

1962

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Recommended Citation

Frank G. Dawson and Burns H. Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 Fordham L. Rev. 727 (1962).

Available at: <https://ir.lawnet.fordham.edu/flr/vol30/iss4/4>

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"Prompt, Adequate and Effective": A Universal Standard of Compensation?

Cover Page Footnote

Member of the New York Bar.

"PROMPT, ADEQUATE AND EFFECTIVE": A UNIVERSAL STANDARD OF COMPENSATION?

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BURNS H. WESTON

PPRIVATE foreign-wealth deprivations¹ raise some of the most contentious issues of contemporary international law. Many commentators assert that all deprivations by States of alien-owned wealth within their boundaries are circumscribed by the orthodox requirement of "full" or "prompt, adequate and effective" compensation.² Yet because this prescription evolved from nineteenth century socio-economic and legal thought which sought to internationalize Western European presuppositions of private property ownership,³ it behooves us to examine its use and applicability to mid-twentieth century perspectives.⁴ The concern of present-day debate is to decide whether, in the context of general and fundamental socio-economic and political reform, less than "full" compensation may be paid for the taking of foreign-owned property. The principle of compensation itself is seldom challenged. Since the question is not whether compensation should be forthcoming, therefore, the proper focus of legal analysis should be upon techniques by which the timing, the amount, and the form thereof may be realistically determined.

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1. By this is meant state action against private alien wealth over which States claim jurisdictional competence, totally or partially depriving alien owners of title or control. The term is used to avoid the normative ambiguities of the terms "confiscation" and "expropriation," the former referring to deprivations without the offer of compensation and the latter to deprivations accompanied by an offer thereof.

2. The assertion excludes circumstances involving international treaties or contracts specifying another standard.

3. "The international community in its inception was confined to only some Christian states of Europe. It expanded within very narrow limits to embrace, first, the other Christian States of Europe and next their own offshoots in other continents. It thus retained until recently its racial exclusiveness in full and its geographical and other limitations in part. The international law which the worldwide community of States today inherits is the law which owes its genesis and growth, first, to the attempts of these States to regulate their mutual intercourse in their own interests and, secondly, to the use made of it during the period of colonialism." Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 Am. J. Int'l L. 863, 866 (1961).

4. While recognizing that wealth deprivations assume many forms reflecting an array of techniques, this discussion focuses upon problems of compensation resulting from direct and overt takings.

I. THE HISTORICAL CONTEXT

The international law governing private foreign-wealth deprivations can best be characterized as the accommodation and reconciliation of two distinct interests: the national interest of every State in exercising authority over and regulating the use of all forms of property within its territorial competence;⁵ and, the common interest of the international community in fostering the maximum production and flow of wealth across state boundaries. Specifically, the most meaningful policy preference for the depriving State is the maintenance of an international legal framework of sufficient flexibility to enable it to maximize the economic, political, and social aspirations of its people.⁶ To the foreign trader and investor, on the other hand, the most meaningful policy consideration is the stabilization of expectations respecting his ownership of, and gain from, property located abroad.⁷ International law seeks to harmonize these distinct, yet interdependent, interests to achieve, in a world beset by conflict, that stability which is requisite to the international common interest of securing an optimum realization of material and spiritual values for all men.

Legal norms relating to foreign wealth deprivations have been determined, at any given period in history, by the economic, political, and social processes of the time. From about the mid-nineteenth century to World War I, the international scene, dominated by European cultures, was characterized by impressive material transformations—the acceleration of industrialization, the harnessing of new sources of power, far-reaching technical improvements in agriculture, increasingly rapid trans-

5. It should be noted that contemporary opinion asserts that States incur international responsibility, in the absence of treaty obligation, not by the taking itself, but by failure to provide compensation therefor. This is logical owing to the conceded competence of States to control forms of wealth within their territorial boundaries. See Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 *Am. J. Int'l L.* 801, 808 (1960); Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 *Am. J. Int'l L.* 545, 555 (1961).

6. Thus, in 1955, debate in the United Nations General Assembly centered upon a draft convention adopted by the Third Committee of the General Assembly, article 2 of which read: "The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." U.N. Doc. No. A/C.3/L.489 (1955), discussed in Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 *Am. J. Int'l L.* 854, 856-57 (1956).

7. "Foreign investment is voluntary; it cannot be coerced. Unless there is a reasonable prospect of profit and an assurance of security, it simply will not occur. In many undeveloped countries, though the prospect of profit is present, the assurance of security is not." Wilcox, *A Charter for World Trade* 145 (1949).

portation, the expansion of commerce, improved techniques in finance and corporate organization, large aggregations of capital, and political and economic imperialism—in respect to which the State played a comparatively negative role, protecting a regime of *laissez-faire* and assuring the "sanctity" of private wealth.⁸ The period was especially marked by the enormous expansion of British overseas investments which were assured diplomatic protection reinforced by the most powerful fleet and the largest empire in the world.⁹

Interference in the economic process during the nineteenth century, therefore, was confined principally to the *regulation* of private wealth. Governmental wealth-deprivation powers were exercised but rarely, and then, only for limited purposes. Private foreign-wealth deprivations were never matters of major national policy, but were confined to *limited* deprivations involving isolated takings of amounts of property insignificant to the aggregate of foreign-owned wealth in the depriving State.¹⁰ The taking of a parcel of land from a British subject for the royal gardens of the King of Greece,¹¹ the seizure of insubstantial foreign railway properties in Portuguese East Africa,¹² and the appropriation of the property of several "dissolved" foreign "religious communities"¹³ were typical of such deprivations. It was primarily during this period of limited deprivations that the legal policies concerning compensation were formulated. These orthodox preferences, absent contrary treaty provisions, condition the legality of the taking of foreign wealth upon "public utility" and payment of "full" or "prompt, adequate and effective" compensation, in lieu of restitution.¹⁴ The standard of compensation was succinctly stated by Fachiri in 1919: "[I]f a state expropriates the physical property of an alien without the payment of full compensation it commits a wrong"¹⁵

8. See generally Ellsworth, *The International Economy* 156-75 (2d ed. 1959).

9. See generally Carrington, *The British Overseas, Exploits of a Nation of Shopkeepers* 402-833 (1950).

10. See Rubin, *Nationalization and Compensation—A Comparative Approach*, 17 *U. Chi. L. Rev.* 458, 459 (1950). The International Law Commission refers to limited deprivations as "acts of expropriation *stricto sensu*." Fourth Report on International Responsibility, U.N. Doc. No. A/CN.4/119, at 27 (1959).

11. *Finlay Case*, 39 *Brit. Foreign State Papers* 410 (1849).

12. *Case of the Delagoa Bay Ry.* (1891), 2 *Moore, Arbitrations* 1865 (1893).

13. *Expropriated Religious Properties Case* (1910), 1 *U.N. Rep. Int'l Arb. Awards* 7 (1920).

14. See, e.g., *Walter Fletcher Smith Case (Smith v. Compañía Urbanizadora del Parque de Mariano)*, U.S. State Dep't Press Release, May 16, 1929, 24 *Am. J. Int'l L.* 384 (1930); *Case of the Norwegian Claims Against the United States* (1922), 1 *U.N. Rep. Int'l Arb. Awards* 307 (1922).

15. Fachiri, *International Law and the Property of Aliens*, 10 *Brit. Yb. Int'l L.* 32, 55

Historic practice to date¹⁶ reveals little disagreement when applying these prescriptions to contemporary limited deprivations. A unique feature of the twentieth century, on the other hand, is the direct *interference* and *participation* of the State in the national and international economic order, with its concomitant effects upon traditional concepts of private wealth. Two world wars, the Great Depression, the "bipolarization" of the world, the spread of nationalism, the development of the corporate and welfare states, the formation of state trading monopolies, and the consequent dislocation of traditional social, economic, and political patterns have precipitated demands for long-overdue social and economic reforms (especially in those regions often indiscriminately termed "underdeveloped"), the fulfillment of which, it is hoped, will foster increased self-respect and human dignity.¹⁷ The growing intensity of unsatisfied demands for wealth, power, knowledge, respect, health, security, and other values¹⁸ may be met often only through centralized planning and large-scale public participation in finance and technology which, necessarily, will result in assaults upon, and conflicts with, traditional values rooted in another century.¹⁹ States are today, therefore, less willing to rely exclusively upon the individual entrepreneur as the instrument of policy through which community aspirations may be achieved.²⁰ As John H. Herz has written:

(1929). It is interesting to note that Fachiri did not appear to contemplate the nature of nonphysical property and its relation to problems of foreign wealth deprivation.

16. Chorzów Factory Case, P.C.I.J., ser. A, No. 7, at 4 (1926); P.C.I.J., ser. A, No. 13, at 4 (1928) (merits).

17. Cf. U.N. Charter, art. 55(a). See also McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 Am. J. Int'l L. 1 (1959).

18. For a discussion of such values, see McDougal & Lasswell, *supra* note 17, at 22-26.

19. See Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 Am. J. Int'l L. 863, 875 (1961). One writer suggests, more negatively, that the historical development of increased state interference with traditionally accepted "proprietary rights" has had and will continue to have adverse effects upon the personal freedom of the individual because it represents the conflict between "collectivism" and "individualism." See Adriaanse, *Confiscation in Private International Law* 2 (1956). A more favorable argument is well stated by Sir John Fischer Williams: "To seek to entrench individualism as against collectivism by a canon of international law, is not merely to take an economic doctrine out of the sphere of domestic legislation, where alone it properly belongs, but also to run a grave risk of discrediting international law in the eyes of those who accept collectivist doctrines either for all property or for a part of it. Such action will in the end neither help to preserve private property nor strengthen the power of international law." Williams, *International Law and the Property of Aliens*, 9 Brit. Yb. Int'l L. 1, 21-22 (1928).

20. "Since the end of World War II, governments have, to an increasing extent, accepted the premise that in order to achieve certain vital aims of public economic policy, it was necessary to place not only control but outright ownership of public assets in public hands." Einaudi, *Nationalization in France and Italy* 4 (1955).

The great changes in state functions which have taken place since the days of *laissez-faire* liberalism have had a direct influence upon the meaning and importance of the right of expropriation. Little by little not only so-called social legislation—in the form of the regulation of labor conditions, taxation for social or other non-financial purposes, etc.—which more and more has come to be included in the state's police power, but direct interference with private property in the form of abolishing it, transferring it to the state, or redistributing it among other groups of the people have been frequent in many parts of the world, and not only in backward ones. New economic policies striving for autarchy have brought about not only indirect interference, such as currency legislation, but in certain countries have directly interfered with those two traditional rights of the private owner (especially the *entrepreneur* and the land owner) which had come to be considered essential elements of private property: his right of management and disposal, and his profits. The clearest example of the new type of state interference is, however, the direct taking away of private rights in the form of outright abolition or redistribution.²¹

Thus, the planned, large-scale taking of alien property has become today the most publicized form of foreign-wealth deprivation. Though once matters of only limited concern, foreign-wealth deprivations are today subjects of national policy.²²

Extensive foreign-wealth deprivations are equated, with varying degrees of accuracy, with "nationalization," "socialization," or "the redistribution of wealth."²³ Whichever term is used, each presumes that extensive deprivations involve radical policy change respecting all or part of a nation's economic structure. Hence, extensive foreign-wealth deprivations do not restrict, eliminate, or transfer foreign wealth to attain the comparatively narrow objectives of limited deprivations. Rather, they assist in the reorganization and administration of a sector or sectors of the economy so as to subject the means of production, formerly owned by private entrepreneurs, to centralized state control and responsibility, if not ownership.

It may be difficult, of course, to distinguish clearly between limited and extensive deprivations, since nationalizations may not always be

21. Herz, *Expropriation of Foreign Property*, 35 Am. J. Int'l L. 243, 256 (1941).

22. See generally Einaudi, *Nationalization in France and Italy* 4 (1955); Doman, *Postwar Nationalization of Foreign Property in Europe*, 43 Colum. L. Rev. 1125 (1948); Foighel, *Nationalization—A Study in the Protection of Alien Property in International Law*, 26 Nordisk Tidsskrift for International Ret 89 (1956); Jewkes, *The Nationalization of Industry*, 20 U. Chi. L. Rev. 615 (1953); Kuhn, *Nationalization of Foreign-Owned Property in Its Impact on International Law*, 45 Am. J. Int'l L. 709 (1951); Re, *The Nationalization of Foreign Owned Property*, 36 Minn. L. Rev. 323 (1952).

23. Friedman distinguishes between "nationalization" and "socialization," asserting that the former is a measure of an "economic character and permitting the reorganization of certain forms of property within a given sector of the economy in order to ensure their survival amid new conditions of production." Friedman, *Expropriation in International Law* 6 (1953). He holds further that the object of "socialization" is "to secure the benefits of technical reorganization to new social classes acceding to power." *Ibid.*

extensive deprivations. This alone demonstrates the futility of attempting to establish rigid criteria purporting applicability in all situations.²⁴ Nevertheless, there are relevant *factual* questions which should be considered when seeking to delineate between these types of deprivations. For example: what is the size and value of the property taken, in absolute terms and in relation to the size and value of all similar property located in the depriving State? What is the importance of the seized property—strategic or otherwise—to the economy of the depriving State? What was its past and what might be its future contribution to the gross national product of the depriving State? What sums of money and other forms of wealth are involved? How many people are directly involved? In short, a meaningful consideration of the underlying facts, outcomes and effects of each deprivation is required.

Not only have the differences in nature, scope, and effect between limited and extensive deprivations not been adequately explored, but the consequences of these differences in international law have seldom, if ever, been subjected to systematic analysis.²⁵ Despite ascertainable profound disparities between limited and extensive foreign-wealth deprivations, considerable international legal opinion, nevertheless, continues to apply the orthodox preference for "full" or "prompt, adequate and effective" compensation to both types of deprivation, sometimes even expressly disregarding the distinctions involved. Thus, speaking before the American Foreign Law Association in 1960, B. A. Wortley remarked:

The first point I want to make is that nationalization, which is the seizure of a

24. The distinction drawn between limited and extensive deprivations should be recalled throughout the length of this discussion. Because nationalizations may sometimes be characterized as limited deprivations, the orthodox compensation standard may not always be inappropriate. While motivated by desires to achieve economic reform, a nationalization may be of such insubstantial economic and financial effect as to merit application of the orthodox standard. Since the diacritical line may be difficult to draw, labels can be misleading.

25. The task would appear more difficult than in 1926 when, during an International Law Association discussion of the protection of private property, it was asserted that the Soviet Union, because of her "attack upon the international agreement as to the sacredness of private property" and her failure to "agree with the common conscience of all other civilized nations upon its most difficult question of morals and ethics" had "excluded and exc communicated herself from the society of civilized nations." Herz, *Expropriation of Alien Property—An Inquiry Into the Sociology of International Law*, 8 Soc. Research 63, 65 (1941). The recent Harvard Draft attempts, although inadequately, to distinguish the consequential relevance of these two types of deprivations in article 10(4). Harvard Law School Preliminary Draft of the Convention on the International Responsibility of States for Injuries to Aliens, art. 10(4) (1959); see Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, 553 (1961). A similar but more comprehensive distinction is made by Garcia Amador, *Fourth Report on International Responsibility*, U.N. Doc. No. A/CN.4/119, at 63 (1959).

country's economy, does not differ in principle from other forms of expropriation, i.e., from confiscation without payment, from requisition in an emergency with payment after the event, or from classical expropriation after prior payment.²⁶

Elsewhere, Wortley has argued that "the state that wishes to conduct political experiments which result in its enrichment at the expense of the foreign owners cannot, as a matter of principle, refuse restitution or full compensation. . . ." ²⁷ This proposition has recently been represented on the Continent by Adriaanse^{27a} and in the United States by Kissam and Leach.^{27b}

Perhaps the most celebrated expression of the orthodox position was that of former Secretary of State Cordell Hull who, while

26. Wortley, *Some Latest Developments in the Law of Expropriation and Nationalization*, Summary of Address, American Foreign Law Ass'n, New York, Feb. 15, 1960 (mimeograph).

27. Wortley, *Expropriation in Public International Law* 115 (1959); cf. Domke, *Foreign Nationalizations*, 55 *Am. J. Int'l L.* 585, 607 (1961).

27a. Adriaanse states: "[T]he possibility to expropriate should not depend upon what the State wants, but on the contrary, it should be limited by the possibility of [full] payment by the State. We should strive to make this rule of public international law an axiom . . ." Adriaanse, *Confiscation in Private International Law* 166 (1956).

27b. Kissam and Leach have written: "Unless restricted by treaty or other agreement, a State has the right under international law to expropriate property of foreign nationals within its territorial jurisdiction, but only if the expropriation is made for reasons of public utility, and only upon the payment of prompt, adequate and effective compensation. The requirement of compensation is equally applicable in cases of both general and individual expropriation . . . Economic difficulties of the expropriating State . . . do not justify the taking of property without payment, since poverty is no excuse for unlawful conduct, whether by individuals or by States . . . Any action taken in defiance of these principles should not be accorded recognition by other States." Kissam & Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 *Fordham L. Rev.* 177, 214 (1959). The same authors write: "Beneficial as nationalization may ultimately prove to be to a State and to its citizens, there is little to justify placing the burden of a State's economic experimentation upon the shoulders of the foreign investor, who has neither any voice in the decision to indulge in such experimentation, nor any status to enjoy whatever benefits may ultimately be derived therefrom." *Id.* at 189. The view that foreign investors will derive few benefits from a nationalization has, in the short run, probable validity. A long-range view recognizes, however, the economic interdependence of the international community which tends to extend and share the benefits of the improved economic and social well-being of the depriving State to other nations, thereby, directly or indirectly, improving the status of the previously deprived alien. The present beneficial economic relationship between Mexico and the United States may well be a case in point. Thus, while United States private investment in Mexico had fallen by 1943 to \$422 million from the 1914 total of \$835 million and the 1930 total of \$710 million (which figures represent long-term investment), the direct investment figures alone for 1958 had risen to \$781 million. See *United States-Latin American Relations, Compilation of Studies, Study No. 4, Senate Subcommittee on American Republics Affairs, S. Doc. No. 125, 86th Cong., 2d Sess.* 296 (1960).

acknowledging the "validity" of the Mexican agrarian takings,²⁸ contended in a Note to the Mexican Government that "under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof."²⁹ Thus, despite historical change and predictable future inroads upon traditional concepts of private wealth ownership,

the ancient belief [is] kept alive that government [is] still confronted by an unchanging and rigid concept of property rights, and that the only way to go forward [is] to deal with title deeds as if they still have the fearsome strength given them by the Napoleonic Code.³⁰

While these orthodox publicists are not alone,³¹ considerable opinion seeks to modify the orthodox compensation "rule" in the modern extensive foreign wealth deprivation context. Thus, Konstantin Katzarov and other Eastern Europeans suggest that compensation for claims arising from extensive deprivations be fixed by "new criteria."³² Many Western writers are similarly persuaded. As Doman has observed:

Nationalization for alleged social or strategic reasons hardly can be fitted in the category of eminent domain; nor do the nationalization measures fall under the concept of the police power which would be inordinately difficult to distinguish from eminent domain. The post-war nationalization acts do not come under any traditional category of a legal system based on capitalist economy. Post-war nationalization represents a revolutionary development and it would be futile to attempt to associate it with past legal concepts. Rather, it should be looked upon as a *sui generis* matter and be dealt with accordingly.³³

28. The Note of the Mexican Ambassador of Aug. 3, 1938 pointed out the importance of the program of agrarian reform to the future of the Mexican people: "On the one hand, there are weighed the claims of justice and the improvement of a whole people, and on the other hand, the purely pecuniary interests of some individuals . . . [T]he future of the nation could not be halted by the impossibility of paying immediately the value of properties belonging to a small number of foreigners who seek only a lucrative end." 3 *Bishop, International Law* 518 (1949).

29. Note of Secretary of State Hull of Aug. 22, 1938, Press Releases, U.S. Dep't of State, vol. 19, No. 465, at 138; 5 *Foreign Rel. U.S.* 647, 677 (1938). (Emphasis added.)

30. Einaudi, *Nationalization in France and Italy* 4 (1955).

31. See Cheng, *Expropriation in International Law*, 21 *Solicitor* 98 (1954); Cheng, *General Principles of Law as Applied in International Courts and Tribunals* (1953). See also Brandon, *Legal Aspects of Private Foreign Investments*, 18 *Fed. B.J.* 298 (1958); McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 *Nederlands Tijdschrift voor Internationaal Recht* 218 (1959); Wehberg, 1 *Annuaire L'Institut de Droit International* 110 (1950).

32. Katzarov, *The Validity of the Act of Nationalisation in International Law*, 22 *Mod. L. Rev.* 639, 647 (1959).

33. Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 *Colum. L. Rev.* 1125, 1128 (1948).

The logical consequence of this observation has been ably expressed by the late Sir Hirsch Lauterpacht:

The rule is clearly established that a State is bound to respect the property of aliens. This rule is qualified, but not abolished [A] modification must be recognized in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases, neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation.³⁴

It is not solely the influence of collectivist philosophy that calls for this modification, but also, and perhaps primarily, the glaring imbalance between poor and prosperous nations compelling the former to achieve social and economic reforms within a minimum period of time.³⁵ For, as Dunn has observed, if extensive deprivations are to be governed by traditional compensation standards the dominant capital-exporting powers could exercise a veto power over legitimate attempts of poorer nations to achieve fundamental economic and social reform.³⁶ Hence, Kuhn has urged that the traditional doctrine of compensation must yield to, among other factors, "considerations of the debtor's political instability or its capacity to pay."³⁷ He concludes, "a compromise in the method of compensation is not a compromise in the principles of international law"³⁸ These same and, we submit, realistic views are reflected in the writings of numerous scholars, including Baade,³⁹ Bindschedler,⁴⁰ Del-

34. 1 Oppenheim, *International Law* 318 (Lauterpacht ed., 1948).

35. Thus, Richard N. Gardner has written: "It is not sufficiently understood that the gap in living standards within the free world is actually widening, not decreasing. In some of the less developed countries, population growth is causing an absolute decline in per capita income. In most others, whatever increase has taken place has been far less than increases in per capita income in the industrialized countries. This wide and growing gap in living standards is a time bomb which ticks ominously beneath the surface of contemporary affairs." *International Measures for the Promotion and Protection of Foreign Investment*, 53 *Am. Soc'y Int'l L. Proceed.* 255, 257 (1959). Illustrative of the compulsion to achieve material progress in a minimum amount of time was former Brazilian President Kubitchek's well-publicized slogan, "Fifty years' progress in five."

36. Dunn, *International Law and Private Property Rights*, 28 *Colum. L. Rev.* 166, 178 (1928).

37. Kuhn, *Nationalization of Foreign-Owned Property in Its Impact on International Law*, 45 *Am. J. Int'l L.* 709 (1951).

38. *Id.* at 711-12.

39. Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 *Am. J. Int'l L.* 801 (1960).

40. Bindschedler, *La Protection de la Propriété Privée en Droit International Public*, 90 *Hague Academy Recueil des Cours* 173 (1956).

son,⁴¹ DeVisscher,⁴² Foighel,⁴³ Friedman,⁴⁴ Gould,⁴⁵ Lapradelle,⁴⁶ and Rubin,⁴⁷ who contend, with varying emphasis, that, while there remains an obligation within the context of extensive wealth deprivations to afford some recovery to deprived aliens, the compensation standards are not those properly invoked in limited deprivations.

Thus, the issue has been joined, the debate finding its way even into the conference rooms of the United Nations where the entire question has assumed deeper significance in the East-West struggle.⁴⁸

II. THE ORTHODOX COMPENSATION PREFERENCES

The orthodox view requiring "prompt" compensation anticipates immediate recovery whether the deprivation be limited or extensive, some of its adherents even insisting upon prior payment.⁴⁹ Historic practice, however, seriously challenges theories of immediate or prior payment, emphasizing instead the deferred character of compensation. Thus courts have ruled, even for limited deprivations, merely that compensation be paid "as quickly as possible"⁵⁰ or within a "reasonable time"⁵¹ or "in due time."⁵² Moreover, while many State constitutions decree "prior" or "prompt" payment, at least as many, reflecting international practice, either do not mention "prompt" or expressly accept deferred payment in certain emergencies.⁵³ In practice, the term "prompt" seems not to have been defined by rigid formulae. Its meaning would appear influenced by the peculiarities of each case.

41. Delson, *Nationalization of the Suez Canal Company: Issues of Public and Private International Law*, 57 *Colum. L. Rev.* 755 (1957).

42. DeVisscher, *Theory and Reality in Public International Law* 193 (1957).

43. Foighel, *Nationalization—A Study of the Protection of Alien Property in International Law*, 27 *Nordisk Tidsskrift for International Ret* 188 (1957).

44. Friedman, *Expropriation in International Law* (1953).

45. Gould, *An Introduction to International Law* 467 (1957).

46. Lapradelle, *Effets Internationaux des Nationalizations*, 43 *Annuaire de L'Institut de Droit International* 42 (1950).

47. Rubin, *Nationalization and Compensation—A Comparative Approach*, 17 *U. Chi. L. Rev.* 458 (1950).

48. This is exemplified by the contrasting statements of the Soviet Union and the United States representatives concerning the Suez Canal nationalization. See U.N. Gen. Ass. Off. Rec. 10th Sess., 3d Comm., 676th meeting, Nov. 29, 1955.

49. Wortley, *Expropriation in Public International Law*, 28-29 (1959).

50. *Goldenberg v. Germany* (1928), 3 *Revue de Droit International* 559 (1929).

51. *Portugal v. Germany* (1930), *Ann. Dig. Int'l L. Cases* 150, 151 (1929-1930).

52. *Case of the Norwegian Claims Against the United States* (1922), 1 *U.N. Rep. Int'l Arb. Awards* 307 (1922).

53. Garcia Amador, *Fourth Report on International Responsibility*, U.N. Doc. No. A/CN.4/119, at 56 (1959).

This uncertainty notwithstanding, it would seem neither unrealistic nor oppressive, to apply a stringent "prompt" requirement in limited deprivations since the sums involved presumably would be of such insignificance as to permit swift payment, thereby promoting a stability of expectation through rapid readjustment in the investment community. In extensive deprivations, however, "prompt" payment becomes less practicable, if not impossible, since States engaging in such deprivations usually lack the resources necessary for compliance. Rigidly enforced, "prompt" payment would permit comprehensive reforms only at the price of financial crisis. As the International Law Commission has observed:

It is clear that the time-limit for the payment of the agreed compensation necessarily depends on the circumstances in each case and in particular on the expropriating State's resources and actual capacity to pay. Even in the case of "partial" compensation, very few states have in practice been in a sufficiently strong economic and financial position to be able to pay the agreed compensation immediately and in full.⁵⁴

Consequently, deferred payment, with interest as a substitute for "prompt" payment, is widely accepted as satisfactory in extensive wealth deprivations.⁵⁵

In addition to the stipulation for "prompt" payment, orthodox theory proclaims that compensation must be "adequate" or "full"; that is, it must correspond to the value of the property taken. The question of value, of course, raises enormous complexities in both limited and extensive deprivations and demands separate and detailed inquiry.⁵⁶ Moreover, the unqualified use of this traditional terminology tends to ignore such peripheral factors as the possible inflation of claims or the timing of the assessment which may influence the valuation and, hence, the amount of compensation. Apparently recognizing these ambiguities, courts have held, in limited deprivation cases, that a State must "make full reparation for the injuries done by it"⁵⁷ or "make good" the losses

54. *Id.* at 59.

55. Article 10(4) of the recent Harvard Draft recognizes that the "prompt" compensation requirement should be relaxed "if property is taken by a State in furtherance of a general program of economic and social reform . . ." The recent Report of the Committee on International Law, Ass'n of the Bar of the City of New York, however, terms this "the most striking departure from what the United States Government and the preponderance of international lawyers in this country have regarded as established international law." 15 Record of N.Y.C.B.A. 414, 417 (1960).

56. It would appear that, to date, no such effort has been made.

57. Case of the Delagoa Bay Ry. (1891), 2 Moore, Arbitrations 1865 (1893).

suffered,⁵⁸ and that, while "fair compensation" must equal the value of the property taken,⁵⁹ it must not exceed the fair market value⁶⁰ or include speculative prices.⁶¹

Assuming the inherent difficulties relating to "full" or "adequate" compensation are not insurmountable, again it would not seem unduly burdensome to the depriving State to premise compensation in limited deprivations upon the fair market value or the "value of the undertaking at the moment of dispossession, plus interest to the day of payment."⁶² Where deprivations are extensive, however, the orthodox view once more presents acute difficulties. 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. After years of political or economic inferiority, nations which are but recently independent or which seek to transform outmoded socio-economic institutions are unlikely to accept voluntarily externally conceived restrictions incompatible with their legitimate aspirations. Extensive deprivations may be of such absolute and relative magnitude as to render "full" compensation truly impossible. This is reflected in many postwar national constitutions which refer to "fair," "equitable," or "reasonable" compensation or which, properly or not, expressly leave the quantum of actual compensation to state discretion at the time of the taking.⁶³ Moreover, recent opinion⁶⁴ and practice suggest that "partial" compensation in this context has become more the norm than the exception.

The remaining element of the trinity is the requirement that compensation be "effective"; that is, in a medium of exchange of maximum value to the deprived alien, preferably in his own legal currency. Payment in limited deprivations, according to the Permanent Court of International Justice, should be in a "hard" currency, or at least in the most stable available currency.⁶⁵ The United States-Panama Claims Commission, however, did not deem the term "expropriated" to imply an obligation to pay money compensation, but suggested that "reciprocal

58. *The Wimbledon*, P.C.I.J., ser. A., No. 1, at 32 (1923).

59. *The Chorzów Factory Case*, P.C.I.J., ser. A., No. 13, at 46 (1928) (merits).

60. See Hyde, *Compensation for Expropriation*, 33 *Am. J. Int'l L.* 108 (1939).

61. *Case of the Norwegian Claims Against the United States* (1922), 1 *U.N. Rep. Int'l Arb. Awards* 307 (1922).

62. *The Chorzów Factory Case*, P.C.I.J., ser. A., No. 13, at 47 (1928) (merits).

63. *García Amador*, Fourth Report on International Responsibility, *U.N. Doc. No. A/CN.4/119*, at 53 (1959).

64. See notes 32-47 *supra* and accompanying text.

65. *The Wimbledon*, P.C.I.J., ser. A., No. 1, at 32 (1923).

transfer of other property" might be sufficient,⁶⁶ thus impliedly recognizing the existence of occasional difficulties with "effective" payment even in limited takings. For example, great imbalances in foreign trade may sometimes pose serious "effective" payment problems. Even "hard" payments may be of little "effective" value if currency restrictions inhibit export from, and reinvestment in, the depriving State.⁶⁷

Recognizing these problems, "effective" payment would seem, nevertheless, a reasonable goal in limited deprivations, not only to assure minimum stability in the investment community, but to encourage reinvestment either in the depriving State or elsewhere. Extensive deprivations introduce difficulties of larger proportion, however, due to the vastness of the takings, to desires to terminate private ownership entirely in all or certain economic sectors, and to the need to retain a minimum of "hard" currency to effectuate the undertaken reforms. Consequently, claimant States have recently been disposed, however reluctantly, to accept payment in government bonds or those of newly established state-controlled enterprises.⁶⁸ Bonds redeemable in "soft" currencies, of course, may be of small value at maturity due to inflation, devaluation, inconvertibility, or general monetary instability. That these disadvantages must somehow be reconciled with apparent state reluctance to adhere, by more traditional means, to the theory of "effective" compensation, is well illustrated by the negotiations of the ill-fated International Trade Organization.⁶⁹ Thus, Canada stated that if it were to take the property of American investors, compensation in United States dollars would not necessarily be forthcoming; nor did Canada agree that any local currency would always be sufficient. The general consensus, however, was that the medium of payment should at least be "useful." Continuing inability to resolve such problems naturally renders the "effective" nature of the payment a matter of considerable uncertainty, not easily answered by predetermined norms. The form of compensation in extensive deprivations would seem

66. Caselli Claim (1933), Ann. Dig. Int'l L. Cases, No. 195, at 441.

67. Wortley, Expropriation in Public International Law 103 (1959).

68. See Doman, Compensation for Nationalized Property in Post-War Europe, 3 Int'l L. Q. 323 (1950).

69. Wilcox, A Charter for World Trade 140-52 (1949). It is interesting to note that lawyers and businessmen in Europe and the United States appear to be returning to the multilateral investment code approach, the most salient efforts being those of Hermann Abs of Germany and Sir Hartley Shawcross of Great Britain. See Gardner, International Measures for the Promotion of Foreign Investment, 53 Am. Soc'y Int'l L. Proceed. 255, 257 (1959).

best determined by special agreement of the parties or by the "discretion" of the decision-maker.⁷⁰

While disagreement exists as to the timing, the amount, and the form of payment required by international law for extensive deprivations, a brief examination of representative twentieth century settlements reveals that claimant States have never received "prompt, adequate and effective" compensation. Recovery has been afforded largely through diplomatic agreements and *en bloc* settlements geared to the practical realities of the contemporary world rather than, as in limited deprivation cases, through special awards of mixed claims commissions and arbitral tribunals based on the merits of individual claims.

III. TWENTIETH CENTURY EXTENSIVE DEPRIVATION SETTLEMENTS

The Mexican agrarian and oil deprivations present perhaps the earliest illustrations of the futility of confronting extensive wealth deprivations with orthodox demands.⁷¹ By the Constitution of 1917, the Mexican Government assumed ownership of all national lands and waters, acquiring the power, *inter alia*, to cause private use to conform to the needs of the general welfare. The 1923 Bucareli Conference provided but temporary relief to threatened United States landowners, for the Alien Land Law of 1925 limited the amount of individual foreign land ownership, offering compensation in bonds to aliens for such amounts of their land as had exceeded the statutory limit and had, therefore, been seized. United States protests over the inadequacy of compensation produced few results until 1938. The United States had contended that Mexico could not lawfully take alien property except upon payment, in advance, in a "prompt, adequate and effective" manner. Mexico had argued that the extensive land deprivations were *ipso facto* lawful, and, while acknowledging a general obligation to grant recovery under international law, contended that the time, amount, and manner of payment could be determined only pursuant to her own laws which, be it noted, were cognizant of the distinctions between limited and extensive takings. While neither government officially modified its original position, Mexico finally agreed in 1938 to the establishment of a joint commission to settle \$10 million of agrarian claims accumulated since 1927, and made a good faith down payment of \$1 million. By the Mexican-American Agreement of 1941, which resolved all prior agrarian and other

70. See Rubin, Nationalization and Compensation—A Comparative Approach, 17 U. Chi. L. Rev. 458, 461 (1950).

71. See generally Call, The Mexican Venture chs. 5-6 (1953); Cline, The United States and Mexico chs. 11-12 (1961); Kunz, The Mexican Expropriations, 17 N.Y.U.L.Q. 327 (1940).

claims exclusive of those arising out of the petroleum seizures, Mexico promised to pay \$40 million in annual installments, as against claims totalling more than \$350 million.⁷² It would appear that these installment payments have been faithfully and punctually met.⁷³

Alien-owned oil properties in Mexico were seized pursuant to executive decree in 1938. Claims for "prompt, adequate and effective" payment again were made. The Mexican Minister of Finance ordered twenty per cent of the sales proceeds of the seized oil properties to be reserved for compensation payments. After voluminous diplomatic exchange, a Mexican-United States settlement was finally obtained in 1942, British settlements not being concluded until 1947. None of these settlements can be said to have met orthodox prescriptions, but, rather, involved installment payments over several years, totalling much less than the 1938 value of the properties. The United States, on behalf of the American oil companies who estimated the total value of their holdings at \$260 million, finally settled for a sum approximating \$24 million plus interest at three per cent. British oil interests valued their properties at almost the same amount, but ultimately settled for the considerably larger sum of approximately \$130 million including interest.⁷⁴

Although faced with the new social and economic forces generated by the Mexican Revolution,⁷⁵ arbitral decisions in particular instances and diplomatic correspondence in general nevertheless emphasized the

72. See American-Mexican Claims Report, U.S. Dep't of State Pub. 2859, Arb. Ser. 9, at 4 (1948). This lump sum settlement of all prior nonpetroleum claims makes difficult a determination of the amounts awarded for the agrarian seizures themselves. It is, nevertheless, noteworthy that the agreement was, in fact, a lump sum settlement of a variety of claims stemming from the complexities of the Mexican Revolution.

73. See Cline, *The United States and Mexico* 248 (1940).

74. *Id.* at 243-51. The disparity between the United States and British settlements would appear to be due, according to Cline, to the divergent historic relationships between Mexico and these two countries: "The Mexican nation, for historic reasons, had fastened onto the American companies as the storm center of emotional diatribes against 'foreign imperialism.' In a considerably less heated atmosphere, where historic wrongs and rights were not dragged in, to muddle and distort the specific issues at hand, the British made their peace with Mexico. They were no more successful than the United States in getting the Mexican government to retreat from the Constitution of 1917, but their companies did possibly receive a proportionately greater recompense than did their American counterparts." *Id.* at 250.

75. "La Revolución Mexicana is the all embracing name for a vast social transformation, an attempt to give to the masses land, hygiene, education, to reshape the country completely, to create a new Mexican nation, to emancipate the Indian, who represents . . . more than 90 per cent of the population, and to liberate the peón through an economic and spiritual higher standard of living." Kunz, *The Mexican Expropriation*, 17 *N.Y.U.L.Q.* 327, 328 (1940).

orthodox "rules" governing limited deprivations. Despite the homage paid to those principles, political, economic, and wartime realities were apparently the decisive factors contributing to the compromise settlements.

Between 1945 and 1949, Bulgaria, Czechoslovakia, Hungary, Poland, Rumania, and Yugoslavia enacted extensive deprivation laws affecting both aliens and nationals and permitting the taking of mines, branches of industry, transportation and communication facilities, commercial enterprises, banks and insurance companies, as well as other properties.⁷⁶ Although acknowledging a duty to pay some compensation to deprived aliens⁷⁷ none of the Eastern European nationalization laws complied with the orthodox "prompt, adequate and effective" restrictions. Poland, for example, provided for payment in long-term securities within one year of the determination of the amount due, with payment in cash or "other values" expressly restricted to exceptional circumstances. The amount of compensation was to be determined by a special commission whose final decision would be conditioned upon stipulated factors, *i.e.*, the net value of the assets on the day of taking, the decrease in value of the enterprise due to war damage, special considerations such as the value and duration of concessions and licenses, and the general decrease in national wealth due to wartime depredation. Similar *unorthodox* patterns were repeated in Bulgaria, Czechoslovakia, Hungary, Rumania, and Yugoslavia with varying degrees of specificity.⁷⁸ To a large extent, therefore, the time, amount, and form of recovery remained an open question to which claimant States offered diverse responses, some of which were conditioned upon 1947 peace treaties with Bulgaria, Hungary, and Rumania providing for the restoration of properties of United Nations' nationals seized during the war, or for compensation in amounts up to two-thirds of the war damage suffered.

76. See The Status of Permanent Sovereignty Over Natural Wealth and Resources, U.N. Doc. No. A/AC.97/5/Rev., at 142-43.

77. All the nationalization laws expressly provided for compensation in money, bonds, or other forms of wealth. "Enemies of the State" were excluded from compensation, *i.e.*, German nationals or their sympathizers. Willingness to pay "full" compensation was apparently voiced by the Czech Government. See Sharp, *Nationalization of Key Industries in Eastern Europe* 46 (1946). However, as Hilary Minc, a one-time Communist member of the Polish Provisional Government, stated: "I think I represent the whole nation when I say that just compensation should be paid to such an extent, in such form, conditions, and terms that it would not handicap the development of our economy." Address by Hilary Minc to the National Council of Poland, Broadcast by Radio Warsaw, Jan. 2, 1946, in Sharp, *op. cit. supra* at 46-47.

78. See generally Doman, *Compensation for Nationalized Property in Post-War Europe*, 3 *Int'l L.Q.* 323 (1950); Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 *Colum. L. Rev.* 1125 (1948).

In the United States, the International Claims Settlement Act of 1949,⁷⁹ supplementing these peace treaties, provided that assets of Bulgaria, Hungary, and Rumania or their nationals, frozen under the Trading With the Enemy Act,⁸⁰ could be liquidated to satisfy American claimants should the treaties be dishonored. In 1955, the International Claims Settlement Act was extended to provide recovery through such liquidation for property nationalized subsequent to these treaties,⁸¹ with individual claims to be determined by a Foreign Claims Settlement Commission established for that purpose. The liquidation of frozen assets, however, proved insufficient to pay in full the claims adjudicated by the Commission, necessitating supplementary strategies,⁸² as exemplified by the Rumanian and Bulgarian negotiations. In March 1960, the United States and Rumania agreed to a lump-sum settlement of \$24,526,370 for claims arising out of Rumanian wartime takings payable under the peace treaty, postwar nationalization claims, and unsatisfied contractual obligations arising principally out of prewar defaulted government bonds.⁸³ Previously, the Commission had found the realized value of the frozen assets to be \$22,026,370 and, therefore, insufficient to satisfy its awards totalling \$84,729,291.⁸⁴ The 1960 settlement merely supplemented the liquidated frozen assets by an additional \$2,500,000 payable in five installments over four years.⁸⁵ The liquidation of Bulgarian assets yielded \$2,700,000 against commission awards amounting to \$4,600,000, exclusive of interest. In January 1961, the United States Government opened negotiations with Bulgarian representatives, as previously done with Rumania, with hopes of obtaining additional payment.⁸⁶

The presence of \$46,800,000 in Yugoslav gold in the United States, part of which was transferred to federal reserve banks by Yugoslavia during the German occupation and frozen by the United States under

79. 64 Stat. 12 (1950), amended by 69 Stat. 562 (1955), as amended, 22 U.S.C. §§ 1621-42p (1958).

80. 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1953).

81. 69 Stat. 562 (1955), as amended, 22 U.S.C. §§ 1621-42p (1958).

82. See generally Drucker, *The Nationalization of United Nations Property in Europe*, 36 *Transact. Grot. Soc'y* 75 (1951); Ujlaki, *Compensation for the Nationalization of American-Owned Property in Bulgaria, Hungary and Rumania*, 1 *N.Y.L.F.* 265 (1955).

83. See Christenson, *The United States-Rumanian Claims Settlement Agreement of March 30, 1960*, 55 *Am. J. Int'l L.* 617, 620 (1961).

84. See *Foreign Claims Settlement Commission of the United States, Eleventh Semi-annual Report to the Congress for the Period Ending Dec. 31, 1959*, at 1 (1960).

85. Christenson, *The United States-Rumanian Claims Settlement Agreement of March 30, 1960*, 55 *Am. J. Int'l L.* 617, 622 (1961).

86. 44 *Dep't State Bull.* 150 (1961).

the Trading With the Enemy Act, enabled the two nations in 1948 to settle claims arising out of Yugoslav foreign wealth deprivations estimated at \$150 million. The United States agreed to release the frozen assets in return for \$17 million, payable in forty-five days, through partial liquidation of the blocked gold.⁸⁷

Western European countries have not relied exclusively upon the manipulation of frozen assets to achieve settlements with the Eastern European States, but have sought to associate compensation with collateral trade agreements. Thus, in 1946, Czechoslovakia agreed to pay Britain £8 million over ten years as against claims exceeding £100 million. By a related agreement Britain consented to the average annual importation of £575,000 of Czech goods, Czechoslovakia agreeing to pay part of the £8 million compensation out of the profits derived therefrom.⁸⁸ To effectuate these terms, Britain agreed, in addition, to loan Czechoslovakia the funds necessary to refurbish her industrial plant. A similar accord was reached between Britain and Yugoslavia in 1949, by which £25 million in claims were settled by a payment of £4,500,000.⁸⁹ A British compensation agreement with Poland amounted to but one-third of the investments taken.⁹⁰

Other Western European nations have negotiated comparable agreements.⁹¹ Swiss compensation arrangements with Czechoslovakia and Yugoslavia, however, in addition to being tied to trade agreements, provided for deferred payment in return for reimbursement in Swiss francs.⁹² The delivery of raw materials illustrates yet another means of compensation, as when France agreed to accept specified quantities of Polish coal over a number of years.⁹³

While Seymour Rubin has suggested that the United States is unable

87. See Drucker, *Compensation for Nationalized Property: The British Practice*, 49 *Am. J. Int'l L.* 477 (1955). See also Ujlaki, *Compensation for the Nationalization of American-Owned Property in Bulgaria, Hungary and Rumania*, 1 *N.Y.L.F.* 265 (1955).

88. H.M.S.O. Cmnd. no. 56, Oct. 22, 1956. See Drucker, *supra* note 87; Drucker, *The Nationalization of United Nations Property in Europe*, 36 *Transact. Grot. Soc'y* 75 (1951); Wortley, *Expropriation in Public International Law* 146 (1959).

89. Drucker, *supra* note 87.

90. Garcia Amador, *Fourth Report on International Responsibility*, U.N. Doc. No. A/CN.4/119, at 58 (1959).

91. France, Norway, Sweden and Switzerland are noted. *Id.* at 59.

92. See Aubert, *Foreign Expropriation in Swiss Law*, 6 *Am. J. Comp. L.* 577, 586 (1957); Rubin, *Nationalization and Compensation—A Comparative Approach*, 17 *U. Chi. L. Rev.* 458, 461 (1950). A Swiss-Rumanian accord provided that twenty-five per cent of the agreed compensation be paid from frozen Rumanian assets in Swiss banks. See Garcia Amador, *Fourth Report on International Responsibility*, U.N. Doc. No. A/CN.4/119, at 59 (1959).

93. *Ibid.*

to arrange lump-sum settlements without the aid of blocked assets,⁹⁴ events surrounding the July 1960 agreement between the United States and Poland may belie this conjecture and may suggest new avenues of approach.⁹⁵ Poland agreed to pay \$40 million over twenty years and to negotiate directly with American holders of \$45 million worth of Polish Government bonds issued between 1919 and 1939 in exchange for the release of \$1 million in frozen Polish assets. In addition, it should be noted that within the last four years the Export-Import Bank has loaned Poland over \$61 million and the United States has sold to Poland, at low prices, farm produce, authorized by the Agricultural Trade Development and Assistance Act,⁹⁶ valued at over \$293 million.⁹⁷ The combined effect of these superficially unrelated arrangements may indicate a significant development in the attitude of the United States in meeting the difficulties which arise from extensive deprivations.

Few postwar Western-European nationalizations directly affected aliens. At least one French nationalization, nevertheless, illustrates the difficulty of applying orthodox preferences even against an economically-advanced depriving State. Thus, in 1946, former alien investors in the nationalized French gas and electric industry were compensated with bonds of the *Caisse Nationale d'Équipement de l'Électricité et du Gaz* at three per cent annual interest, amortizable over fifty years.⁹⁸ Apparently, there were few international agreements modifying the effect of the nationalization law upon foreign investors. Yet, in spite of an

94. Rubin, *Nationalization and Compensation—A Comparative Approach*, 17 U. Chi. L. Rev. 458, 465 (1950).

95. The text of the agreement itself is set forth in 55 Am. J. Int'l L. 452 (1961).

96. 68 Stat. 454 (1954), as amended, 7 U.S.C. §§ 691-724 (1958) (Supp. II, 1959-1960).

97. See N.Y. Times, July 17, 1960, p. 1, col. 4. A similar but earlier negotiated settlement without the use of blocked assets evolved from the United States-Bolivian negotiations following the Bolivian nationalization in 1952 of three, largely foreign-owned, tin-mining companies which together produced about 75% of Bolivia's tin, among them the American controlled Patino combine. Bolivia offered \$21.8 million to the companies who valued their holdings at a minimum of \$60 million. A subsequent study of the company incomes enabled the Bolivian Government to "counterclaim" for \$520 million, a sum representing "illegal profits," dubious foreign exchange manipulations, and tax evasion. Bolivian consent to pay full compensation to deprived United States interests elicited United States Government pledges to purchase 15,000 tons of tin at world market prices, to double its Point Four Aid to Bolivia, and to provide new technical assistance. Bolivia agreed to allocate a percentage of total tin production revenues to the reimbursement of American Patino interests, an obligation which ceased, however, when the price of tin fell below eighty cents per pound. See Thomas, *Protection of Property of Citizens Abroad*, 1 Proceedings of the 1959 Institute on Private Investments Abroad (The Southwestern Legal Foundation) 417, 437-38 (1959).

98. See Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 Colum. L. Rev. 1125, 1142 (1948).

Anglo-French agreement fixing compensation in the form of three per cent credit-vouchers payable over a seven-year period, former British investors in the gas and electric industry were apparently paid but seventy per cent of their total investments.⁹⁹

In 1951, Iran, "for the Happiness and Prosperity of the Iranian Nation" nationalized its British-dominated concessionary, the Anglo-Iranian Oil Company, with provisions to set aside up to twenty-five per cent of the oil revenues, minus exploitation expenses, to meet expected claims.¹⁰⁰ Upon Iranian refusal to arbitrate, Great Britain, assuming the Company's claims, began extensive but futile appeals to available international legal authorities and political bodies.¹⁰¹ By 1953, a financial crisis caused by British blockades and the severance of diplomatic relations precipitated the collapse of the Mossadegh regime. Meanwhile, the oil market normally served by Iran had been largely absorbed by American oil companies,¹⁰² thus aggravating an already complex situation, since any compensation would of necessity be supplied from Iranian oil sales proceeds. This difficulty was resolved in 1954 by an agreement establishing an international consortium to market the oil and operate the industry as agents of the Iranian Government and the new National Iranian Oil Company.¹⁰³ The second part of this agreement, concerning the measure and method of compensation, proved inconsistent with orthodox requirements, the Iranian Government undertaking to pay £25 million to the Anglo-Iranian Company over a ten-year period.¹⁰⁴ In addition, the agreement permitted the consortium companies, of which the Anglo-Iranian Oil Company was but one, to include in their operating costs over ten years the sum of £67 million, thereby reducing the profits from which royalties would otherwise accrue to the principal National Iranian Oil Company. It is difficult to ascertain the amount of additional compensation indirectly afforded the Anglo-Iranian Oil Company, since the under-

99. See Schwarzenberger, *The Protection of British Property Abroad*, 5 *Current Legal Problems* 295, 307 (1952).

100. See generally Ford, *The Anglo-Iranian Oil Dispute of 1951-1952* (1954); Bishop, *The Anglo-Iranian Oil Co. Case*, 45 *Am. J. Int'l. L.* 749 (1951); Frankel, *The Anglo-Iranian Dispute*, 6 *Yb. World Aff.* 56 (1952); Frankel, *The Middle East in Turmoil*, 10 *Yb. World Aff.* 84 (1956).

101. The International Court of Justice pronounced that it lacked jurisdiction. *Anglo-Iranian Oil Co. Case*, I.C.J. Rep. 89 (1951). Appeals to the United Nations Security Council also provided no relief. See Thomas, *Protection of Property of Citizens Abroad*, 1 *Proceedings of the 1959 Institute on Private Investments Abroad* (The Southwestern Legal Foundation) 417, 443-44 (1959).

102. See Rubin, *Private Foreign Investment* 92 (1956).

103. See Farmanfarma, *The Oil Agreement Between Iran and the International Oil Consortium: The Law Controlling*, 34 *Tex. L. Rev.* 259, 287 (1955).

104. *Id.* at 261.

lying profit-sharing agreements within the consortium are reputedly of a private nature.¹⁰⁵ It is probable, however, that the total compensation was well below the "full" value of the property taken.

Emanating from this background, but prior to the settlement, the case of *Anglo-Iranian Oil Co. v. Jaffrate*¹⁰⁶ demonstrated the urgent need to reevaluate the "rules" applicable to extensive wealth deprivations. There, the Supreme Court of Aden was confronted with issues raised by the Iranian nationalization through the necessity of determining the ownership of an attached oil cargo.¹⁰⁷ The court held that the oil had been taken originally by Iran without "prompt, adequate and effective" compensation, thus rendering the nationalization confiscatory and illegal. Iran, therefore, could not lawfully pass title to third parties. Refusing to differentiate between limited and extensive deprivations, the court, in effect, would have totally precluded Iran, with but \$239 million in gold and foreign exchange in its treasury, from exercising her legitimate sovereign rights in nationalizing an oil industry worth an estimated \$1 billion.¹⁰⁸ The court's position would seem in marked contrast to the subsequent more realistic "partial" compensation settlement which reflected a practical accommodation of the opposing exclusive interests of the parties.

The most recently settled extensive-deprivation dispute began with the Egyptian nationalization of the Suez Canal Company in 1956.¹⁰⁹ Almost

105. *Id.* at 261-62.

106. 1 Weekly L.R. 246 (1953).

107. Subsequent cases in Great Britain have criticized this case, e.g., *In re Helbert Wagg & Co.*, 2 Weekly L.R. 183, 195 (1956). Also, Italian and Japanese courts, on the same facts, reached opposite results. See *Anglo-Iranian Oil Co. v. Società S.U.P.O.R.*, 49 *Am. J. Int'l L.* 259 (Civil Tribunal of Rome 1954); *Anglo-Iranian Oil Co. v. Società Unione Petrolifera Orientale*, 47 *Am. J. Int'l L.* 509 (Civil Tribunal of Venice 1953); *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, 1953 *Int'l L. Rep.* 305 (High Ct. of Tokyo 1953), where the High Court of Tokyo stated that the nationalization law "is not a completely confiscatory law . . ." but was "subject to payment of compensation." While recognizing the "rule" of international law against confiscation, the court held it could not examine the adequacy of the compensation if some payment were given. While the court stated that "in the event of a violent social reform or revolution" a State must make "adequate, efficient and immediate" compensation to deprived aliens, the court declined to find, paradoxically, "any established rules of international law governing the matter," and, so, did not pass upon the validity of the Iranian Oil Nationalization Law. *Ibid.* See generally for a discussion of these cases, O'Connell, *A Critique of the Iranian Oil Litigation*, 4 *Int'l & Comp. L.Q.* 267 (1955).

108. Ford, *The Anglo-Iranian Oil Dispute of 1951-1952* (1954).

109. See generally Delson, *Nationalization of the Suez Canal Company: Issues of Public and Private International Law*, 57 *Colum. L. Rev.* 755 (1957); Huang, *Some International and Legal Effects of the Suez Canal Question*, 51 *Am. J. Int'l L.* 277 (1957).

all Company shares were alien-owned at the time of the taking. The Egyptian decree promised that shareholders would be compensated "in accordance with the value of the shares" on the Paris Bourse the day preceding the decree, but payable only after Egypt acquired possession of all the Company's assets at home and abroad. As Delson has noted, such a promise may well have been "illusory" since foreign governments are not apt voluntarily to relinquish assets under their control.¹¹⁰ The immediate effect of the Egyptian decree was to precipitate an international crisis resulting in the freezing of Egyptian assets estimated at \$420 million in Great Britain and \$50 million in the United States,¹¹¹ followed by an abortive British and French military intervention. By a subsequent negotiated Heads of Agreement on April 29, 1958,¹¹² the United Arab Republic, "as a full and final settlement," agreed to relinquish all claims to all Company assets located abroad and to pay 28,300,000 Egyptian pounds (28.442 billion French francs) to the foreign shareholders of the Suez Canal Company. The agreement provided for an initial payment of 5,300,000 Egyptian pounds acquired through retained "transit tolls" collected in Paris and London since July 26, 1956, with the balance of the 28,300,000 Egyptian pounds payable in six installments over five years free of interest¹¹³ in pounds sterling in London and in French francs in Paris. According to Rauschnig,¹¹⁴ the market value of the Suez Canal Company capital and profit shares at the closing of the Paris Bourse on July 26, 1957 totalled 81.807 billion French francs;¹¹⁵ *i.e.*, the value of the rights "of those who deserve compensation." Company assets outside the United Arab Republic remained under foreign shareholder control. In turn, these shareholders assumed responsibility for all external liabilities. The total external assets, according to the Company's last balance sheet (December 31, 1956), were valued at 56.527 billion French francs, while total

110. Delson, *supra* note 109, at 768.

111. See Domke, *American Protection Against Foreign Expropriation in Light of the Suez Canal Crisis*, 105 U. Pa. L. Rev. 1033, 1039 (1957); N.Y. Times, March 2, 1957, p. 1, col. 5; p. 13, col. 4.

112. 14 *Revue Egyptienne de Droit International* 338 (1958), 54 *Am. J. Int'l L.* 493 (1960).

113. Rauschnig conjectures that the exclusion of interest payments was due to the fact that Great Britain had not paid interest on its debt to Egypt incurred during World War II. Rauschnig, *Die Abwicklung des Suezkanalkonfliktes*, 8 *Jahrbuch für Internationales Recht* 267, 275 (1959).

114. *Id.* at 273.

115. July 26, 1957 is the date selected by Rauschnig for calculating the market value of the shares because on this day the Suez Canal Company, as an Egyptian company, was dissolved. The total "substance value" the Company claimed to have lost, Rauschnig notes, was 91.8 billion French francs.

external obligations amounted to 41.326 billion French francs. The net value of external Company property, therefore, was 15.204 billion French francs. To the negotiated compensation of 28.442 billion French francs (28,300,000 Egyptian pounds), Rauschnig adds the net value of the Company's external assets (15.204 billion French francs) to arrive at a total indemnity to the foreign shareholders of 43.643 billion French francs. This represents but slightly more than fifty per cent of the market value of \$1.807 billion French francs for Company shares¹¹⁶—an amount well below what might have been deemed "full" compensation.

IV. THE IMPLICATIONS OF NEGOTIATED SETTLEMENTS

None of these twentieth century settlements appear to have complied with orthodox preferences. Traditional standards, formed in another era and still properly applied in limited takings, would seem severely challenged, if not totally rejected in the extensive foreign wealth deprivation context. Appeals to the somewhat metaphysical standard of "prompt, adequate and effective" compensation are not only unrealistic in this setting, but frustrate efforts to achieve at least minimum stability of interaction in a world of violent and radical change. Moreover, to proclaim the fundamental moral propriety of this standard for extensive deprivations is to seek to impose Judeo-Christian norms upon diverse political and social systems which are becoming increasingly skeptical of "universal" and "customary truths" largely formulated without their participation.¹¹⁷ Such preoccupation with a misleading morality inhibits the focusing of responsible attention upon realistic solutions to the dilemmas presented. Happily, the practice of claimant States in negotiating these settlements testifies to their recognition, albeit reluctant, of the sui generis character of extensive deprivations. The need to abandon orthodoxy and seek alternative measures through which all interests may be better protected, therefore, would seem imperative.

There are those who contend, however, that because these negotiated

116. It is difficult to understand why Rauschnig includes the net external assets as a part of the total indemnity, since, despite her initial claims, the United Arab Republic never acquired possession of them.

117. Thus Guha Roy has written: "As the international community was confined, during by far the longest period of its growth, to the Western Christian Powers, the bulk of international law, if not the whole of it, represents their common customs and traditions which need not be, and in most cases are not, the common customs and traditions of the other Powers, and, in any event, the Powers that secured their admittance to the Family of Nations after World War II were not parties to the agreements and understandings on which, after all, international law is, in its last analysis, based." *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 Am. J. Int'l L. 863, 867 (1961).

settlements are in the nature of treaties and consequently not representative of customary international law, they fail to detract whatsoever from universally recognized traditional standards of compensation.¹¹⁸ Their contention, however, is self-limiting, for, though municipal courts have invoked the orthodox requirements,¹¹⁹ no international tribunal has yet passed upon the question of compensation in an extensive deprivation case.¹²⁰ To suggest, moreover, that internationally negotiated settlements which seek the fair adjustment and compromise of conflicting interests are but quasi-legal aberrations, not indicative of uniformity, is to espouse a parochial view of international law. As Carlston has observed: "The function of law in the international society . . . must be to support and promote the viability of the society in which it operates."¹²¹ Because it contemplates the reduction of tensions across state boundaries, international law must reflect and be responsive to the vicissitudes of socio-economic and political relationships between, among and within States. The diverse sources of international law set forth in Article 38 of the Statute of the International Court of Justice,¹²² to assume any significance, must encompass the "total flow of explicit communications and acts of collaboration among peoples which create community-wide expectations that certain uniformities in decision will successfully survive challenge."¹²³ These uniformities are evidenced in the wide spectrum of human activity, not only in tribunal decisions, treaties, and international contracts, but in the practice of states "dictated by political and practical realities,"¹²⁴ diplomatic correspond-

118. See Wortley, *The Protection of Property Situated Abroad*, 35 *Tul. L. Rev.* 739, 764 (1961).

119. It should be noted that Article 38(d) of the Statute of the International Court of Justice, enumerating the sources of international law to which it will turn for guidance, gives lowest priority to municipal court decisions: "Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations [are] . . . subsidiary means for the determination of rules of law."

120. Perhaps the sole instance in which the International Court of Justice came close to deciding the merits of these questions was when it decided it lacked jurisdiction to consider the Anglo-Iranian Oil dispute. *Anglo-Iranian Oil Co. Case*, 45 *Am. J. Int'l L.* 749 (1951).

121. Carlston, *Nationalization: An Analytical Approach*, 54 *Nw. U.L. Rev.* 405, 429 (1959).

122. 59 *Stat.* 1055, T.I.A.S. No. 993 (June 26, 1945).

123. McDougal, *Study Materials for a Course at Yale Law School in the Public Order of the World Community* (mimeographed).

124. See Carlston, *Nationalization: An Analytical Approach*, 54 *Nw. U.L. Rev.* 405, 431 (1959), who would maintain that such considerations are not relevant determinants of international law. This would appear inconsistent with his view of the nature of international law. See note 119 *supra* and accompanying text.

ence, the polemics of publicists and pressure groups, and the public and private utterances of world leaders. The contemporary world, composed of sovereign nations, is characterized by the absence of a supranational authority by which state action can be effectively regulated. International economic and political stability, therefore, is dependent upon mutual expectations of reciprocity, self-restraint, and, if need be, reprisal. A wide range of sources must be analyzed to discern not only the uniform restrictions on past state behavior, but to predict future uniform restrictions which States may reasonably be expected to accept. In short, international law is not a body of "rules" which may be gleaned from textbook headings, relatively unchanged over time.

Even advocates of "partial" compensation, although acknowledging the consequences of the distinctions between limited and extensive deprivations, fail to relate their realistic appraisals to the fact that States are searching today for practical alternatives to traditional norms by which amicable and profitable political and economic intercourse, greatly disrupted by extensive deprivations, may be restored.¹²⁵ Many proponents of "partial" compensation have taken an essentially negative approach, choosing merely to undercut what they deem to be the outmoded orthodox requirements of compensation, rather than promoting the positive formulation of fruitful lines of inquiry for arriving at realistic settlements, which can balance the depriving State's enrichment with the alien's loss.¹²⁶

Such inquiry should be essentially pragmatic: What, if any, compensation has been offered by the depriving State and in what form? Will the preferred compensation be sufficient to encourage and maintain investment in the same or other sectors of the depriving State if desired? What is the fair market value of the property taken? What valuation methods were used and was property depreciation considered? Should the value of intangible property be included within the settlement and, if so, of which types? How many alien claimants are involved? Is the *depriving* State a "capital importing" or a "capital exporting" nation? Is the *claimant* State a "capital importing" or a "capital exporting" nation? What amounts of foreign exchange are available in each country? What weight should be given to possible currency devaluations? What is the gross national product of the depriving

125. Rauschnig, viewing the Suez settlement as a lesson in "sobriety," observed that the agreements reflected a realization of men in power of the mutual interdependence of their countries, especially with regard to international water routes. Rauschnig, *Die Abwicklung des Suezkanalkonfliktes*, 8 *Jahrbuch für Internationales Recht* 267, 276 (1959).

126. Of course, underlying all relevant inquiry is the problem of determining the limited or extensive character of the deprivation. See note 24 *supra* and accompanying text.

State? What is the earning capacity of the depriving or claimant State vis-à-vis other nations? Has the depriving State a monocultural economy; if so, what are the relevant world market fluctuations? Are nationals of the taking State also deprived? Does the constitution of the depriving State require compensation for its own nationals? Would high compensatory demands be prohibitive to the depriving State? Is it in the interest of the claimant State to promote the social and economic welfare of the depriving State? How diverse are the investments of the claimant State's nationals and how many of these are subject to possible future seizure? Are there assets which the claimant State can seize for compensatory purposes? Can the dispute be partially solved by trading arrangements? Are future profits of the nationalized industry foreseeable and could some indemnification be readily derived therefrom? Is the tax structure of the depriving State such as to enable compliance with the compensation claims? Of what character are the current political relations between the two nations? Given current national sensitivities on both sides, could a more equitable settlement be obtained at a future time? Is a final settlement sought or may the issues be subsequently reopened?

Some of these and other questions have arisen in practice and have been resolved differently in each case. None may be properly answered by fixed and predetermined "rules," but only upon an *ad hoc* basis.¹²⁷ If equitable solutions to the dilemmas presented by extensive depriva-

127. As we have seen, twentieth century settlements have afforded a variety of means through which compensation has been obtained, e.g., the use of frozen assets, tying compensation to trade agreements, paying compensation over a period of time out of the profits of the nationalized enterprise, the use of government bonds, and commodity-barter arrangements.

An interesting development in twentieth century settlement techniques is illustrated by the recent negotiations between the United States and Brazilian Governments concerning the nationalization of an estimated six to eight million dollars of holdings in the Companhia Telefonica Nacional, a subsidiary of International Telephone and Telegraph, by the state government of Rio Grande do Sul. United States and Brazilian officials agreed upon a "temporary" compensation formula involving a Brazilian Government loan to the Company in an amount equal to 80% of the estimated value of the installations seized. It was agreed that the Company would reinvest this sum in Brazil in one of its manufacturing and, therefore, less politically vulnerable, subsidiaries. Future compensation negotiations between Brazilian and Company officials will seek, apparently, to implement this initial plan. In addition, the Brazilian Government, by executive decree, moved to prevent future takings of foreign assets by state governments. This negotiated agreement is consistent with, and is a direct result of, the new United States aid and development program for Brazil, by which American investors are encouraged to shift their holdings from politically sensitive sectors, such as public utilities, into manufacturing and production. To facilitate this transition, the Brazilian Government will finance the reinvestment by purchasing the utility holdings. See N.Y. Times, April 13, 1962, p. 1, col. 2.

tions are to keep pace with contemporary realities, progressive scholarly attention must shift from the mere dilution of orthodox standards, to the formulation of patterns of inquiry which will afford new bases for negotiation and render more efficacious the use of established twentieth century settlement techniques.

Those who expressly state or intimate, on the other hand, that under customary international law a State is not obliged to pay any compensation whatsoever, either in limited or extensive deprivations,¹²⁸ would, like those indiscriminately favoring the orthodox view, frustrate comprehensive factual inquiries which seek the maximum accommodation of the interests and expectations of the claimants as well as the restoration of economic and political intercourse. It is widely recognized that States must provide some indemnification to deprived alien owners. It is indispensable to the peaceful functioning of international wealth processes that there be minimal assurance that economic participants will not be forced to forsake entirely the fruits of their labors. Reparation, as a canon of the international law of state responsibility, is "a germinal principle of bare justice."¹²⁹ As Eagleton has stated:

Historically, the idea of a responsibility between States may be traced back to the vague origins of rights and duties which have always been regarded as fundamental by mankind. Among these is the conviction that reparations should be made for an injury committed; and this idea of responsibility, whether between persons or States, is as old as morality itself.¹³⁰

Acceptance of this fundamental belief is not limited to capitalist-oriented nations.¹³¹ A close examination of relevant international agreements to which Bulgaria, Czechoslovakia, Hungary, Poland, Yugoslavia,

128. E.g., Strupp, *Le Litige Roumain-Hongrois Concernant les Optants Hongrois en Territoire Roumain, La Reforme Agraire en Roumainie* 450 (1927); Williams, *International Law and the Property of Aliens*, 9 *Brit. Yb. Int'l L.* 1 (1928). Barring contrary treaty obligations, the view of the Soviet Union would apparently deny any such obligation for the reason that nationalization measures fall "exclusively within the internal competence" of the depriving State. See *The Suez Canal Problem*, Dep't State Pub. 6392, 6396, 6397 (1956). This would appear consistent with the Soviet Union's refusal to pay any compensation to deprived aliens for losses resulting from the early Soviet nationalizations. See *N.Y. Times*, Jan. 14, 1961, p. 13, col. 4.

129. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 *Am. J. Int'l L.* 863 (1961). The canon is one of long-standing, for as Grotius once stated: "Fault creates the obligation to make good the loss." *De Jure Belli Ac Pacis*. bk. II, ch. xvii, § 1, p. 430 (1646 ed. Carnegie Endowment for International Peace transl. 1925).

130. Eagleton, *The Responsibility of States in International Law* 16 (1928).

131. See Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 *Am. J. Int'l L.* 801, 803-04 (1960); Garcia Amador, *Fourth Report on International Responsibility*, U.N. Doc. No. A/CN.4/119, at 46 (1959).

and other socialist-oriented States have been contracting parties, indicates the recognition of an obligation to afford some indemnification in extensive deprivations.¹³² Indeed, these same States, while not always compensating their own nationals for losses suffered through domestic acts, will demand recovery if the wealth of their nationals is subjected to foreign seizure, even by similar economically-oriented States.¹³³ The issue is not, therefore, as noted earlier, whether at least some compensation must be forthcoming. Those who contend that unless there is strict adherence to orthodox theory one will be driven to conclude "that there is no obligation under international law to pay any compensation whatsoever,"¹³⁴ not only belabor a question already resolved by state practice and overwhelming legal opinion, but obscure the proper focus of legal inquiry into available realistic alternatives.

Nor can the duty to compensate in extensive deprivation be said to be measured solely by the "convenience of the wrongdoer." Kenneth S. Carlston has argued, against the background of postwar global settlements, that

injured states were not likely to concede that nationalizing states were entitled as of legal right to pay less than adequate [full] compensation. If such were the rule of law, then reparation would be measured by convenience of the wrongdoer instead of injury to the victim.¹³⁵

The depriving State's ability to pay is, concededly, a determinative factor, but only one of many which decision-makers must examine. It cannot be overemphasized that extensive wealth deprivation settlements have evolved from extended processes of claim and counterclaim and have not been determined solely by the unilateral convenience of either

132. See Baade, *supra* note 131 at 804; Bindschedler, *La Protection de la Propriété Privée en Droit International Public*, 90 *Hague Academy des Recueil des Cours* 173, 252-71 (1956); Foighel, *Nationalization—A Study of the Protection of Alien Property in International Law* 27 *Nordisk Tidsskrift for International Ret* 143, 145-47 (1957). Bystricky, however, asserts that nationalization without compensation is permissible under international law. See Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation*, 7 *Am. J. Comp. L.* 541, 546 (1958). After his careful analysis of the views of communist States, Seidl-Hohenveldern concludes that "apart from specific obligations among states to the contrary, a state should have the basic right to nationalize foreign as well as domestic property in its own territory, but only against payment of reasonable compensation." *Id.* at 542.

133. See Katzarov, *The Validity of the Act of Nationalization in International Law*, 22 *Mod. L. Rev.* 639, 647 (1959).

134. Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, 53 *Am. Soc'y Int'l L. Proceed.* 336, 339 (1959). See also Comment, *Foreign Seizure of Investments: Remedies and Protection*, 12 *Stan. L. Rev.* 606, 610 (1960).

135. Carlston, *Nationalization: An Analytical Approach*, 54 *Nw. U.L. Rev.* 405, 430-31 (1959).

depriving or claimant States, but by mutual promises of reciprocity and restraint based upon the common interests of both parties and of the international community.

"Convenience of the wrongdoer," however, as a determinative factor, cannot be equated with the depriving State's *willingness* to pay. As observed, the requirement that at least some compensation be paid is clearly necessary for the equitable accommodation of all interests and is fully supported by time-honored prescriptions of international law. Nowhere does international law dictate that compensation, in either limited or extensive takings, be dependent upon the depriving State's willingness to make reparation. Because international law must harmonize the exclusive interests of the depriving State with the common interest of the international community, the least that may be expected of the depriving State are acts indicative of its good faith willingness to achieve equitable settlement. Discriminatory acts of a "wanton, riotous, and oppressive"¹³⁶ nature or denials of procedural justice may well reflect a lack of such good faith, sometimes justifying resort by the claimant State to reprisals¹³⁷ aimed at forcing a favorable settlement.¹³⁸ Thus, the

136. See *Walter Fletcher Smith Case*, (*Smith v. Compañía Urbanizadora del Parque de Marianao*), U.S. State Dep't Press Release, May 16, 1929; 24 *Am. J. Int'l L.* 384, 387 (1930).

137. Reprisals have ranged from tariff manipulations to direct military intervention. Violent reprisals, however, should be discouraged as incompatible in a world striving, however inadequately, for minimum stability. See generally Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 *Am. J. Int'l L.* 1 (1960).

138. Questions of "discrimination" and "denial of justice" in themselves raise a host of interpretative problems without the scope of this discussion, although their presence, either alone or combined with other factors, may indicate a lack of good faith. It is not inappropriate to note, however, that traditional doctrine insists upon the "public utility" of a foreign wealth deprivation. In discussing this prescription, publicists again fail to distinguish between limited and extensive deprivations, suggesting for each that the good faith of the depriving State and the validity of the taking may be seriously questioned in the absence of "public utility." It would seem apparent, however, that measures of sweeping socio-economic reform are *prima facie* acts of "public utility." Indeed, the very derivation of the terms "nationalization" and "socialization" presume measures which promote the public welfare. In *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961), 30 *Fordham L. Rev.* 523 (1962), however, the court noted, in discussing the Cuban seizure of American property under Nationalization Law 851, Official Gazette of Cuba, July 7, 1960 authorizing the taking of property or enterprises of United States citizens, that "expropriation . . . was not reasonably related to a public purpose involving the use of such property. The taking of the property was not justified by Cuba on the ground that the state required the property for some legitimate purpose or that transfer of ownership of the property was necessary for the security, defense or social good of the state. The taking was avowedly in retaliation for acts by the Government of the United States [in suspending the Cuban sugar quota], and was totally unconnected with the subsequent use of the property being nationalized." 193 F. Supp. at 384.

circumstances surrounding the two most recent extensive wealth-deprivation disputes yet to be settled—the 1958 Indonesian nationalization of Dutch properties¹³⁹ and the 1959-1960 Cuban seizures¹⁴⁰—cast serious doubts upon the good faith willingness of Indonesia and Cuba to compensate deprived aliens. Foreign wealth deprivations,

According to this statement, it might be inferred that, despite the ostensibly discriminatory intent, Cuba need only have altered the wording of the law to comply with the "public utility" requirement. Moreover, exemplifying the interpretative problems inherent in ascertaining "discrimination," it should be observed that this Cuban law might justifiably be regarded as a counter-reprisal to an initial reprisal by the United States.

139. Thus, in December, 1958, the Indonesian Government nationalized Dutch properties by a decree which referred, *inter alia*, to the "struggle for the liberation of Irian Barat [West New Guinea]." The measure of compensation was to be determined by a committee to be appointed by the Government and was to be regulated by subsequent legislation which, it appears, has never been enacted. Statements by Indonesian public officials clearly indicated that no compensation would be forthcoming until the Dutch relinquished West New Guinea. In addition, the decree affected only Dutch property, suggesting, in light of bitter feelings between the two governments, a discriminatory intent, since similar property of other aliens remained undisturbed. The total import conveyed by the Indonesian behavior strongly suggests a lack of that good faith necessary to negotiate an equitable compensation settlement. See generally Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 *Am. J. Int'l L.* 801 (1960); Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 *Am. J. Int'l L.* 305 (1960); McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 *Nederlands Tijdschrift voor Internationaal Recht* 218 (1959); Wortley, *Indonesian Nationalization Measures—An Intervention*, 55 *Am. J. Int'l L.* 680 (1961); Comment, *Foreign Seizure of Investments: Remedies and Protection*, 12 *Stan. L. Rev.* 606 (1960).

140. The circumstances of the Cuban seizures cast serious doubts upon Cuba's good faith willingness to pay any compensation whatsoever, despite recognition by Cuban laws of a duty to compensate. For example, although the Fundamental Law of Cuba, replacing the Constitution of 1942, acknowledges a duty to compensate, the 4½% twenty-year bonds promised in the Agrarian Reform Law of 1959 as payment, as far as may be ascertained, have not yet been printed. It would appear that no inventories were taken nor receipts given for the property seized. In addition, Law 851 of July 7, 1960, in specifically nationalizing American-owned properties, provided for compensation in government bonds with terms of not less than thirty years at a minimum of 2% interest. The law further provided that the bonds would be amortized out of a fund consisting of 25% of the foreign exchange annually received by Cuba from United States' sugar sales, exceeding 3 million Spanish long tons, at a price of not less than 5.75 cents per English pound. It would seem apparent that, given the suspension of the Cuban sugar quota by the United States, the fund from which compensation would be paid would be nonexistent. Moreover, it has been observed that from 1950 to 1959 the monthly average price for Cuban raw sugar shipments to the United States at no time exceeded 5.50 cents per English pound, making meaningless the 5.75 cents requirement of the Cuban law. Indeed, in only three years, from 1954 through 1959, were Cuban sugar sales to the United States in excess of 3 million Spanish tons. See *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375, 385-86 (S.D.N.Y. 1961), 30 *Fordham L. Rev.* 523 (1962); Allison, *Cuba's Seizures of American Business*, 47 *A.B.A.J.* 48 (1961); *N.Y. Times*, Jan. 12, 1960, p. 10, col. 4; Everhart, *I Had My Property Grabbed by Castro's Men*, *U.S. News & World Report*, March 7, 1960, p. 48.

whether limited or extensive, should "present the features of an orderly attempt by officers of the law to carry out a formal order of condemnation."¹⁴¹ It would seem incumbent upon the State initiating the contest through foreign-wealth seizures to come forward with good faith offers of compensation as a basis for future negotiation.

V. APPRAISAL AND CONCLUSION

There is little reason to believe that a realistic recognition of the inapplicability of orthodox preferences for "full" compensation to extensive deprivations will encourage States to seize alien wealth. Recognition of that which is already tacitly acknowledged by the actions of claimant States is unlikely to be decisive in the future internal policies of depriving States. Such recognition reflects not deliberate evasion, but, rather, the inherent impossibility of applying traditional standards to patterns of economic activity not anticipated in the nineteenth century. Indeed, were orthodox preferences to be conceded validity in this context, difficult problems concerning the viability of and respect for international law would be created, since States would nevertheless persist in engaging in extensive deprivations. Nationalistic fervor, desires to eradicate remnants of colonial pasts, and internal pressures for economic and social reform will continue to be the primary factors motivating extensive deprivations. Far from being a "rule" of international law in the extensive deprivation context, the demand for "full" or "prompt, adequate and effective" compensation would appear to be little more than a preference assumed for bargaining purposes—an element of legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy.¹⁴² Heralding the orthodox demand as an immutable *principle* of international law, official pronouncements and diverse communication media may, unfortunately, both raise and frustrate unwarranted expectations among individual claimants and

141. Walter Fletcher Smith Case (Smith v. Compañía Urbanizadora del Parque de Marianao), U.S. State Dep't Press Release, May 16, 1929; 24 Am. J. Int'l L. 384 (1930).

142. In a question and answer column concerning the facts about the Cuban deprivations, the New York Times broached the subject of payment for seized land: "The Charge: That the United States in demanding 'speedy, efficient, and just' payment for United States-owned lands seized by the Castro regime, was in effect telling Cuba: 'Pay now, cash on the spot, and what we ask for our lands'—thus forcing Cuba 'to choose between an agrarian reform and nothing.' The Facts: The United States never made such a demand. Several times, it is true, the United States has asked the Cuban Government to make 'prompt, adequate and effective compensation' to American citizens whose lands had been taken under the agrarian reform law. But the United States never demanded payment 'now, cash on the spot, and what we ask,' or attempted to impose any other fixed or rigid terms. We sought only to bring about negotiation of the question of compensation" N.Y. Times, Oct. 15, 1960, p. 6, col. 5.

the general public, thereby further exacerbating international relations and hindering settlement efforts between the countries involved.¹⁴³

We are all prone to presume that after economic, political, and social upheavals, the "normalcy" of the *status quo ante* must be restored if there is to be a return to stable international interaction. A new "normalcy," however, is each day created by the adjustment of time and the flow of human events. Twentieth century developments demonstrate the urgent need not to fashion new abstract standards, but, while rejecting outmoded preferences, to discover alternative analytical techniques by which the timing, amount, and form of compensation, consistent with the new "normalcy," may be realistically determined.

143. Moreover, insistence upon orthodox compensation principles, perhaps even when used solely for bargaining purposes, may in some respects actually contradict the foreign economic policies of many of the more prosperous nations by which they seek to encourage the political, social, and economic growth of lesser-developed countries. In this connection, it is significant that the United States Government, throughout the difficulties precipitated by the recent Brazilian telephone company nationalization, would appear to have refrained from invoking orthodox compensation principles. See note 127 *supra*.