is accepted as either being in the public interest or as not requiring any specific public purpose[34].

In the case of Ceylon's nationalizations of the oil companies neither the United States nor the United Kingdom has questioned the expropriations on the ground of the absence of a public purpose. The Government of Ceylon has, on the other hand, outlined its purposes quite clearly, and it would seem that, if "public purpose" was required in the case of a nationalization of a particular sector of the economy, such a purpose decisively exists, although no profitable distinction for the purposes of the law can be made between total nationalization and partial nationalization. The statement of purpose reads :

> "The Government of Ceylon, however, was not prepared to be deflected from a course of action which it was convinced was in the national interest. The three oil companies had together enjoyed a monopoly in the importation and distribution of oil . . .

32. (1928) *Id.* 1079 at 1095. A *dictum* of the P.C.I.J. in the *Oscar Chinn Case*, sometimes relied on for this proposition, is not really conclusive either way: P.C.I.J. Series A/B No. 63 at 79. S. Friedman denies the existence of the public utility principle, *op. cit.* at 142.

33. For this controversy see White, *op. cit.* at 8.

34. Doman, "Post-war Nationalizations of Foreign Property in Europe". 48 Col. L.R. 1125 (1948) and White *op. cit.* at 46. For an examination of motives for recent nationalizations see Doman, "Post-war Nationalizations of Foreign Property in Europe," 48 Col. L.R. 1125 (1948) and Foighel, *Nationalization* (1957) at 23. Resolution 1803 (XVII) of December 14th 1962 of the General Assembly refers to "public utility, security or the national interest" as required for nationalization. This does not materially affect what has been stated above.

> The Government was obliged to take power to acquire a portion of the assets and facilities of the three oil companies, and which were used by them for the importation and distribution of oil, because the assumption by the Ceylon Petroleum Corporation of responsibility for the distribution of a certain percentage of the petroleum products consumed within the country would have rendered a corresponding proportion of the assets and facilities of the three foreign oil companies redundant. At a time when there was an imperative need for putting all capital assets within the country to the most economical and beneficial use, the Government would have been failing in its duty to the people of this country, if it had required the Ceylon Petroleum Corporation to provide itself with entirely new equipment and facilities such as petrol pumps and petroleum stations".[35]

The same reasoning, with additions, probably underlies the proposed total nationalization of the petroleum business as from January 1964.

(*b*) A second limitation according to the traditional view is that there should be no discrimination against the aliens in the nationalization.[36] Mexico did not deny that international law required that United States nationals be treated in the same way as Mexican nationals in her controversy with the United States over the Mexican Agrarian Reforms.

In a recent German decision this duty not to discriminate against foreigners as such or particular foreigners was denied in regard to the nationalization of Dutch enterprises in Indonesia. It was said,

> "the equality concept means only that equals must be treated equally and that the different treatment of unequals is advisable . . . For the statement to be objective, it is sufficient that the attitude of the former colonial people toward its former colonial master is of course different from that toward other foreigners. Not only were the places of production predominantly in the hands of Netherlanders, for the greater part colonial companies, but these companies dominated the world-wide distribution, beyond the production process, through the Dutch markets".[37]

35. Hansard (House of Representatives) 20th February 1963 at 1633-1634.

36. Fischer Williams "International law and the Property of Aliens" 9 Brit. Y.B. Int. 'l L. 1 at 28 (1928); Hertz, "Expropriation of Foreign Property", 35 Am. J.Int. 'l L. 249 (1941); Fachiri, "Expropriation and International Law" 6 Brit. Y.B. Int. 'l L. 159 (1925); Martens, *Traité de Droit International* (1883) at 443, Oppenheim *op. cit.* vol. 1. at 637; Hyde, *International Law*, vol. 2, at 876 (1945); White, *op. cit.* at 5 & 119; Foighel, *op. cit.* at 46; S. Friedman *op. cit.* at 189; *The Standard Oil Co. Tanker Case* (*U.S.A. v. Germany*) 8 Brit. Y.B. Int.'l L. 156 at 168-169 (1927); *Oscar Chinn Case* (1934) P.C.I.J. Series A/B No. 63 at 87, *German Settlers in Poland* (1923) P.C.I.J. Series B, No. 6 at 24, *The Sennembah Maatschappij N.V. Case* (1959) (Holland) as discussed in Domke, "Indonesian Nationalization Measures Before Foreign Courts", 54 Am.J.Int. 'l L. 305 at 307, 316 (1960), *The Sabbatino Case* (1962)-U.S.A.—56 Am. J.Int. 'l L. 1085 at 1101, 1104-1106 (1962).

37. *N.V. Verenigde Deli-Maatschapijen* and *N.V. Senembah-Maatchappij* v. *Deutsche Indonesische Tabak-Handelsgesellschaft m.b.H.* cited in Domke *op. cit.* note 36 at 315.

Moreover, the post-war nationalizations in Czechoslovakia, Poland and Roumania particularly, show a remarkable disregard of this principle of non-discrimination.[38] The subsequent compensation treaties, do not reveal whether there was agreement between the parties to these treaties that the expropriations were illegal as a result of this discrimination.

The principle of non-discrimination is in general a sound one, for it rests on a fundamental principle of justice and is vital to ordered relations based on mutual respect as between all states and not just among a few.[39]

It is not clear how far the modification expressed in the German decision cited above, which is predicated on initial inequality arising from colonial relations, represents the position in law and, indeed, how desirable such a principle is. In the *Sabbatino Case*, the U.S. Circuit Courts of Appeals recognized that the principle of non-discrimination was still a viable principle and applied it to the Cuban expropriations to find that those expropriations were contrary to international law because, *inter alia*, there was discrimination against U.S. nationals in particular.[40] A Dutch Court took a similar view of the Indonesian nationalization of Dutch properties.[41]

Where the ownership of a particular field of enterprises in a State is solely in the hands of a particular foreign nationality or of several foreign nationalities, the application of this principle of non-discrimination becomes difficult. Indeed, this is more or less the situation that has arisen in Ceylon, even though interests of some nationals arising from the marketing of petroleum products are affected.[42] The measures affect the three foreign companies primarily. The difficulties can be viewed from two angles.

(i) How far is nationalization permitted in these circumstances at all?

(ii) How far must there be equal treatment as between foreigners involved and what does this mean, in particular in relation to the Ceylon nationalization?

(iii) How far must there be equal treatment between aliens of a particular nationality?

(i) There is as yet no rule of international law which prohibits nationalization of foreign interests in a field where nationals have no interests of the same kind on the grounds that such expropriation is discriminatory.[43] On one

38. See the analysis by White, *op. cit.* 12 ff.

39. White concludes that the principle still flourishes in its pristine vigour, *op. cit.* at 144. See also S. Friedman, *op. cit.* at 189 and Foighel, *op. cit.* at 46 among modern writers for similar views.

40. *Loc. cit.* note 36.

41. *The Sennembah Maatschappij N.V. Case, loc cit.* note 36.

42. Some nationals have interests as retail distributors of petroleum and as lessors of property which are affected.

43. See White, *op. cit.* at 144.

view The Anglo-Iranian Oil Co., expropriation must seem to have been unquestionable on this basis,[44] although the U.K. purported to take issue on this ground.[45] Nor can the Suez Canal Case be impeached on this ground. The Oil Companies Nationalizations in Ceylon could not on the same analysis be termed discriminatory. What is required is a *bona fide* purpose in carrying out such nationalizations. If there is *malafides* then they would turn out to be discriminatory.

(ii) The principle of non-discrimination would logically require that foreigners should as between themselves be treated equally in a matter of expropriation. Thus it would be discriminatory to expropriate the enterprises of nationals of State A in a particular field but leave the enterprises of nationals of State B in the same field in their hands. Of course, if the modification made by the German Court, discussed above, in connection with the expropriation of the property of colonials were to be admitted, then a measure of discrimination would be permitted as between foreign nationals, depending on whether they are of the nationality of the former colonial power or not. On this basis, adverse discrimination against the British owned Shell Oil Co. in Ceylon would be permitted. However, this modification is a moot point.

The principle of non-discrimination would require application in the detailed enforcement of the nationalization measures. It would be unfair then that 90% of the business of an enterprise belonging to nationality A should be taken over while only 10% of the business of an enterprise belonging to nationality B is expropriated. But this is a principle which must be applied in a general way taking into consideration all the circumstances of the case, for important questions of economic policy might render a certain differentiation necessary. For instance, key points of distribution and the equipment at these points will naturally be more attractive to the nationalizing state, irrespective of their ownership. Thus, it is submitted, no broad principle that property or business of equal value must be taken from each nationality or that the value of the property or business taken from each nationality must bear the same proportion to the total value of the property or business of that nationality can be laid down. All that can be insisted on is that the plan of taking over individual property should be in good faith, should be governed by economic motives and should be in some relation of a reasonable nature to the various proportions of property owned or business done in the country by the different nationalities.

The foreign oil companies claim that approximately Rs. 21 million worth of property has been taken from the Shell Co., Rs. 11 million worth from Esso and Rs. 8 million worth from Caltex. The ratio of the value of British property confiscated to the value of American property confiscated was 21 to 19. The British company had approximately 55 to 60% of the business in the country,

44. See the view of the Rome court in *Anglo-Iranian Oil Company* v. *Società Unione Petrolifera con l' Oriente* as cited in White, *op. cit.* at 138.

45. *Anglo-Iranian Oil Co. Case*, (1951), I.C.J. Pleadings, Oral Arguments and Documents at 98.

while the American companies had the rest. The ratio of the value of the property taken over from the nationalities bears a close relation to the ratio of the value of the business done. It is significant, therefore, that no issue has been taken on the ground of discrimination.

(iii) As between aliens of a particular nationality similar principles should apply, in determining the question of discrimination, to those applied as between different nationalities. In this respect too the treatment of the two American companies in Ceylon cannot be characterized as discriminatory. The business done by Esso and Caltex bore the ratio of 5:4 to each other approximately. The value of property expropriated bears the ratio of 11:8 which is not too far from the former ratio.

(*c*) A third limitation emanates from the principle that there is an international minimum standard to be observed in the treatment of aliens. This is that the *form* of expropriation must conform to international standards. The exact form required by international law is not easy to define but seizure of foreign property in violation of the municipal law of the nationalizing state would certainly be an example of a violation of forms required by international law. Similarly outrageous treatment of the alien in carrying out a nationalization would violate internationally required forms.[46]

It seems clear that on this ground too the Ceylon Government has kept within the bounds of international law.

(3) The Duty to Compensate as a Limitation

This aspect is of particular importance for the nationalization of the oil business in Ceylon and has not only created much controversy in connection with these nationalizations but has been much in issue even in the context of other nationalizations.

The issues that arise may be formulated as follows, it being borne in mind that the customary international law is being considered apart from any treaty provisions that might be relevant to a particular situation.

(*A*) Is there a duty to compensate expropriated aliens especially in connection with nationalization?

(B) If there is a duty to compensate, how is the compensation to be calculated?

(*C*) If there is a duty to compensate, in what form must the compensation be paid?

(*D*) If there is a duty to compensate, at what time must the compensation be paid?

These questions will be discussed in particular relation to the legislation in Ceylon.

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46. For a discussion of the content of this requirement see S. Friedman, *op. cit.* at 136 ff and authorities there cited.

(*A*) (1) The capital exporting countries maintain that there is always a duty incumbent upon the nationalizing state to pay compensation, irrespective of the nature of the expropriation, i.e. whether it be individual or general and impersonal.[47] Mexico denied this obligation in regard to nationalizations of a general and impersonal character in 1938[48] and the Soviet Union has always taken the view that there is no obligation to compensate as such at all.[49]

(2) Among writers too there has been some controversy but the majority seem to be of the view that there is an obligation to compensate always.[50]

(3) In its judgement in the *Case of Certain German Interests in Polish Upper Silesia* (*Merits*), the Permanent Court of International Justice seems to have taken the view *obiter* that at customary international law there is a duty to pay compensation, when it said "The action of Poland which the Court had judged to be contrary to the Geneva Convention is not an expropriation to render which lawful only the payment of fair compensation has been wanting".[51]

In a recent American case, the American Circuit Court of Appeals was of the opinion that the question of compensation was a difficult one.[52] In Germany, the Bremen Court of Appeals seems to have taken the view that there is no duty to compensate in the case of nationalizations of a general character for the purpose of changing a social structure after the granting of independence to a colony,[53] while the Amsterdam Appellate Court seems to have been of the opinion that compensation is due.[54]

In broad terms the possible views may be classified as follows:

(i) There is always a duty to compensate.

(ii) There is a duty to compensate except in the case of nationalizations of a general and impersonal character.

(iii) There is never a duty to compensate as such.

47. See e.g. the U.S.A. in the Mexican controversy of 1938, cited in Briggs, *Law of Nations* (1953) 556 and 557, the U.K. in the *Anglo Iranian Oil Co. Case* (1951) I.C.J. Pleadings, Oral Arguments and Documents, *passim*.

48. As cited in Briggs, *op. cit.* at 556.

49. See Vyshinsky, *The Law of the Soviet State* (1948) at 179.

50. For a list of authorities for and against the duty to compensate see Wortley, *Expropriation in International Law* (1959) at 34-35.

51. P.C.I.J., Series A, No. 7 at 22.

52. *The Sabbatino Case*, 56 Am. J.Int.'l L 1085 at 1101 (1962).

53. *Loc. cit.* note 37 at 316.

54. *Loc. cit.* note 41 at 318.

In both (ii) and (iii) if provision is made for compensation to be paid to the nationals of the expropriating state, the principle of non-discrimination would require that compensation be paid to non-nationals as well.

It is significant in this context that in the case of both the post-war and pre-war nationalizations arrangements were ultimately made for the payment of some compensation, except in the case of the Soviet nationalizations. But there is clearly a difficulty in determining whether the agreements were arrived at because the nationalizing states believed that they were under a legal duty to pay, i.e. because they had the necessary *opinio iuris sive necessitatis*, or whether the agreements were the result of diplomatic shrewdness.

The confusing position is aggravated by the fact that the international polity has no unified economic system to promote which rules relating to expropriation can be directed. The present law governing expropriation can only be considered as a *modus vivendi* between the states which profess economies of a more or less *laissez faire* character and which have sufficient capital for investment abroad on the one hand, and those states which organize their economies with a measure of public ownership in view especially of poor economic conditions. In these circumstances, it is arguable that the traditional view that compensation must be paid represents a fair compromise, provided the content of that obligation is adequately defined, so as, not to cast too heavy a burden on nationalizing states. It is clear that the principle of non-discrimination between alien and national is by itself inadequate, because it is based on a conception of the alien as entirely part of the society of the nationalizing state, which is not a true conception of the alien's position. Indeed, it is difficult to regard the traditional law as even having been fully accepted at all, in view of the dearth of authority,[55] although it may be stated that it has been consistently upheld by the capital-exporting states, so that the problem may be regarded not as one of establishing a change in that law, as is conceived by some,[56] but of finding a norm by reference to modern theory and practice which will be in accord with the international legal order. It may, indeed, be argued that the problem is to establish with certitude that a previous rule wherein the duty to compensate was not recognized under any circumstances has been changed by state practice so as to require compensation in all circumstances. This argument would seem also to be stronger, since in the face of doubt it is for those who assert a duty to compensate to prove that it exists rather than that it is for those who assert that such a duty does not exist to prove that it does not exist, because this is in keeping with a basic freedom of action which is inherent in any legal system and with the concept of state sovereignty known to international law. These contradictory alternatives would seem to warrant a determination of the law by reference to social ends as a theoretical justification. These would require that it is in the interests of the international legal order that some compensation be paid in all circumstances.

55. Compare Fischer Williams, *op. cit.* note 36 and Fachiri, *op. cit.* note 36.

56. See, for instance, White, *op. cit.* at 235.

It is significant, then, as evidence of a customary rule of law, that 87 members of the General Assembly of the United Nations voted in favour of a resolution which stated that in the case of nationalization, expropriation or requisition

> "the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law".[57]

Only 2 states voted against the resolution and 12 abstained. This resolution is a conclusive indication that international law requires the payment of compensation in all circumstances in which the property of an alien is nationalised.

This principle was admitted by the Ceylon Government when it said that "it was at all times ready and willing to pay compensation to the oil companies, and, that in fact, provision for that purpose already existed in the Ceylon Petroleum Corporation Act".[58] In Parliament, the Minister of Finance stated that:

> "the Government of Ceylon replied by its note of January 11, 1963 that it accepted the position that the basis of assessment of compensation should be equitable and the compensation be paid as speedily as possible".[59]

The Ceylon Petroleum Corporation Act, chapter IV, sections 44 to 54, recognizes the *right* in municipal law of those whose properties have been expropriated to compensation.

(*B*) As to the quantum of compensation, the capital exporting countries have maintained that adequate compensation should be paid in keeping with the maxim that compensation should be "prompt, adequate and effective".[60] Various terms have been used to explain this concept of 'adequacy' such as 'full', 'fair' and 'just'. Although no clear exposition of the principle behind such a rule has been given in state practice it would seem that it is based in its extreme form on the notion of completely individualist economies that a person who is deprived of property or an enterprise should be put in the same position as he would have been had the deprivation not taken place, in so far as money can put him in such a position. It is related very closely to the theory of respect for acquired rights.[61] The possible elements of loss to an alien arising from an expropriation may be analysed as follows in ordinary circumstances.

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57. Resolution 1803 (XVII) of 14th December 1962, paragraph 4.

58. *Loc. cit.* note 23.

59. *Loc. cit.* note 24 at 1636.

60. See the statement of U.S. Secretary of State Hull in the Mexican Agrarian Reforms controversy as cited in Briggs, *op. cit.* at 556, the U.K. Memorial in the *Anglo-Iranian Oil Co. Case*, I.C.J. Pleadings, Oral Arguments and Documents at 106 (1951), the statement of the U.S. Government to the Ceylon Government, *loc. cit.* note 6.

61. For a critical survey of this theory see Kaeckenbeeck, "La Protection Internationale des Droits Acquis", 59, Hague Recueil vol. 1, 321 (1957) and an article in 17 Brit. Y.B. Int.'l L. 15 (1956) by the same author.

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(i) The "value" of any property taken from him, such as, for example, the value he might have been able to get in the ordinary market.

(ii) Indirect damages which may arise from the loss of property or the enterprise such as incidental contracts.

(iii) Goodwill or future prospective profits of the business.

As late as 1928 controversy raged among British international jurists as to whether compensation was due at all.[62] A logical conclusion to be drawn from this is that the precedents previous to that date, whether from diplomatic dealings between states or judicial decision,[63] were not conclusive on the issue. It follows that there was no clear rule as to how compensation was to be calculated. Then in 1928 the Permanent Court of International Jurists made an *obiter* pronouncement which has been variously interpreted. The Court held that the particular taking of German property by the Polish Government was in breach of the Geneva Convention, and therefore, unlawful so that the question of what the customary international law of compensation was did not arise, but it also said:

> "It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had the right to expropriate".[64]

This statement has been taken to mean that at customary international law "the value of the undertaking" at the moment of dispossession must be paid. But as Lord Finlay pointed out in the same case, the Court was probably referring to expropriation authorised by the Geneva Convention and carried out in accordance with its terms and not any expropriation that might have taken place in the absence of the Convention.[65] In any event, the statement of the Court was *obiter*. It is to be noted that "value of an undertaking" was not defined.

In the Mexican controversy with the U.S.A. the two states agreed that the "just value" of the property expropriated would be paid[66] and referred to this standard as the "usual" method of determination, though Mexico had originally denied its obligation to pay compensation at all. The U.K. and Netherlands were paid compensation on the same basis. However, in the post-war nationalizations no admission of this kind was made by the expropriating countries and the affected aliens never received what they demanded although

62. Fachiri, "Expropriation and International Law", 6 Brit. Y.B. Int'l L. 159 (1925) versus Fischer Williams, "International Law and the Property of Aliens" 19 Brit. Y.B. Int'l L. 1 (1928).

63. See authorities discussed in articles cited in note 62.

64. *Chorzow Factory (Indemnity) Case* P.C.I.J. Series A No. 17 at 47.

65. *Id.* at 72.

66. Hyde, *International Law, Vol. I* at 719 (1947) reproduces the relevant paragraph of the U.S. note.

no clear criterion for assessment appears.[67] Nor has it been possible to ascertain what percentage of the "just value" of the expropriated property in any sense has been paid. The proposition is true that the compensation paid did not include the value of all three elements described above.

In spite of the Mexican experience which presents contradictions in any case, so much so that the principle of assessment accepted may be regarded just as much a political concession as a legal necessity, the meaning of "just value" does not appear from the practice of states, while it is equally clear that the capital exporting countries have maintained that all three elements must be included in the assessment of compensation.

In some judicial decisions, such as *The Chorzow Factory* (*Indemnity Case*) and *The Vinland Case*,[69] damages for loss of future profits and goodwill were awarded, but these cases were dealing with damages for interference with property which was *unlawful according to international law*. In the former case, the taking of property was contrary to the Geneva Convention. In the latter the damage was caused by the sinking of a steamship by German submarines during the first world war which was contrary to international law. These cases are not authority for determining the principles of compensation in cases of nationalizations which are *lawful if compensation is paid*. In the one case damages are due for an illegality, in the other the question is how much must be paid in order that an expropriation may be legal.

If, then, it cannot be asserted with certitude that it was ever the law that compensation to be paid must take into account the three elements mentioned above, as would appear to be the position, the issue is what is the law on the point, if it is admitted that some compensation must be paid. It is also significant that the General Assembly resolution of 14th December 1962[70] referred to "appropriate compensation" and not "adequate" compensation with the associations that term might carry. The following observations are offered:

(1) It would seem that the principle that the alien should be put in the same position as he would have been in had the expropriation not taken place must be rejected as the governing principle in view of the fact that the extreme view which flows from this principle does not represent the law. Indeed, it has been suggested by Lauterpacht that "partial compensation" is in keeping with legal principle.[71] But here again there is no firm principle of assessment offered, with due respect.

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67. For an analysis of these agreements see White, *op. cit.* 193 ff. See also Schwarzenberger. "The Protection of British Property, Abroad", 1952 Current Legal Problems 295. Drucker, "Compensation for Nationalized Property: The British Practice", 49 Am. J. Int'l L. 477 (1955), Vienot, *Nationalizations Etrangéres et Interêts Francais* (1953).

68. P.C.I.J. Series A, No. 17 at 51.

69. 7 U.N. Reports of International Arbitral Awards at 243.

70. Resolution 1803 (XVII).

71. Oppenheim-Lauterpacht, *op. cit.* at 352. Cheng suggests another modified principle: See *General Principles of Law as applied by International Courts and Tribunals* at 48 (1953).

(2) Can it be said, then, that any compensation may be paid, provided some compensation is paid? This would permit even nominal offers of compensation. Such a rule would not be in accord with the ends of social justice in the international community.[72]

(3) The solution is to be found in seeing the requirement of compensation as a concession to social ends as stated earlier. Since the interests of both economic schools must be protected, the alien must be afforded a recompense which will not weigh too heavily against the expropriating state. In so far as the expropriation is for the public benefit of the country on which the alien has depended for his profit, it is not out of accord with justice that he should be required to expect only such payment as will cover losses arising from the loss of what may be called "the average value" of tangible or intangible assets taken over. That is to say, such intangible assets indirectly lost such as goodwill, future profits and contracts which are connected with the tangible or intangible assets taken over but are not attributable to their "average value" cannot be claimed. This is so because the alien has no right to expect that he will be permitted to continue in business indefinitely and must, therefore, face the risk of losing such intangible assets. On this basis only element (i) mentioned above will be recoverable as compensation while elements (ii) and (iii) cannot be recovered.[73] Thus the Ceylon Petroleum Corporation (Amendment) Act of 1963 in providing that no compensation shall be paid for losses direct or indirect as a result of the creation of a state monopoly of the oil trade is within the law,[74] as is the Act of 1962, in not making provisions for the above kind of loss.[75]

How is the "average value" of the tangible or intagible assets taken over to be determined? Here it is tempting to answer that the "market value" of the property at the time of taking is the standard of calculation. But two problems may arise :

(*a*) There may be no open market for that kind of property in the country in question since the state may be instituting a monopoly.

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72. The German Court, in the case cited in note 37 above, said in relation to nationalization as opposed to individual expropriation :

> "Compensation could not be paid in full and promptly out of the substance, but only be made out of the proceeds of the nationalized enterprises. Compensation as to time and amount must therefore be made in accordance with the conditions in the expropriating state", cited in Domke *op. cit.*, note 36 at 317. This view leaves the matter entirely in the discretion of the nationalizing state, which is certainly not in the interests of international order.

73. Fatouros, "Legal Security for International Investment" in Freidman and Pugh, *Legal Aspects of Foreign Investment* at 728 (1959) thinks that (ii) should be included in compensation but not (iii).

74. Section 8.

75. See Sections 47 (1) and (2).

(*b*) The market may be artifically depressed prior to the nationalization in view of the nationalization[76].

Is the market value in the nearest state with a free economy to be the standard or perhaps the market value in the alien's national state? Neither of these represent the true value of the property in the open market in the nationalizing state. Factors such as import controls and duties in particular states will influence value judged according to these standards.

A satisfactory solution is difficult to propose. It is significant then that the Ceylon Petroleum Corporation Act states that (i) the compensation shall be the actual purchase price of property plus an additional sum for the reasonable value of additions and improvements and, in the case of movables or attachments to land, minus a reasonable amount for depreciation.[77]

(ii) where the value according to (i) is not ascertainable, the value in open market on the day the property was vested in the Corporation,[78]

(iii) in the case of rights or interests in movable or immovable property, the purchase price of that right or interest less a proportionate amount on account of the period for which the holder has enjoyed such right or interest.[79]

The difficulties arising from the vagaries of the open market resulting from nationalization are not faced, but they are avoided to some extent by the use of the standard of the purchase price as stated above.

The U.S. Government has denied that these sections of the Act conform to international law.[80]

It is significant in the light of the observations made and facts stated above that some municipal courts which have had recently to examine the issue of compensation for expropriation raised before them in relation to international law have made statements of a heterogeneous variety.

An Italian Court took the view that "equitable" compensation was all that was required and denied that it was necessary that compensation equivalent to the value of the property be paid in order that there be conformity with international law.[81] Considerations of the "public interest" were said to be relevant in determining such compensation.

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76. As in the case of the French nationalization of the gas and electricity industries.

77. Section 47 (1).

78. *Ibid.*

79. Section 47 (2).

80. *Loc. cit.* note 6.

81. *Anglo-Iranian Oil Co. Ltd.* v. *S.U.P.O.R.* (1955) I.L.R. at 23.

A Japanese Court confronted with a similar situation as the Italian Court arising out of the Iranian oil nationalizations took the view that the expression of an intention to pay compensation coupled with a concrete preparation for payment was sufficient compliance with the rule of international law.[82] But no indication was given of the requirements as to "adequacy".

A Dutch Court confronted with a case arising out of the Indonesian nationalizations took the view that compensation was necessary "which would be equal in value and somewhat conform to equity".[83] But no further definition was given.

In a case before the court of Aden arising out of the Iranian oil nationalizations, the view was taken that the Iranian law provided for *no* compensation and therefore was contrary to international law.[84]

None of these cases, however, help to formulate a satisfactory basis for the assessment of compensation and some of them may go further than is desirable in permitting the payment of any compensation at all and in giving too much place to the vague concept of "public interest".

In view of the attendant difficulties one may not be too bold or rash in suggesting that the Ceylon legislation which lays down the standard for the calculation of the "average value" is not out of accord with the law, although in its adoption of the residuary alternative of the "market value" it does not make allowance for the difficulties outlined above which are connected with that concept. The standards there laid down are equitable provided the residuary principle does not turn out to be an escape clause for the provision of illusory compensation. But it is not easy to state whether standards which might put the alien in a worse position that there envisaged are permissible. Perhaps, all that can be said in the present state of the law is that compensation must be equitable but that equity must be judged not necessarily in terms of what the property is worth to the alien in the 'market', fictitious or real, but in terms of what the property is worth to the alien from the point of view of what he has expended on it and the use he has got out of it . Indeed, a state may choose whichever of these principles is more advantageous to it. The concept of value is flexible but objective and not illusory. It will be noted that the standard of the purchase price is more objective and readily applicable than any other.

It is also equitable that the calculation should be made as at the date of confiscation, so that, interest will accrue after that date till the actual date

82. *The Kosan Kabushiki Kaisha Case* (1953) I.L.R. at 305 in the lower court, and at 312 in the higher court.

83. Domke, *loc. cit.* note 36 at 318.

84. *The Rose Mary* (1953) 1.W.L.R. 246 at 253.

of payment. Sections 49 and 50 of the Ceylon Petroleum Corporation Act provide for this.[85]

(4) On this analysis, it is the 'value' of the property on one of the above standards or the other that is of relevance. To introduce the idea of 'partial value' would clearly require a modification that cannot be attributed to a specific principle. One may argue that one hundredth of the 'value' is just as 'partial' as three fourths of the value. Or if a specific proportion is to be chosen then it would be difficult to find a principle on which such a proportion is to be founded. Equally, the idea of 'reasonable proportion' is vague and vacuous for the matter of quantum of compensation. It would seem that under the post-war compensation treaties only partial compensation was paid in the sense that the aliens did not get all that they asked for. For instance, the U.S. claims that the payment of $17 million under the U.S.—Yugoslav treaty represents 42.8% of the amount originally claimed, while under the Anglo-French treaty of 1951, the compensation amounted to 70% of the private investments valued according to principles most favourable to the aliens.[86] Apart from the fact that these treaties were concluded in the spirit of diplomatic compromise, they do not help to forumulate any principle underlying partial compensation. It is submitted, therefore, with due respect for greater authority, that the idea of "partiality" has no place in the principles of assessment. It is equitable that the "full value" be paid, value being interpreted as 'average value' with an objective content such as that expressed in the Ceylon Petroleum Corporation Act, not necessarily as 'market value' whatever that may mean, or 'value claimed by the alien'. The idea that compensation must bear 'a reasonable relation to the value of the property transferred' is to be interpreted in this sense.

(5) Where an alien suffers loss as a result of the creation of a State monopoly, the question of compensation for losses incurred by the fact that property may not be taken over but cannot be used in that particular business of the alien raises an acute problem. Here the cardinal principle is that the alien has no right to expect to continue in business indefinitely. He must bear the risk of being asked to cease business at any time just as much as he runs the risk of failing in his business. The most he can expect is to be allowed to sell his property in the nationalizing state or be allowed to remove any material that can be removed from that State. It is even doubtful whether he should be compensated for the cost of removal as this is a possibility he must face in assuming the risks of business in a foreign state without the protection of a treaty. The Ceylon legislation explicitly provides against compensation for the above kind of loss in section 8 of the amending Act. At the same time no conditions have been imposed by the Ceylon Government on the use, removal or sale of any property not taken over so that the law has not been infringed.

85. "The compensation payable in respect of any property vested in the Corporation shall be considered as accruing due from the date on which that property was vested' Section 49 provides for the payment of interest.

86. See further on this aspect of the matter Foighel, *op. cit.* at 117.

(*C*) As to the form of payment, here again there is little authority in state practice of a conclusive nature. The term "effective" which has been used in this connection is not a term of art. Moreover, it has been current largely in the vocabulary of the capital-exporting states. It is significant that the General Assembly resolution of 14th December 1962 does not explain this requirement or mention it in detail.

The term, however, has value if it means that the alien must be able to use the compensation to his benefit. But it does not necessarily mean that the alien must be paid in the currency of the alien's national state. The decided cases on form of payment concern payment of damages for illegal acts,[87] where it may be possible to allow that the alien may be put in the best possible position, in this respect, that he might normally desire, as by the payment of damages in his national state's currency. But the compensation for legal expropriation cannot be put on the same footing. Here again it is a question of finding a mean, if theory is to be resorted to.

What is the alien entitled to expect, considering that he has entered an economic society, foreign though it may be, for the purpose of making profit? At one extreme it has been suggested that he can expect to be put in a position in which his financial situation remains unaffected by the nationalization, so that payment in the currency of the nationalizing state would seem to suffice.[88] But this view does not take account of the fact that the alien is also a foreigner and should have a certain measure of liberty in the use of his assets or at least the income from them outside the country of nationalization. Two considerations are important, namely the fact that the alien is a foreigner who is entitled to a considerable amount of freedom in moving his assets out of the country and the fact that he has, nevertheless, decided to make himself a member of a particular social and economic group over which the state has wide powers in regard to the movement of assets. The particular difficulties that a state may have in making available compensation in the required form are not so important from the legal point of view although they merit consideration, especially in view of the fact that nationalization is resorted to in modern times by states which are poorly situated in regard to foreign exchange.

There are conceivably several possible alternatives:

(i) Payment may be made in kind.

(ii) Payment may be made in the currency of the nationalizing state with or without permission for income from it to be remitted abroad in a particular currency or in any currency.

87. See *The Wimbledon*, P.C.I.J. Series A No. 1 at 32, and *The Chorzow Factory (Indemnity) Case*, P.C.I.J. Series A No. 17 at 51.

88. Bindschedler, "La Protection de la Propriété Privée en Droit International Public", 90 Hague Recueil, vol. II, 173 at 269 (1956) and *Verstaatlichungsmassnahmen und Entschädigungspflicht nach Volkerrecht* at 56 (1950); S. Friedman, *op. cit.* at 219.

(iii) Payment may be made in internal securities with or without the same conditions as in (ii).

(iv) Payment may be made in the currency of the alien's national state.

(v) Payment may be made in any convertible currency.

Clearly from the point of view of the nationalizing state payment in securities without permission for the income to be remitted abroad would be most convenient or perhaps payment in kind. For the alien payment in the currency of his national state would perhaps be most suitable. However, neither would making the latter alternative obligatory nor permitting the fomer alternative constitute a just solution in all the circumstances of the case. Payment in kind would probably be most inconvenient for the alien.

The general treaty practice of the post-war years seems to be that payment was made in the currency of the alien's national state in one way or another.[89] Apart from the difficulty there undoubtedly is of attributing law creating force to these treaties and particularly to this aspect of these treaties, this rule would appear to favour an extreme which may perhaps be modelled on the rule relating to damages for an illegal act. On the other hand, it is possible to find examples of payment in the nationalizing state's currency. In 1929 Greece paid the U.K. in drachmas.

Fundamentally, if the alien is put in a position in which he may employ the compensation he receives in such a way that he receives a fair income as compared with the return he might receive elsewhwere and he is permitted to use this income abroad, the principle that the alien must be able to use the compensation to his benefit is satisfied, interpreting this to mean that he must be able to use the benefit anywhere. Since he chose to invest in the nationalizing state he could not necessarily demand that he be allowed to remove his investment whenever he pleased. The same would apply to compensation, except that just as much as he could be excepted to remit profits of his investments abroad, so he can legitimately expect to remit the interest on his compensation abroad. Thus, where the investment possibilities in the nationalizing state promise a fair return as above described, payment may be made in the currency of the nationalizing state or where securities carry a fair interest on the same basis payment may be in that form. Moreover, this is conditional upon the alien's being allowed to remit his income abroad.

Although generally it may be said that the conditions in the nationalizing state will not be equitable for investment either because this is not permitted to aliens or in general or because the returns do not compare reasonably with returns on investment elsewhere or because remittance of dividends abroad

89. See Foighel, *op. cit.* at 126.

is not permitted where such investment would be possible and equitable, there may be circumstances in which payment in the currency of the nationalizing state or in securities can well be legal. If such possibilities were not available to the alien, then he must be paid in a convertible currency but not necessarily in the currency of his national state.

> The Ceylon Petroleum Corporation Act of 1961 provides that "the mode and manner of payment of compensation under this Act shall be determined by the Minister in consultation with the Minister of Finance".[90]

According to the canons of statutory interpretation adopted in England which are also applicable in Ceylon, there is a presumption that a statute is to be interpreted so as to be consistent with international law unless there is clear indication to the contrary. In *Co-operative Committee on Japanese Canadians* v *A-G for Canada* the Privy Council said :

> "It may be true that in considering legislation some weight ought, in an appropriate case, to be given to a consideration of the accepted principles of international law . . ."[91]

It is equally true that in some cases the English courts have held that the legislation in question was expressly in contravention of international law but had to be given effect to by the courts[92]. However, it is submitted that the principle requires necessary implication or express words over-riding the presumption that international law is to be observed. In the Ceylon Petroleum Corporation Act there are no express words nor is there a necessary implication that the Minister may exercise his discretion in a manner contrary to international law. Thus, it is possible for the Ceylon Government to act in accordance with international law in regard to the form of payment.

(*D*) The time of payment has also been the subject of much controversy. Taken literally the requirement of 'promptness' asserted by the capital-exporting states would require payment in a lump sum at the time of or before the actual taking of the property. It is not clear, however, that this view is generally accepted or that it represents the law.[93]

It is significant that in the *David Goldenberg Case* it was said *obiter* that compensation should be paid "le plus rapidement possible".[94] This is a considerably wide derogation from the concept of strict "promptitude".

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90. Section 53.

91. (1946) A.C. 87 at 104.

92. *Mortensen* v *Peters* (1906) 8 F, 93, *Croft* v *Dumphy* (1933) A.C. 156.

93. Some writers still maintain that payment should be "prompt", see eg. White *op. cit.* at 12, Foighel, *op. cit.* at 120, Wortley, *op. cit.* at 33. The U.S.A. contended for this view with the modifications that failing immediate payment, reasonable steps towards immediate payment were adequate, in the note to the Ceylon Government, see *loc. cit.* note 6.

94. "As quickly as possible": 2 U.N. Reports of International Arbitral Awards 901 at 909.

Treaty practice is also not consistent with such a conception. Mexico paid the U.S.A. over a period of 4 years and ended payment 9 years after nationalization. France is being paid by Poland over a period of 15 years, Sweden by Poland over 17 years, Belgium by Hungary in 10 years.[95]

It would seem that the failure of aliens to obtain prompt payment testifies to the negative fact that promptitude is not fully accepted as a legal requirement, even if the compensation treaties cannot be regarded as embodying a legal view of the time of payment since diplomatic motives could very well have prompted both sides to the agreements.

The principle that the alien must be put in the same position as he would have been had the nationalization not taken place as far as money can do so, would lead to the conclusion that payment must be in a lump sum and immediate. But, as has been shown,[96] this principle is not inherent in the law of expropriation. The fact that interest accrues from the date of expropriation indicates, however, that the compensation is due on that date. If something is due on a certain date, it normally means that it must be paid on that date. The practice of nationalizing states, then, involves a contradiction, unless one also concedes that no interest accrues from the date of expropriation.

The problem is first, to find a suitable explanation for not recognizing that payment must be made on the date of expropriation and, second, to find the correct principle to be applied to the issue of the period of time within which compensation should be paid.

(i) The only satisfactory explanation of the apparent contradiction is that the logical consequence of the rule that payment is due on the date of expropriation is not recognized for practical reasons of social need. Ordinarily, nationalising states are not in a position to pay immediately. The illogicality must be regarded as a concession to such states in the interests of the ultimate good of international society. In order to promote the economic good of the international community, they are given a certain latitude. This is a clear instance where the legitimate interests of the capital-exporting states are made to subserve the interest of the community at large. It is only in terms of an organic view of international law and international society permitting a hierarchy of legal values that this exception to logic can be understood.

(ii) To formulate the proper rule, it is necessary to make an assessment of the interests of the two parties to the issue. The alien's national state (a much as the alien) would like to have the compensation paid immediately, while the nationalizing state has an interest in taking as long as it possibly can to pay. A reconciliation of these interests produces a solution which is based on compromise. Payment over a "reasonable period" with a "reasonable" arrangement is suggested, although "reasonable" is not a term generally known

95. See Foighel, *op. cit.* Appendix A at 127 ff. The Appendix contains an useful analysis of several other treaties as well.

96. See *supra* at 141.

to international law nor is it a term of art. It is submitted that in no circumstances should the "reasonable" period exceed 10 to 12 years although in a given case the "reasonable period" resulting from particular circumstances may be less. This limit is arbitrary but it is based on a rough norm to be extracted from the recent treaty practice.[97] Also it becomes clear that each case must be considered on its own merits with its many ramifications. Any factors relevant to the alien's need for the compensation and the nationalizing state's ability to pay will be relevant within the maximum limit. In short, the test is a practical one. Whatever the period, the payment will have to be spread proportionately, at least over that period.

Similarly, for the assessment of compensation only a reasonable period can be given. Payment to the alien must be begun soon after the expropriation, whatever the period proposed for the actual payment. Clearly, the "reasonable period" here must be much shorter than the period for the payment of compensation. It is to be judged by how long it is necessary for a state to collect the necessary information from the alien and other sources and make an assessment of the compensation in the ordinary course of its functioning. Since this process also involves the cooperation of the alien, his willingness or unwillingness to cooperate will be a consideration of relevance in determining the reasonable period.

The Ceylon Petroleum Corporation Act deals with the period of payment in the section which governs the "mode and method of payment". Therefore, the same reasoning applies to the period of payment as applied to the form of payment. In other words the Act permits and requires compliance with international law.[98]

(4) Adjudication by an International Tribunal

The Ceylon Petroleum Corporation Act sets up a Compensation Tribunal to deal with the applications for compensation and pronounce on the assessment.[99] Further, the Chairman of the Petroleum Corporation is under an imperative obligation under this Act to call for particulars of the alien's claim and submit the claim with relevant documents to the Compensation Tribunal.[100] However, the Act provides in section 65 (4) that "An Award of the Tribunal shall be final and shall not be called in question in any Court".

In Ceylon law the oil companies can compel the Chairman of the Petroleum Corporation and the Compensation Tribunal to carry out their functions, in the event that they fail to do so or delay in doing so, by reference to the

97. See note 95 for a list of treaties.

98. See *supra* at 148.

99. Part V, sections 55 to 65.

100. Part IV, sections 44 to 46.

prerogative order of *mandamus*,[101] which can be got on application to the Ceylon Supreme Court.[102] The Act does not take away these constitutional rights. Equally the Act does not prevent the Courts from examining and pronouncing on the question whether the Minister of Trade and Commerce has exercised his discretion in regard to the time and form of payment under section 53 in accordance with international law, which, it has been submitted, is a requirement of this section.[103] But the question whether the quantum of damages is in conformity with international law is not an issue which the Courts can examine in virtue of section 65 (4).

Hence, where the alien oil companies are dissatisfied on any issues here discussed in connection with compensation except the quantum of compensation, they have a remedy before the Courts of Ceylon.

Now, it is a well recognised rule of international law that local remedies must be exhausted before an international tribunal can assume jurisdiction.[104] This means that the local courts and other tribunals provided must be resorted to as far as the highest court of appeal in ordinary circumstances. The main idea behind the rule is that the nationalizing state must first be given an opportunity of redressing the grievances of the alien. This rule, however, has two further implications :

(i) Where there are no remedies to exhaust or the remedies available are *obviously futile* the alien is not under an obligation to refer his case to the local courts.[105]

(ii) The legal issue must be viewed as the alien alleges it and the question whether local remedies are available and are not obviously futile is to be decided in relation to this allegation.[106]

When these two propositions are applied to the claims of the oil companies, it will be seen that in respect of their allegation that the principles for the calculation of compensation are not in accordance with international law, there is no remedy available in Ceylon, since the Compensation Tribunal is

101. For the operation of this order see de Smith, *Judicial Control of Administrative Action*, at 432-439 (1959); Lawson & Bentley, *Constitutional and Administrative Law* at 339-342 (1961).

102. Courts Ordinance No. 1 of 1889, section 42, *Corea* v *Urban Council Kotte* (1958) 62 New L.R. 60. The same principles apply to the grant of these orders as in English Law: *Nakkuda Ali* v *Jayaratne* (1950) 51 New L.R. 457 at 460, (1951) A.C. 66 at 75.

103. See *supra* at 148 and 150.

104. *The Finnish Ships Arbitration* (*Finland v U.K.*) (1934) 3 U.N. Reports of International Arbitral Awards 1481. The nature of this rule is a very complicated question and cannot be even touched on here. The writer has dealt with the problems in an article to be published in the British Yearbook of International Law.

105. *Id.* at 1503. *Interhandel Case* (1959) I.C.J. Reports 6 at 28.

106. *Id.* at 1503.

bound by the Statute and the Courts cannot examine the award of the Compensation Tribunal. Hence, if they want to contest this point at any time, it will be possible for an international tribunal to assume jurisdiction. But on any other issue, e.g. that compensation has not yet in fact been paid or that the form and time of payment are contrary to international law, it is possible for the oil companies to seek redress from the Ceylon Courts which recognise according to the English principle of law that international law is generally part of the law of the land[107] subject to overriding statute law and certain other exceptions which are irrelevant here, the English principle being applicable in Ceylon. As long as this possibility exists, the oil companies must resort to the available remedies on these issues before an international tribunal can be seized of the dispute. It was said in the *Interhandel Case* in a situation where the question was whether the Swiss claimants should have resorted to the U.S. Courts before coming to the International Court, that the relevant issues were justiciable by the U.S. Courts, because

> "the decisions of the United States courts bear witness to the fact that United States Courts are competent to apply international law in their decisions where necessary".[108]

The same can be said of the position in Ceylon.

An international tribunal would, therefore, reject a claim by the U.S. or British Government on behalf of their nationals, if the issue raised relates to anything except the quantum of compensation, on the ground that local remedies have not been exhausted.

Although international arbitration is dependant on the consent of both parties to the litigation in the present state of international law, it is submitted that due weight should be given to the General Assembly resolution which states :

> "However, upon agreement by sovereign states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication".[109]

It cannot be said that the resolution purports to override international law, but provided local remedies have been exhausted the resort to international adjudication or arbitration is distinctly in the interests of the international community and especially the parties to the dispute themselves.

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107. See e.g. *Triquet* v *Bath* (1764) 3 Burr. 1478, *Viveash* v *Becker* (1814) 3 M & S 284, Lauterpacht, 25 Grotius Society 52 (1939).

108. (1959) I.C.J. Reports 6 at 28.

109. Resolution 1803(XVII) Section 4, Voting was 87 in favour, 2 against and 12 abstentions.