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The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation

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**The Proposed New International Economic Order:
A New Approach to the Law Governing Nationalization and
Compensation**

F. V. GARCÍA-AMADOR*

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The proposed New International Economic Order is generating legal postulates, some of which substantially depart from the corresponding principles of traditional international law. This is happening, in particular, in connection with the principles governing expropriation and nationalization of foreign-owned property and the compensation therefor. Obviously, such principles have become the primary concern in the formulation of the emerging law of the proposed new order, the so-called "(international) law of development."

I. BACKGROUND OF THE NEW APPROACH

The new approach to the law of expropriation, nationalization, and compensation is closely associated with the current Third World criticisms of the principles governing the international responsibility of States for injuries caused to aliens and the repudiation of international law in general by spokesmen for the newly independent countries. These Third World attacks may be distinguished from the nineteenth century Latin American criticisms and doctrines. Although the motivation is similar, the approach and purpose are not the same.

1. *Earlier Attacks: The Latin American Doctrines*

The Latin American principle of the equality of nationals and aliens emerged as a reaction to the abusive exercise of the right of diplomatic protection based on the "minimum international standard." The Calvo doctrine proposed an equal legal treatment under which aliens could not claim any greater measure of protection than nationals.¹ This doctrine was widely endorsed by statesmen and scholars

1. C. CALVO, 6 LE DROIT INTERNATIONAL 231 (5th ed. 1885).

around the world, and beginning with the recommendation of the First International Conference of American States, was subsequently incorporated into several inter-American conventions and other legal instruments.²

The Latin American position regarding a State's responsibility for injuries sustained by aliens to their person or property during civil disturbances is, in a sense, a specific application of the Calvo Doctrine. Article 2 of the Inter-American Convention Relative to the Rights of Aliens of 1902 states:

. . . the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war, whether civil or national, except in the case of failure on the part of the constituted authorities to comply with their duties.³

This theory of limited non-responsibility had also been enunciated by a Latin American publicist, Torres Caicedo, from Colombia.⁴

The Latin American position is characterized by a rather narrow, restrictive interpretation of the acts or omissions which constitute a "denial of justice." Thus, in the Resolution on "International Responsibility of States," adopted by the Conference of 1933, only "manifest denial of justice or unreasonable delay of justice" are included. This resolution adds that such cases "shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the difference may have arisen."⁵

2. See full text of *Recommendation on Claims and Diplomatic Intervention*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE INTERNATIONAL CONFERENCES OF AMERICAN STATES 1889-1928, 45 (1931). A general formulation of the Calvo doctrine was incorporated in the Convention on Rights and Duties of States of 1933. Article 9 of the Convention reads, in part, as follows: "Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals." *Id.* at 122.

3. For full text of the Convention, see *id.* First Supp., at 91.

4. In this respect see Podestá Costa, L.A., *La responsabilidad del Estado por daños irrogados a la persona o a los bienes de los extranjeros en luchas civiles*, 34 REVISTA DE DERECHO INTERNACIONAL 7 (1938). Calvo himself also elaborated on this application of his original doctrine: "De la non-responsabilité des Etats a raison de peartes et dommages éprouvés par des étrangers en temps detroubles intérieurs on de guerres civiles". I REV. DE DR. INT'L ET DE LEG. COMPA. 417-27 (1969).

5. First Supp., *supra* note 2, at 92.

The tendency to further restrict the scope of the "denial of justice" concept is reflected in the American Treaty of Pacific Settlement ("Pact of Bogota") signed in 1948:

Article VII. The contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective state.⁶

With strict regard to the institution of "denial of justice," this provision leaves little room to doubt that only when aliens have not had the available means to resort to local courts should the right of diplomatic protection be recognized. It is another question whether Article VII of the Pact of Bogota may be interpreted as not only restricting to a minimum any claim based on a denial of justice, but also as determining that no other category of acts or omissions contrary to international law would justify diplomatic representation or the international claim itself.

The abusive exercise of diplomatic protection in Latin America has occurred in the form of threats, and at times, in the actual use of armed force against the respondent State. For example, the action taken in 1902 by three European powers to recover certain contractual debts from Venezuela led to the enunciation of another well-known Latin American doctrine. In a Note transmitted to the United States Department of State, Foreign Minister of Argentina, Luis M. Drago, discussed at length the legal and political international aspects of public debts. He concluded, *inter alia*, that:

. . . We in no wise pretend that the South American nations are, from any point of view, exempt from the responsibilities of all sorts which violations of international law impose on civilized peoples. We do not nor can we pretend that these countries occupy an exceptional position in their relations with European Powers, which have the indubitable right to protect their subjects as completely as in any other part of the world against the persecutions and injustices of which they may be the victims. The only principle which the Argentine Republic maintains and which it would, with great satisfaction, see adopted, in view of the events in Venezuela, by a nation that enjoys such great authority and

6. American Treaty on Pacific Settlement, April 30, 1948, 30 U.N.T.S. 55. For full text, see also International Conferences, Second Supp., *supra* note 2.

prestige as does the United States, is the principle, already accepted, that there can be no territorial expansion in America on the part of Europe, nor any oppression of the peoples of this continent, because an unfortunate financial situation may compel some one of them to postpone the fulfilment of its promises. In a word, the principle which she would like to see recognized is: that the public debt cannot occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.⁷

Perhaps the most well-known Latin American doctrine concerning the law of State responsibility for injuries to aliens is the *Calvo Clause*. Putting aside the questions relating to form and validity, this clause aims to bar the exercise of diplomatic protection when the alien, by his own account, expressly or impliedly, is committed not to request such protection from the State of nationality.⁸

It should be noted that none of these Latin American doctrines, including their attacks and criticisms of the traditional law, aim at anything more than the elimination of the improper exercise of the State's right of diplomatic protection. None of these doctrines involve a total repudiation of the law of State responsibility or of any of the institutions thereof.⁹

2. *Current Repudiation of Traditional International Law in General*

Statesmen and scholars from new States (i.e., those which have achieved independence since World War II) are reluctant to acknowledge that they are bound by the existing principles and rules of international law. Their argument is not so much the alleged feudal, Christian-European origin of that law, but that economic and political conditions have changed so substantially in recent decades that the traditional principles and rules are no longer relevant to their way of life. According to Professor Abi-Saab, one of the first spokesmen of this view:

7. See full text of the Note in U.S. GOVT., PAPERS RELATING TO FOREIGN RELATIONS OF THE UNITED STATES 1903, at 1 (1904).

8. For a thorough study of the clause and its role in diplomatic practice and the jurisprudence of international claims commissions, see D. SHEA, *THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY* (1955).

9. Thus, the Inter-American Conference held in Mexico in 1945 aimed only at the elimination of "the misuse of diplomatic protection of citizens abroad. . . ." See International Conference, Second Supp., *supra* note 2, at 102.

[The] principle of state succession has as an effect the inheritance by the newly independent States of a body of rules emanating from feudal Christian Europe and no longer responsive to the needs of a changing world. . . . [T]he structure of sound relations and interest for which these rules were developed are different from those of the newly independent states.¹⁰

Further motivation for the newly independent countries to repudiate traditional international law is evident:

There are indeed good reasons for Asian states to resent traditional international law. It has often been an obstacle rather than a help for their national aspirations. The position of a colony under international law was minimized and the transition of such a territory into an independent state met with great barriers of doctrines of international law . . .¹¹

Professor R. P. Anand has thoroughly discussed the Western, Christian origins of traditional international law.¹² Former Judge Jessup has pointed out that Anand and others belonging to this school of thought have a basic complaint, namely:

that the rules of law were developed by the exploiting imperialistic powers to promote their interests at the expense of countries which in earlier centuries were either colonies or politically and militarily weak and provided important sources of raw materials and perhaps labor to the exploiting powers.¹³

Occasionally, this claim is made on behalf of the newly independent States as well as those small States in existence at the time the rules were formulated. In this broader context, the claim has been argued by Ambassador Jorge Castañeda as follows:

The immense majority of new states did not participate in the process of formation and development of the numerous juridical institutions and rules of law that were consolidated and systematized during the nineteenth century. First of all, more than half of the presently existing states had not yet become independent. But even the small countries existing at that time did not participate very actively in this process. The political mechanics of the nineteenth century and the concomitant method of creating

10. Abi-Saab, *The Newly Independent States and the Rules of International Law*, 8 How. L.J. 99 (1962).

11. *Id.* at 100 (citing Syatauw).

12. R. P. ANAND, *NEW STATES AND INTERNATIONAL LAW* (1972).

13. Jessup, *Non-Universal International Law*, 12 COLUM. J. TRANSNAT'L L. 419 (1973).

international law, based on the order resulting from the Congress of Vienna, on the doctrine of the balance of power, and on the recognized supremacy of the states that formed the Concert of Europe, naturally resulted in according a comparatively minor role to the smaller states.¹⁴

There are occasions in which the argument of non-participation in the creation or development of the rules of law has been invoked by member States with regard to binding decisions of competent international organs.¹⁵

In connection with the new school of thought, one of its leading spokesmen has made the following interesting observation:

. . . strange as it may seem, there is no noticeable tendency amongst the Asian and African states to regard international law as a product of the Western civilization or reject it on that basis. Such views are generally expressed by Western scholars who advocate a "new approach" to international law and its diversification. These Western scholars are of course sometimes quoted by authors from new states to express discontent with international law. But, as Professor Boutros-Ghali points out, "It appears that Western scholars are more enthusiastic to see a 'new approach' on the part of the Afro-Asians than the Afro-Asians themselves."¹⁶

Irrespective of the measure to which Western scholars have contributed to the current repudiation of traditional international legal principles and institutions, it is clear that the number of publicists sharing the above views has been steadily increasing. This group includes not only Western scholars but also those from a wide variety of geographical, political, and ideological origins.¹⁷

14. Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORGANIZATION 39 (1961).

15. In a note of October 13, 1972, addressed to Mr. Galo Plaza, then Secretary-General of the OAS, the Prime Ministers of Barbados, Guyana, Jamaica and Trinidad and Tobago dealt with "their relations with Cuba and the obligation [which] the Organization of American States has sought to impose upon Member States in respect [to] their relations with Cuba." The Prime Ministers noted, *inter alia*, that when the Organ of Consultation agreed in 1964 on the diplomatic and commercial measures against Cuba "none of the English-speaking Caribbean States had the honour to be a member of the Organization of American States, and they therefore were not represented."

16. Jessup, *supra* note 13, at 416-17 (citing Anand).

17. See generally J. SYTAUW, *SOME NEWLY ESTABLISHED STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1961); Fatouros, *International Law and the Third World*, 50 VA. L.R. 783 (1964); Falk, *New States and International Legal Order*, 118 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 1 (1966); S. SYNHA, *NEW NATIONS AND THE LAW OF NATIONS* (1967);

3. *The Third World Position on the Law of State Responsibility*

Not surprisingly, Third World critics of traditional international law have focused their attacks on those principles governing State responsibility for injuries to aliens. Some of the reasons given for repudiating or demanding a drastic revision of the prevailing doctrines and principles are the same as those that are part of the criticisms of international law as a whole. Thus, Professor S. N. Guha-Roy argues, "the law of responsibility of States for aliens is not a part of universal international law as 'a custom' [is] in no way binding on other States, unless it can be shown to have its roots in some general principles of law of a more or less universal character."¹⁸ Other criticisms relate to particular doctrines of the law of State responsibility. Professor Guha-Roy also objects to "what is ordinarily presented as the international standard of justice":

First, a national of one state, going out to another in search of wealth or for any other purpose entirely at his own risk, may well be left to the consequences of his ventures, even in countries known to be dangerous. For international law to concern itself with his protection in a state without that state's consent amounts to an infringement of that state's sovereignty. Secondly, a standard open only to aliens but denied to a state's own citizens inevitably widens the gulf between citizens and aliens and thus hampers, rather than helps, free intercourse among peoples of different states. Thirdly, the standard is rather vague and indefinite. Fourthly, the very introduction of an external yardstick for the internal machinery of justice is apt to be looked upon as an affront to the national system, whether or not it is below the international standard. Fifthly, a different standard of justice for aliens results in a twofold differentiation in a state where the internal standard is below the international standard. Its citizens as aliens in other states are entitled to a higher standard than their fellow citizens at home. Again, the citizens of other states as aliens in it are also entitled to a better standard than its own citizens.¹⁹

Padilla Nervo launched a bitter attack on the institution of State responsibility while a member of the U.N. International Law Commission, and invoked the principle of international law that establishes the legal equality of States:

F. OKOYE, *INTERNATIONAL LAW AND THE NEW AFRICAN STATES* (1972); G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 381 (1974).

18. 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.* 562 (1961).

19. *Id.* at 563.

The vast majority of new States had taken no part in the creation of the many institutions of international law which were consolidated and systematized in the nineteenth century. In the case of the law of the sea, for instance, though the future needs and interests of newly-established small countries were not taken into account, at least the body of principles thus created was not directly inimical to them. With State responsibility, however, international rules were established, not merely without reference to small States but against them, and were based almost entirely on the unequal relations between great Powers and small States. Probably ninety-five percent of the international disputes involving State responsibility over the last century had been between a great industrial Power and a small, newly-established State. Such inequality of strength was reflected in an inequality of rights, the vital principle of international law, *par in parem non habet imperium* being completely disregarded.²⁰

Nevertheless, some years later, when he had become Judge of the International Court of Justice, Padilla Nervo admitted that:

[F]or the time being the principles which recognize the capacity of a State to intervene, by way of diplomatic protection of a company of its own nationality, has proved to be a fair and well-balanced safeguard or insurance both for the investor and for the State, where foreign companies operate.²¹

It is not difficult to see the difference between Latin American criticisms of the traditional law of State responsibility and the current Third World attacks. Both are motivated by the belief that the principles governing the treatment of aliens, the "minimum international standard" in particular, often served as mere tools to satisfy the imperialistic aims and actions of more powerful, developed nations. But, while the Latin American doctrines were directed only at the elimination of the abuse of the right of diplomatic protection, the current Third World attacks and criticisms go much further. Some of them appear to altogether repudiate the institution of State

20. [1957] I Y.B. INT'L L. COMM'N 155. A further example of severe attacks on the doctrine of diplomatic protection is found in some of the remarks made by Soviet delegates during the discussion in the UN General Assembly of my reports to ILC. U.N. GAOR (XV) (Part I), Sixth Committee (Legal Questions), Summary Records of Meetings 10, 24 (1960). Another member of the ILC, the late Judge R. Pal, was also critical of some principles of the traditional law of state responsibility, though in moderate terms. [1957] I Y.B. INT'L L. COMM'N 157-58.

21. Barcelona Traction, Light and Power Company, Limited, [1970] I.C.J. 3, 245.

responsibility for injuries to aliens. Unlike the Latin American efforts, very few, if any, of the efforts made by the Third World have been directed at revising either the traditional substantive or procedural rules and accommodating the present needs and interests of developing countries. Instead, as will be shown in due course, the Third World attitude, at least insofar as measures affecting foreign-owned property are concerned, is to place State responsibility outside the realm of international law.

II. THE EMERGING LAW OF THE PROPOSED NIEO

The so-called "law of development" (or "international law of development") is the emerging legal structure of the proposed New International Economic Order (hereinafter NIEO). The philosophy and goals of the new order, as well as its true dimensions, will be discussed first.

4. *Philosophy, Goals, and Non-economic Dimensions of the Proposed NIEO*

To some extent, at least, the roots of the proposed NIEO may be found in the United Nations Charter. The concept of cooperation for development and the corresponding rights and duties provided for in the Charter furnish the basis for restructuring the international economic order. This is particularly true with regard to the relations between "developed" and "developing" nations, and the corresponding rights and duties provided in the Charter. This approach is clearly reflected in the preamble of the Declaration on Establishment of a NIEO, adopted without a vote (consensus) by the U.N. General Assembly, on May 7, 1974.²²

The rationale of the proposed new order, i.e., the essential aspects of the NIEO philosophy, are set forth in the following paragraphs of the aforementioned Declaration:

* * * * *

We, the Members of the United Nations,

Having convened a special session of the General Assembly to study for the first time the problems of raw materials and development, devoted to the consideration of the most important economic problems facing the world community,

22. For full text of the Declaration, see C.A. Res. 3201, 6th Special Session, GAOR, Supp. (No. 1), U.N. Doc. A/9559 (1974). The text is also reproduced in UNITAR Doc. Service No. 1, *A New International Economic Order*, II SELECTED DOCS. 1945-1975 at 891, and in 68 AM. J. INT'L L. 798 (1974).

Bearing in mind the spirit, purposes and principles of the Charter of the United Nations to promote the economic advancement and social progress of all peoples,

Solemnly proclaim our united determination to work urgently for THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations, and, to that end, declare:

1. The greatest and most significant achievement during the last decades has been the independence from colonial and alien domination of a large number of peoples and nations which has enabled them to become members of the community of free peoples. Technological progress has also been made in all spheres of economic activities in the last three decades, thus providing a solid potential for improving the well-being of all peoples. However, the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, *apartheid* and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved. The benefits of technological progress are not shared equitably by all members of the international community. The developing countries, which constitute 70 per cent of the world's population, account for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality.

2. The present international economic order is in direct conflict with current developments in international political and economic relations. Since 1970, the world economy has experienced a series of grave crises which have had severe repercussions, especially on the developing countries because of their generally greater vulnerability to external economic impulses. The developing world has become a powerful factor that makes its influence felt in all fields of

international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community.

3. All these changes have thrust into prominence the reality of interdependence of all the members of the world community. Current events have brought into sharp focus the realization that the interests of the developed countries and those of the developing countries can no longer be isolated from each other, that there is a close interrelationship between the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. International co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.

The main goals of the NIEO are enunciated in its Programme of Action, as well as in instruments adopted by the General Assembly or other forums before and after the Declaration and the Programme. Among these goals, the following deserve special mention:²³

(1) With regard to raw materials and primary commodities, efforts should be made, *inter alia*, to find a link between the prices of exports of developing countries and the prices of their imports from developed countries.

(2) In the field of food, efforts should be made, *inter alia*, to take full account of specific problems of developing countries, particularly in times of food shortages, in the international efforts connected with the food problem.

(3) In the field of general trade, the terms of trade of the developing countries should be ameliorated and concrete steps taken to eliminate the chronic trade deficits of these countries, including implementation, and improving and enlarging the generalized system of preferences for exports from developing nations to the developed countries. In this connection, the principles of non-reciprocity and

23. For full text of the resolution see U.N. Doc. A/RES/3202 (1974). See also UNITAR, *supra* note 22, at 893.

preferential treatment for developing countries in multilateral trade negotiations should be the guidelines.

(4) In the field of transportation, an increasing and equitable participation of developing countries in world shipping tonnage should be promoted.

(5) With regard to the international monetary system, measures to check the inflation already experienced by the developed countries and to prevent it from being transferred to developing countries should be taken.

(6) A number of urgent measures are contemplated to finance the development of developing countries and to meet the balance of payment crisis in the developing world.

(7) In the field of industrialization, all efforts should be made by the international community to encourage the industrialization of developing countries.

(8) With regard to the transfer of technology, all efforts should be made, *inter alia*, to formulate an international code of conduct for this transfer corresponding to the needs and conditions prevalent in developing countries, and to give access on improved terms to modern technology, and to adapt that technology, as appropriate, to specific economic, social, and ecological conditions and to the varying stages of development of developing countries.

The Declaration on the Establishment of a NIEO proposes that the new order be founded on a "full respect" for a number of principles of a marked political and legal character. Many of these principles are enunciated in subparagraphs 4(a) through 4(i):

4. The new international economic order should be founded on full respect for the following principles:

(a) Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States;

(b) The broadest co-operation of all the States members of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all;

(c) Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries,

while devoting particular attention to the adoption of special measures in favour of the least developed, land-locked and island developing countries as well as those developing countries most seriously affected by economic crises and natural calamities, without losing sight of the interests of other developing countries;

(d) The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result;

(e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right;

(f) The right of all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples;

(g) Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries;

(h) The right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities;

(i) The extending of assistance to developing countries, peoples and territories which are under colonial and alien domination, foreign occupation, racial discrimination or *apartheid* or are subjected to economic, political or any other type of coercive measures to obtain from them the subordination of the exercise of their sovereign rights and to secure from them advantages of any kind, and to neocolonialism in all its forms, and which have established or are endeavouring to establish effective control over their natural resources and economic activities that have been or are still under foreign control.

* * * * *

The foregoing proposed principles make it clear that, despite its title, the New International Economic Order is not exclusively "economic" in character. It contains much broader dimensions,

consequently making it look rather like a proposal to review and restructure the entire existing international order.²⁴ The reaffirmation of such principles as the sovereign equality of States, self-determination, and nonintervention, along with the extension of assistance to developing countries, peoples, and territories under colonial and alien domination, seem to indicate that the idea is to ensure the realization of NIEO's developmental goals by incorporating such principles into the proposed new order.

5. *The "Law of Development" as a New Legal Discipline*

The "law of development"—the emerging legal structure of the proposed NIEO—was conceived as a legal discipline several years before the adoption by the UN General Assembly in 1974 of both the Declaration on the Establishment of a NIEO and the Charter of Economic Rights and Duties of States, the latter being the instrument by which the new order was given a more elaborate and systematic legal framework. In an article published in 1965, Professor Michel Virally referred to the law of development as a new branch of international law in the following paragraph:

Le temps paraît donc venu, au moment où les problèmes du développement sont attaqués dans toute leur ampleur par l'Organisation des Nations Unies, de mettre un peu d'ordre dans les créations de la pratique, de prendre un peu de hauteur pour en faire la synthèse et la critique, de les raccrocher aux principes dont ils devraient constituer l'application, de jeter enfin les bases d'un véritable droit international du développement.²⁵

Professor Virally notes that in early 1965 the idea, as well as the expression itself, "international law of development," was launched by Professor André Philip at an international colloquium on the adaptation of the United Nations to the present world.

In a survey of international law prepared by the Secretary General in response to a request made by the UN International Law Commission (ILC), the existence of a "law relating to economic development" is admitted as an

24. In this respect see Galindo Polh, *El nuevo orden económico internacional: instituciones y principios que intervienen en su elaboración*, QUINTO CURSO DE DERECHO INTERNACIONAL ORGANIZADO POR EL COMITÉ JURÍDICO INTERAMERICANO (Agosto 1978), Conferencias e Informes, Doc. OEA/OAS/Serv. C/V. C-5, CJI-38 at 115 (1979).

25. Virally, *Vers un droit international du développement*, XI ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7 (1965).

emerging body of law, a part of, and a complement to, the objective stated in the Preamble to the UN Charter of promoting "social progress and better standards of life in larger freedom" and the purpose of the Organization mentioned in paragraph 3 of Article 1 of the Charter, namely, to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character.²⁶

The Survey goes on to emphasize the obligation of member States to cooperate not only in maintaining peace, but also in promoting economic stability and progress. In its view, the scope of international law is growing

from a body of law imposing negative restraints on independent sovereign States, to a body of law which, in recognition of conditions of increasing interdependence, imposes on States various positive obligations of a procedural and substantive kind. The law, in other words, is coming to be seen as concerned not only with the protection of the independence of States, but also with the duty to cooperate in the promotion of national and human welfare. . . .²⁷

Professor Oscar Schachter, in a penetrating analysis of the new law, emphasizes some of its specific features. On the one hand, there is "the effort to revoke or 'delegitimize' certain legal principles and practices which are regarded by the developing countries as inimical to their needs and development." Examples of these efforts include the move to modify the scope of the most-favored-nation clauses and the broad principle of non-discrimination in trade so as to allow preferences for developing countries, and the move to eliminate the "international standard" of compensation for expropriated foreign-owned property. On the other hand, there is the "new conception of international entitlement to aid and preferences based on need."²⁸ According to Professor Schachter, this concept is the central feature of the new evolving law of development. To him:

The present rationale for international assistance and preferential treatment on the basis of need is more in keeping with the

26. [1971] II Y.B. INT'L L. COMM'N (Part 2) 34-35.

27. *Id.* at 35.

28. Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 7 (1976). Other scholars have also made valuable contributions with the view toward further characterizing the new discipline; some of them will be mentioned in the course of the present and next sections.

premises of the modern welfare state—that is, to provide for the minimal human needs of the most disadvantaged segments of society. For this reason, it does not seem so utopian or so revolutionary as the abstract formulation may suggest. Yet we should not underestimate its impact in international affairs. We have seen that when a standard of need is adopted as a ground for preference and affirmative action, it tends to be applied and extended beyond the more obvious cases of human suffering. Thus, there is increased acceptance of the idea that specially disadvantaged countries such as land-locked states or former colonial territories or states dependent on a single commodity have special needs that entitle them to preferential treatment. (Footnote omitted).²⁹

In light of these features of the emerging law of development, there seems to be little room to doubt that some of the basic principles of traditional international law have never been subjected to such far-reaching challenges. Hence, further discussion of the fundamental claim of the developing world is justified.

6. *The Claim of the Developing World to Preferential Treatment*

The Survey of the UN Secretary-General emphasizes the increasingly compulsory nature of cooperation for development. Viewed as a primary responsibility of the developed countries, it becomes a duty correlative to the right claimed by the developing countries to preferential treatment.³⁰ Hence, the duty and the right are explicitly provided for in the Charter of Economic Rights and

29. *Id.* at 9-10.

30. As some scholars have pointed out, the idea of the "law of development," thus approached, yields another notion, that of the "right to development." In this respect see M'Baye, *Le Droit de Développement Comme un Droit de l'Homme*, V REVUE DES DROIT DE L'HOMME 505 (1972); Carillo Salcedo, *El Derecho al Desarrollo Como Derecho de la Persona Humana*, 21 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 119 (1972); Gros Spiell, *El Derecho Internacional del Desarrollo*, CUADERNOS DE LA CÁTEDRA J. B. SCOTT (Universidad de Valladolid) 30-33 (1975). The notion of such (subjective) right seems to be equivalent to the "new conception of international entitlement to aid and preferences." As has been noted, "from time to time spokesmen for poor countries employ the language of law to express their view that aid is a matter of right and not a discretionary act." Schachter, *Principles of International Social Justice*, in JUS ET SOCIETAS, ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMANN 251 (1979). Professor Schachter was referring to proposals of developing countries made at the UNCTAD Working Group charged with the preparation of the draft Charter of Economic Rights and Duties of States. In this connection, see text at 34-35 *infra*.

Duties of States (hereinafter NIEO Charter), the most conspicuous legal instrument of the proposed new order.³¹

Article 17 of the NIEO Charter contemplates, in general terms, both the duty of international cooperation and the preferential treatment owed to developing states:

International cooperation for development is the shared goal and common duty of all States. Every State should cooperate with the effort of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.

However, attention should be called to the fact that in Article 17, as well as in other articles of the Charter, the word "should", not "shall", is used. In these articles, then, the Charter does not seem to impose true legal obligations.³²

Other provisions of the NIEO Charter deal with specific areas of development, such as international trade. According to Article 19: "Developed countries should extend, improve, and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries. . . ." Article 19 further states that in those fields of international economic cooperation where it may be feasible, developed countries should grant the same treatment to developing countries. This should be done with a view toward accelerating the economic growth of these countries and bridging the economic gap between developed and developing countries.

The provisions dealing with the transfer of technology are also very explicit. Article 13 of the Charter provides:

In particular, all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and

31. For the full text of the Charter *see* C.A. Res. 3281, 29 GAOR, Supp. (No. 31), UN Doc. A/9631 (1974). The text is also reproduced in UNITAR, *supra* note 22, at 901.

32. In this connection it should also be noted that the developing countries, at the request of the developed countries, agreed to replace in preambular paragraph c) the word "obligation" [of the UN Charter], used in the developing countries draft Charter, by the word "provisions." *See* note 61 *infra*, at 433.

in accordance with procedures which are suited to their economies and their needs.

Preferential treatment of developing countries is further recognized in Articles 8, 9, and 11.

As paradoxical as it may seem, the principle of the legal equality of States has been invoked to rationalize the claim of unequal, preferential treatment in favor of the developing countries. Discussing the impact of NIEO on the substantive rules of international law, H. J. Geiser remarks:

Similarly, the principle of equality of States will remain fully valid in the context of a NIEO. Here again, it will be further defined and used, more and more, not only as a formal, abstract concept, but as a concrete means of change, to point at gross inequalities among States and to justify differential standards and measures in such areas as trade, financial assistance and technical cooperation, precisely in view of establishing some measure of real equality among all members of the international community.³³

Logically speaking, the foregoing construction of the old, almost venerable principle of the legal equality of States (or for that matter, a similar construction of the modern, though somewhat equivocal expression adopted by the UN Charter—the principle of the “sovereign equality” of the Members of the Organization) does not seem to be a sound rationale for advocating that unequal and preferential treatment be given to countries in certain stages of development. Indeed, the problem is not whether or not such a claim is compatible with the principle of the legal equality of States; since the purposes of this principle have nothing to do with those of NIEO’s postulates, this problem cannot be even raised.

A more reasonable and powerful justification of the new concept of international cooperation for development and the claim to preferential treatment can be found in other bases of NIEO explicitly mentioned in its instruments (for example, equity, interdependence, and the interests common to both the developing and developed countries). Presumably, it was on account of these considerations and the realities of our time that developed countries already had

33. Geiser, *A New International Economic Order: Its Impact on the Evolution of International Law*, 9 ANNALS OF INTERNATIONAL STUDIES 97 (1978).

agreed to grant preferential treatment to developing countries in particular areas, especially in international trade.³⁴

Thus, in light of the new concept of international cooperation for development and the claim of the developing world to preferential treatment, the relations between developed and developing countries are governed by a kind of "double standard." Scholars mention as the most convincing expression of this phenomenon the gradual abandonment in practice of the traditional principles of non-discrimination and reciprocity—the two essential elements of the old most-favored-nation clause. Thus, given the special needs, interests, and emerging new rights of the developing countries, discrimination has become legitimate. For the same reasons, non-reciprocity in international trade and other areas of economic activity has likewise become justifiable.³⁵

III. THE NEW APPROACH TO NATIONALIZATION AND COMPENSATION

Expropriation and nationalization of foreign-owned property, and particularly the compensation therefor, are indeed one of the outstanding themes of the emerging law of development. The point of departure of NEIO's new approach to the subject is the doctrine of "permanent sovereignty over natural wealth and resources." A close look at the evolution of this doctrine, which was originally introduced at the UN General Assembly in 1952 and incorporated in the Charter of Economic Rights and Duties of States which the Assembly adopted in 1974, is therefore illuminating.

7. *Antecedents of NIEO's Resolutions on "Permanent Sovereignty"*

As far back as 1952, the General Assembly admitted that "the right of peoples freely to use and exploit their natural wealth and

34. To illustrate, reference should be made to the waiver of reciprocity provided in Article XXVIII.1 of the 1965 GATT Protocol, and the establishment of the system of tariff preferences by the Lomé Convention and the United States Foreign Trade Act of 1974.

35. For further elaboration on these aspects of the emerging "law of development," see generally Virally, *Le Principe de la Réciprocité dans le Droit International Contemporain*, 122 *ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS* 1 (1967); Ladreit de Lacharrière, *L'Influence de la Inégalité de Développement des Etats sur le Droit International*, 139 *ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS* 227 (1973).

resources is inherent in their sovereignty.”³⁶ This resolution incorporated the notion of “permanent sovereignty over natural resources.” From the viewpoint of the developing countries, the principle of jurisdiction over natural wealth and resources may be deemed an expression of, *inter alia*, economic self-determination. This idea has been incorporated in Article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.³⁷ Before these covenants were opened for signature in 1966, the General Assembly recommended “that the sovereign right of every State to dispose of its wealth and its natural resources should be respected.”³⁸ In another connection, the close relationship between the notion of “permanent sovereignty” and the question of decolonization cannot be overlooked.

The principles enunciated in the above-mentioned instruments had previously appeared in a more elaborate form in General Assembly Resolution 1803 (XVII), dated December 19, 1962. This Resolution, which was the first of a series of resolutions adopted by the General Assembly and other bodies under the heading of “Permanent Sovereignty over Natural Resources,” provides that the exploitation and development of such resources, and the importation of foreign capital for such purposes, should be in conformity with conditions freely-established by the peoples and nations concerned.³⁹ The following paragraph of this Resolution further states:

3. In cases where authorization is granted, the capital imported and the earnings of that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State’s sovereignty over its natural wealth and resources.

36. For full text of Resolution 626 (VIII), see 7 U.N. GAOR, Supp. (No. 20) 106, UN Doc. A/2361 (1952).

37. Paragraph 1 of these articles reads as follows: “All peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Paragraph 2 adds: “All people may, for their own needs, freely dispose of their natural resources . . .” The covenants entered into force on January 3 and March 23, 1976, respectively.

38. C. A. Res. 1515, 15 U.N. GAOR, Supp. (No. 16) 134, UN Doc. A/4648 (1960).

39. For the full text of the resolution, see UN Doc. A/Res/1803 (1962). The resolution is reproduced in 2 I.L.M. 223 (1963).

Nationalization and compensation are discussed in paragraph 4, and one particular aspect thereof is addressed in the first sentence of paragraph 8 of the Resolution:

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

. . . .

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; . . .

Because the language of Resolution 1803 is general and vague, it is technically deficient as a statement of the substantive and procedural principles governing nationalization and compensation therefor. It fails to clearly define the rights and the obligations of the States or parties involved. The Resolution was a compromise reached first at the Special Commission on Permanent Sovereignty.⁴⁰ It was introduced with hopes of obtaining the support of both the developing and developed countries. Being a compromise, no more precise language could be expected.⁴¹

Irrespective of its technical gaps, however, Resolution 1803 contains elements which are relevant when viewed in terms of the historical evolution of NIEO's position on nationalization and compensation, as well as other important aspects of the subject. Relevant elements in the Resolution include:

40. See draft resolutions and amendments submitted to the Commission in the course of its three sessions and the text of Resolution I adopted at its last session in its Report, UN Docs. A/AC. 97/5/Rev. 2; Eco. & Soc'l Council E/3511; A/AC 97/13, at 240-45 (1962).

41. For a thorough description of the process of elaboration of the resolution, see Gess, *Permanent Sovereignty on Natural Resources*, 13 INT'L & COMP. L. Q. 398 (1964).

(1) Foreign private capital investments are not governed exclusively by domestic law; they are also governed by international law;⁴²

(2) Expropriation and nationalization are justified only on grounds or reasons of public utility, security, or the national interest;

(3) There is an obligation to pay appropriate compensation, and this compensation must be determined by the State in accordance with both domestic and international law;

(4) In case of disputes over the question of compensation, national jurisdiction is not the exclusive and national method of settlement, and arbitration and international adjudication are expressly contemplated; and

(5) Application of *clausula pacta sunt servanda* to investment agreements between States and foreign private individuals or corporations is apparently admitted.

Looking at these factors, it becomes clear that despite the general and vague language of the Resolution, this 1962 General Assembly declaration of permanent sovereignty over natural resources reaffirms and incorporates the basic principles of traditional international law which govern expropriation, nationalization, and compensation.

In Resolution 88 (XIII), the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD) reaffirmed the "sovereign right of all countries freely to dispose of their natural resources for the benefit of their national development," and *reiterated* that:

in the application of this principle, such measures of nationalization as States may adopt in order to recover their natural resources, are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts, without prejudice to what is set forth in General Assembly Resolution 1803 (XVII).⁴³

42. This is the situation also in the aforementioned international covenants. Paragraph 2 of their respective article 1 reads in full:

All 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 (emphasis added).

43. For the full text of the resolution see T.D.B. Res. 88 (13th Sess.), UNCTAD Doc. TD/B/421 (1972).

One year later, and only eleven years after Resolution 1803 was adopted, an entirely new and radically different approach was taken at the XXVIII Session of the General Assembly. Recalling the previous resolutions on permanent sovereignty over natural resources (but obviously enough, not the UNCTAD resolution), the General Assembly, in Resolution 3171, made the following affirmation:

3. *Affirms* that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.⁴⁴

The new position adopted by the General Assembly is evidenced by its choice to drop all references to international law and international jurisdiction. Under Resolution 3171, only domestic law governs the determination of "possible" compensation and the mode of payment, as well as the settlement of disputes.

8. *Scope of "Permanent Sovereignty" Under the Charter of Economic Rights and Duties of States*

Before turning to the provisions of the NIEO Charter which specifically deal with the expropriation, nationalization, and transfer of ownership of foreign property, a brief discussion of the scope of "permanent sovereignty" under the Charter seems to be in order.

The NIEO Charter supports the position taken by the UN General Assembly in its Declaration on the Establishment of a NIEO that the scope of "permanent sovereignty" should be broadened to include not only natural resources, but also "all economic activities." As mentioned, one of the principles enunciated in the Declaration was that of "full, permanent sovereignty of every state over its natural resources and all *economic activities*" (emphasis added).⁴⁵ The Charter more explicitly pronounces in Article 2 (1) that "Every State has and shall freely exercise, full permanent sovereignty, including possession, use and disposal, over *all* its wealth, natural resources and economic activities" (emphasis added). Obviously, since this right of the State is an inherent, integral, and inseparable

44. For the full text of the resolution see UN Doc. A/RES/3171 (1973).

45. See paragraph 4, 3) of the Declaration in section II-4 *supra*.

part of its sovereignty, its exercise with respect to general "economic activities" should not be deemed intrinsically incompatible with the governing principles of traditional international law. The right does not *per se* raise the question of compatibility; it is in connection with its exercise that such a question is susceptible of being raised.

Article 2 of the NIEO Charter deals with some of the aforementioned economic activities in the following subparagraphs:

2. Each State has the right:

(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;

(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph.

Strictly speaking, these provisions suggest nothing incompatible with either existing international law or national practice. On the one hand, regardless of a State's national priorities and objectives, there has never been any basis in international law for denying the State its right to subject foreign private investment to its own laws and regulations; in this regard, international law is concerned only with the acquired rights of aliens. On the other hand, the prohibition against compelling a State to grant preferential treatment to foreign investment is no more than a mere formulation of the Calvo Doctrine. Accordingly, the Charter in this respect is perfectly compatible with the widely-accepted standard of "national treatment." A look at the national practices in Latin America and other developing regions (and lately even in some developed countries) shows frequent regulation and control of the activities of transnational corporations by the State in which they operate.⁴⁶

46. Insofar as Latin America is concerned, *see* DEPARTMENT OF LEGAL AFFAIRS OF THE OAS, A COMPARATIVE STUDY OF LATIN AMERICAN LEGISLATION ON THE REGULATION AND CONTROL OF PRIVATE FOREIGN INVESTMENT, Doc. OEA/Ser. G., CP/INF. 680/75 (1975).

Irrespective of its well-recognized intrinsic merits and justification, the obligation of non-intervention imposed upon transnational corporations may lead to a "dead letter" provision being included in an instrument dealing with the rights and duties of States. Such a provision finds a more appropriate place in the so-called "codes of conduct" under preparation in the UN and other fora.⁴⁷

9. *The Charter Provisions on Expropriation, Nationalization, and Transfer of Ownership of Foreign Property*

Provisions in Article 2, subparagraph 2(c) of the Charter of Economic Rights and Duties of States specifically deal with the expropriation, nationalization, and transfer of ownership of foreign property, and questions concerning the compensation therefor. Subparagraph 2(c) states:

2) Each State has the right to:

. . . .

(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

In addition to the questions concerning compensation, the foregoing subparagraph embodies two aspects of the institution of nationalization: (1) the treatment of aliens as compared to the treatment of nationals; and (2) the reasons or grounds for affecting foreign property through expropriation, nationalization, or transfer of ownership of foreign property.

In providing for the nationalization, expropriation, and transfer of ownership of property, the NIEO Charter refers to "foreign property." By so limiting the provision, the Charter authorizes a

47. To illustrate, one of the "guidelines of conduct" set forth in a Latin American document states that "the TNES [Transnational Enterprises] shall abstain from all interference in the internal affairs of the States where they operate." See Aide Memoire, note 76 *infra*.

State to exclude its own nationals from the application of any measures it adopts in accordance with subparagraph 2(c). In practice, it may happen that natural resources which are the object of these measures are owned by, or under the control of, foreign enterprises exclusively. When such is the case, no violation of the traditional principle of non-discrimination between foreigners and nationals will be committed. However, under the cited subparagraph of the Charter, when natural resources are owned or controlled by both foreign and national companies, a State may ignore traditional international principles and treat the companies differently. This position of the Charter should be compared to the one taken by Resolution 1803 (XVII). As will be recalled, paragraph 4 of this Resolution explicitly subjects domestic and foreign interests to the same standards:

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interest, *both domestic and foreign*. . . . (emphasis added).

It should be stated that even in traditional international law, the principle of non-discrimination between nationals and aliens as a condition for the exercise of the right of expropriation and nationalization is a controversial point. In any case, it is difficult to accept a suggestion that the Charter, while providing in Article 2, 2(a) that "No State shall be compelled to grant preferential treatment to foreign investment," fails to include the natural corollary of non-discrimination.⁴⁸ A more acceptable view, which has ample support even among Western international authorities, is that "it appears unlikely that a nationalization would be contrary to international law if there is a patent public purpose even if the expropriating measures are exclusively directed against aliens."⁴⁹ This view should be qualified by saying that any discrimination between nationals and aliens to the detriment of the latter must be justified, and such justification may be assumed when the measures are taken for the purpose of development. This other suggestion is reinforced by the idea that the departure of the Charter from the standard of "national treatment"

48. See Brower and Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law*, 9 INT'L LAW. 306 (1975).

49. I. DELUPIS, *FINANCE AND PROTECTION OF INVESTMENTS IN DEVELOPING COUNTRIES* 68 (1973).

conforms with one of the basic postulates of NIEO, i.e., the claim to preferential treatment in favor of developing countries.

While Resolution 1803 states that expropriation and related measures "shall be based on grounds or reasons of public utility, security or the national interest. . .," the Charter remains silent as to when such actions may be justified. While it is true that it is for municipal law, rather than for international law, to decide proper grounds for such actions, some standard must be established or else the actions cannot be considered justified according to international law. Without such a standard, expropriation and related measures would become an "arbitrary" act. Despite the different types of legal systems affecting private property, and despite the wide variety of reasons given for affecting such property, every municipal law requires some public, social, or economic justification for acts of expropriation or nationalization.

The absence of such a requirement in subparagraph 2(c) seems to be an attempt to liberate the State from international law in regard to this requirement of nationalization. While admittedly the fulfillment of this requirement that some justification be given may in practice be no more than a mere formality, its absence will cause the right of nationalization and expropriation to become an unqualified power of the State which may be exercised indiscriminately. In both international and municipal law, property may be affected for different reasons or purposes, but, as stated in Resolution 1803, it may be expropriated, nationalized, or requisitioned only on "grounds or reasons of public utility, security or the national interest." It does not matter that the taking of such actions is a sovereign, inalienable right of power of the State; the exercise of such power or right becomes illegitimate if these grounds or reasons are absent.

10. *The Question of Compensation: The Substantive Provisions*

Subparagraph 2(c), Article 2 of the Charter of Economic Rights and Duties of States contains various substantive and procedural provisions concerning the question of compensation for expropriation, nationalization, or transfer of ownership of foreign property. With regard to the substantive provisions, let us consider first whether compensation constitutes a truly legal obligation.

Under the corresponding paragraph of General Assembly Resolution 1803, it is stated that "the owner *shall* be paid appropriate compensation. . . ." However, according to subparagraph 2(c) of the

Charter, "appropriate compensation *should* be paid. . . ." The use of *should* in lieu of *shall* clearly indicates that under the NIEO Charter, the payment of compensation ceased to be a legal duty. Therefore, whether compensation is to be paid is left to the discretion of the nationalizing State. This is indeed an evident departure from a well-established principle of customary international law. Current inter-State and national practice continue to support the international legal obligation to compensate for the expropriation, nationalization, or transfer of ownership of property.

There is a further departure from well-established principles of traditional, customary international law in subparagraph 2(c) of the NIEO Charter. While Resolution 1803 provided for the payment of appropriate compensation "in accordance with the rules in force in the State . . . and in accordance with international law," the Charter provides that when paying appropriate compensation, the State should take "into account its relevant laws and regulations and all circumstances that the State considers pertinent." This is certainly a departure from the principle incorporated in Resolution 1803, according to which the determination of the appropriateness of compensation is not left entirely to the discretion of the expropriating State. Obviously, this provision of the Charter is nothing but a corollary to the provision giving the State exclusive jurisdiction to determine if compensation should be paid.

This direct and complete repudiation of the traditional principles of international law governing compensation as well as any other aspects of nationalization is evidenced not only in the letter but also in the spirit of the provisions contained in subparagraph 2(c). Portions of the legislative history of the NIEO Charter highlight this spirit.

11. *The Legislative History of These Provisions*

It should be recalled that the first attempts to reserve to national jurisdiction questions of compensation, including the application of international law altogether, were made in the course of the formulation of Resolution 1803 (XVII). Of particular note were the Soviet bloc attempts, which were rationalized in the following statement by the Hungarian delegate:

It was not correct to say that nationalization with the payment of compensation was a generally acceptable principle; the fundamental principle was that of state sovereignty. Any decision

relating to whether and how much compensation should be paid was essentially an international affair of the state concerned, which therefore was the sole judge in the matter and could brook no outside interference whatsoever in the exercise of its sovereignty. The basis of any right to compensation was not some rule of international law but the relevant legislation of the state concerned. . . .⁵⁰

The Soviet bloc attempts were formalized in a number of USSR proposals. At the Commission of Permanent Sovereignty over Natural Resources, the USSR submitted a draft text wherein a sovereign right to carry out nationalization and expropriation measures "without let or hindrance" was recognized. At the 32nd session of ECOSOC and the 17th session of the General Assembly, it submitted amendments to paragraph 4 of the Commission's draft resolution. With regard to compensation, the USSR argued, during the Commission discussion, that paragraph 4 restricted sovereignty over natural resources since it did not confirm the "inalienable right of people to nationalize and expropriate property in the general interest," and restricted their sovereignty by requiring the payment of appropriate compensation.⁵¹

a) Background of Resolution 3171 (XXVIII)

After the adoption of Resolution 1803 (XVIII), there were no significant developments until the UNCTAD Trade and Development Board adopted its own resolution on permanent sovereignty over natural resources. As will be recalled, the paragraph dealing with nationalization and compensation ended with the restrictive clause "without prejudice to what is set forth in General Assembly Resolution 1803 (XVIII)." In the course of the discussion, eleven Latin American countries had submitted a joint draft resolution whose preamble referred to the UN Charter and decisions of the General Assembly and UNCTAD as instruments in conformity with which

50. 17 U.N. GAOR, Second Committee (846th mtg), U.N. Doc. A/C.2/SR. 846 at 4 (1972). Of course, other delegates of the bloc made similar statements.

51. For further details as to these and other USSR proposals, see Gess, *supra* note 41, at 422. For the full text of these amendments, see UN Docs. A/AC.97/L.2 and Rev. 1; E/L.914, A/C.2/L. 670; A/L. 414. In plenary, the USSR amendments were rejected by a vote of thirty-four in favor, forty-eight against, and twenty-one abstentions.

permanent sovereignty should be exercised.⁵² After the amendments submitted by the United States were rejected, the Latin American co-sponsors introduced a revised draft wherein the aforementioned restrictive clause was incorporated as a compromise formula to meet the objections of those countries that had seen a conflict between the original draft and Resolution 1803.⁵³

The increased membership of the United Nations by some thirty new developing countries, and the marked departure of the Latin American countries from the position they had traditionally supported were the two main factors that eventually led the UN General Assembly to accept the views on nationalization, expropriation, and compensation that the Soviet delegations presented at the Commission on Permanent Sovereignty and at the 1962 session of the Assembly. The discussion of the General Assembly in the third Committee of the 1973 session of the Assembly (at which the aforementioned Resolution 3171 (XXVIII) was adopted) clearly shows the decisive role played by these two factors.

The representative of Iceland, on behalf of the delegations of Argentina, Chile, Egypt, Iceland, Kenya, the Lybian Arab Republic, Peru, The United Republic of Tanzania, and Venezuela introduced a draft resolution relating to the agenda item on permanent sovereignty over natural resources. No questions of nationalization or expropriation were contained in this draft. In the course of the discussion, the delegations of Algeria, Iraq, and the Syrian Arab Republic introduced as an amendment the paragraph 3 that is reproduced at the end of section III-7.⁵⁴ Given the explicit and unequivocal language of this paragraph, it is difficult to understand remarks from the representative of Iraq, who introduced the amendment, that:

The amendment was not, however, directed against foreign investment as such. This government welcomes any private investment

52. See full text of the draft resolution in 12 Trade & Dev. Bd., UNCTAD Doc. TD/B/L.299 (1972). The co-sponsors of the draft were Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Peru, Uruguay, and Venezuela.

53. As revised, the draft resolution as a whole was adopted by a vote of thirty-nine in favor, two against, and twenty-three abstentions. Greece and the United States voted against; some developing countries abstained. For further details of the discussion of Resolution 88 (XIII), See Note, 7 J. WORLD TRADE LAW 376-82 (1973).

54. For a full text of the draft resolution and the amendment, see 28 U.N. GAOR, Annexes (Agenda Item 12) 1 at 6-7.

which was in conformity with the goals of its national development plans, but it contended that [for] States that had the power to carry out nationalization, *subject to compensation*, it was the only means of safeguarding their interests (emphasis added).⁵⁵

In any case, the amendment was incorporated into the draft resolution and put to a vote as paragraph 3 thereof.⁵⁶

Still, a third factor seems to have contributed greatly to the abrupt and drastic change from the original position of the 1962 General Assembly. Just three months prior to the adoption of Resolution 3171 (XXVIII), the Algiers Conference of Non-Aligned Countries adopted its well-known Economic Declaration. A paragraph of the Declaration reads as follows:

The Conference gives its unreserved support to the application of the principle that nationalization carried out by States as an expression of their sovereignty, in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and its mode of payment and that any disputes which might arise should be settled in accordance with the national legislation of each State. . . .⁵⁷

When paragraph 3 of General Assembly Resolution 3171 is compared with the second half of the foregoing text, it is discovered that they are, almost literally, of the same tenor.⁵⁸

b) The UNCTAD Working Group Negotiations

As one more closely approaches the date of the adoption of the NIEO Charter, one begins to see how legislative history illuminates the genuine scope and purpose of its provisions on nationalization,

55. *Id.* Second Committee, Summary Records of Meetings at 425.

56. The paragraph was adopted by a vote of eighty-one in favor, eleven against, and twenty-three absentions. Some developed and developing countries abstained.

57. Fourth Conference of Heads of State or Governments of Non-Aligned Countries (Algiers, September 5-9, 1973) at 10.

58. Before concluding this briefing of this first set of antecedents of NIEO's new approach, it should be added that in contrast to the vote on Resolution 1803, the General Assembly resolution referred to passed by the vote of both the Third World and Soviet blocs, the large majority of developed countries abstaining and some voting against. Resolution 3171 was adopted by 108 in favor, one against (United Kingdom) and sixteen abstentions. Resolution 1803, in turn, had been adopted by eighty-seven in favor, two against, and twelve abstentions. The two countries voting against were France and South Africa; the countries abstaining were the Soviet bloc (including Cuba), Ghana, and Burma.

expropriation, transfer of ownership of foreign property, and compensation therefor. In particular, reference is made to the third and fourth sessions of the Working Group on the Charter of the UNCTAD Trade Development Board (hereinafter Working Group) and its respective reports, and also to the negotiations and discussion in the 29th session of the UN General Assembly (1974), the latest evolutionary stage of the Charter.

The third and fourth, or last two sessions of the Working Group, were held in 1974; the third in Geneva and the fourth in Mexico.⁵⁹ The report on the third session contains the first proposals regarding nationalization and compensation advanced in the Group. Presented in the form of alternatives, these proposals reflected the two major (and opposite) positions which had been taken on the subject. Since no agreement was reached at the session, the report confined itself to reproduce the proposals as "paragraphs that have only been the subject of discussion and preliminary consultations and also require further consideration."⁶⁰

The experience and outcome of the fourth and last session of the Working Group was similar to that of the third session. Since no agreement could be reached as to a considerable number of topics and issues, the so-called "Draft Charter" submitted by the Group in its report to the UNCTAD Trade Development Board again is drafted as alternate proposals. As pointed out by the Chairman of the Group, Ambassador Jorge Castañeda, when introducing the report in the Second Committee of the Assembly, "The Group has more or less agreed on sixteen basic articles, as well as on ten preambular paragraphs and on eleven principles in Chapter I . . . where agreement had not been reached, the various alternatives were given in the report."⁶¹ Ambassador Castañeda gave the following account of the disagreements in this excerpt from his statement:

59. The first two sessions of the Group can be overlooked for the present purposes. Little progress, if any, was made apart from the organizational aspects; negotiations with the view of reconciling different positions did not start until the third session. A report on the two first sessions of the Group (Geneva, February and July, 1973) was submitted to the Board, then transmitted with comments thereon to the General Assembly at its 28th regular session (1973). See UNCTAD Doc. RD/B/SR. 361-81 (1973).

60. Cf. UNCTAD Doc. TD/B/AC. 12/3 (1974), Alternatives 1, 4, and 6 at 15-16.

61. 29 U.N. GAOR, Second Committee (1638th Mtg.) 382, UN Doc. A/C.2/SR. 1638, at 383.

The second point in paragraph 2 on which agreement had not been reached was nationalization and terms of compensation. There had been differences of opinion on the matter for over a century, as could be seen from the many recorded international cases and precedents. The views of the developed countries, and some of the precedents, were diametrically opposed to the views of the developing countries and to other precedents. The basic difference of opinion concerned the law which was applicable and the nature of the compensation. The developing countries maintained that compensation should be fixed in accordance with the law of the expropriating State. The Group B countries maintained that, while the domestic law of each country played a decisive role, if the solution imposed by that law in the setting of compensation did not satisfy certain international standards, international law should be applicable. In that context, they understood international law to include generally accepted practice as well as bilateral or multilateral agreements concluded by the expropriating country. Among such generally accepted practice, they included the payment of "prompt, adequate and effective" compensation—the almost ritual formula of jurists in those countries, particularly the common-law countries. The countries of the Group of 77 denied the existence of generally accepted practice on that issue, since the legal precedents and opinion on the matter differed too widely for there to be any real international custom. It had therefore been very difficult to reconcile the views of those two groups. Every effort had been made to come to some kind of agreement which defined the issue in precise terms [sic] would probably not be possible for some time to come. In New York, attempts had been made to refer only to the right to nationalize, without dealing explicitly with the question of conditions of compensation. However, all efforts had been in vain. One of the main reasons was undoubtedly the fact that both parties felt that all the issues in paragraph 2 were inextricably linked and that any agreement must be a comprehensive one.⁶²

One point should be clarified in connection with the positions held during the last session of the Working Group. In the third session, there were only two main positions. These positions basically corresponded to those referred to in the foregoing passage. However, in the last session, several other alternatives were advanced.

It is true that one of the alternatives incorporated the position according to which "the payment of compensation, as appropriate,

62. *Id.* at 383-84.

shall be in accordance with the domestic law of the nationalizing State," and that controversies concerning the question of compensation shall be settled under the same law and by the tribunals of the same State (Alternative 1), and, likewise, that other alternatives incorporated the position according to which "the sovereign rights in question (to nationalize, expropriate or requisition) shall be exercised in accordance with the applicable rules of international law, in particular with regard to the payment to the owners of prompt, adequate and effective compensation" (Alternative 4). But it is also true that other proposals sought a compromise between this and the opposed position. In particular, there was Alternative 2, according to which "in the case of foreign property just compensation shall be paid in the light of all relevant circumstances;" also negotiation, good offices, inquiry, fact-finding, conciliation, mediation, arbitration, or international adjudication were contemplated for the settlement of disputes "on the basis of the principles of equity of States and free choice of means." As stated in the report of the Working Group, this alternative was proposed by the representative of the Philippines (Mr. H.J. Brillantes) in his capacity as Chairman of Negotiating Group 2. "The view was expressed," the report goes on, "that this proposal could serve as a useful basis for further negotiations."⁶³

Any effort made in the subsequent New York informal talks to reach an agreement on the basis of the Philippine alternative, or of any other formula of compromise, failed. As the Second Committee of the General Assembly was told by the Chairman of the Working Group, "all efforts had been in vain" in this respect. Accordingly, the only text that reached the General Assembly was Article 2, subparagraph 2(c) of the new "Draft Charter," which was submitted to the Assembly by the representatives of the developing countries, the Group of 77. This draft had been elaborated and completed in the course of the Assembly session and was circulated to the representatives of the States not members of the Group shortly before the discussion of Item 48 of the Agenda began in the Second Committee.⁶⁴

63. See UNCTAD Doc. TD/B/AC.12/4, Corr. 1 (1974) at 8; full text of alternatives at 8-10.

64. See U.N. Doc., *supra* note 61, at 389. For the full text of the draft resolution, entitled "Charter of Economic Rights and Duties of States" (Doc. A/C.2/L.1386), see 29 U.N. GAOR, ANNEXES, Report of the Second Committee at 1.

c) The Alleged Change in the Group of 77 Position

With regard to the history of the text submitted by the Group 77—which was the one eventually incorporated into the present Charter—the following account has been offered by an authorized spokesman of the Group:⁶⁵

Le second changement introduit par les 77 présente une importance décisive. Le projet initial des 77 reconnaissait le droit de chaque Etat de nationaliser, exproprier ou transférer la propriété des biens étrangers, auquel cas cet Etat devrait verser une indemnité adéquate, à condition que toutes les circonstances pertinentes le requièrent. De nombreux Etats du groupe des 77, y compris le Mexique, avaient de graves réserves à l'égard de cette formulation. Ils estimaient qu'une telle formulation serait interprétée en ce sens qu'il n'existait pas d'obligation d'indemniser dans le cas d'expropriation des biens étrangers, ou en d'autres termes, que la paiement pouvait être laissé à la volonté discrétionnaire de l'Etat expropriant. En revanche, une forte majorité des 77 affirmait qu'il existe une obligation internationale d'indemniser, puisque ceci constitue un principe général du droit et qu'en aucune législation n'est inscrit le principe contraire, en estimant toutefois que la législation de l'Etat expropriant devait fixer les conditions, modalités et les délais de la compensation. Après un débat au sein du groupe de contact des 77, et sur proposition du Mexique, il fut décidé sous condition d'une approbation ultérieure du Groupe des 77 en plénière, laquelle fut obtenue, de changer le texte de cet alinéa par un autre qui consacrait la position opposée, c'est-à-dire celle reconnaissant que l'Etat expropriant avait une obligation de payer une indemnisation. La partie correspondante de cette nouvelle rédaction dit ainsi: ". . . auquel cas (l'Etat qui adopte ces mesures) devrait verser une indemnité adéquate, *compte tenu de ses lois et règlements, et de toutes les circonstances qu'il juge comme pertinentes*"⁶⁶ (emphasis added).

65. Castañeda, *La Charte des Droits et Devoirs Economiques des Etats, Note sur son processus d'elaboration*, XX ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 31, 50-51 (1974).

66. A similar account was given to the Second Committee by another representative of Mexico, Mr. García Robles, when introducing, on behalf of the sponsors, the revised and final draft of the Group of 77. The original draft, in effect, said that ". . . appropriate compensation should be paid by the State taking such measures, *provided that all relevant circumstances call for it*" (emphasis added). The revised and final text instead says that ". . . taking into account its relevant laws and regulations and all circumstances that the State considers pertinent" (emphasis added). According to the representative of Mexico, in this new version "a more explicit clause had been substituted for

This account of the developments leading to the Group of 77 text, and the interpretation of the meaning of the alleged change are shared by other representatives of the Group. As a matter of fact, the existence of an international obligation to pay compensation has been admitted by a number of developing countries in various fora, including the 29th session of the General Assembly.

Despite the fact that these countries individually admit the existence of such an international obligation, there remains the question of whether the above interpretation of the Group of 77 text is warranted in light of the history of this Group's position and other relevant developments that took place during the discussion at the 29th session of the General Assembly.⁶⁷ The last minute change in the Group of 77's position that we are told took place does not conform at all to the attitude taken by the same Group (or by a large majority of its members) a year earlier when Resolution 3171 (XVIII) was adopted. As will be recalled, paragraph 3 of the Resolution denies the existence of an international obligation to compensate. Except for the Philippine alternative, such an obligation was also absent from each of the other alternatives proposed by developing countries at the UNCTAD Working Group.

d) The General Assembly Discussions

A look at the discussion in the 29th session of the General Assembly, and in particular, the attempted compromise formulas submitted by developed countries and some of the developing countries at the Second Committee, further illuminates the complex history of subparagraph 2(c) of Article 2 of the NIEO Charter. At the Second Committee, the following amendments were proposed by fourteen developed countries:

the words 'provided that all relevant circumstances call for it'. See U.N. Doc., *supra* note 61, at 433. Obviously, the new text was more explicit than the original one, but only in terms of the amount of words. From the point of view of substance, it is evident that no change at all took place.

67. The aforementioned construction of the final revised text of the Group of 77 has been shared by former Judge Eduardo Jiménez de Aréchaga. To him also, "it was only a few days before the vote that the Group of 77 changed its position and proposed to revise the text by inserting a provision *imposing* the obligation to pay 'appropriate compensation'" (emphasis added). See *General Course in Public International Law*, 159 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 3, 301 (1978).

Article 2

1. Every State has permanent sovereignty over its natural wealth and resources and has the inalienable right fully and freely to dispose of them.

2. Each State has the right:

. . . .

(d) To nationalize, expropriate or requisition foreign property for a public purpose, provided that just compensation in the light of all relevant circumstances shall be paid;

(e) To require that its national jurisdiction be exhausted in any case where the treatment of foreign investment or compensation therefore is in controversy, unless otherwise agreed by the parties;

(f) To settle disputes where so agreed by the parties concerned through negotiation, good offices, inquiry, fact-finding, conciliation, mediation, arbitration or judicial settlement, on the basis of the principles of sovereign equality of States and free choice of means.

3. States taking measures in the exercise of the foregoing rights shall fulfill in good faith their international obligations.⁶⁸

Each of these paragraphs was overwhelmingly rejected. Paragraphs 1 and 2 (including subparagraphs (d), (e), and (f)) were rejected by a vote of 97-19, with eleven abstentions. Paragraph 3, voted upon separately, was rejected by a vote of 71-20, with eighteen abstentions. A large number of developing countries abstained from the vote on paragraph 3: Afghanistan, Barbados, Cyprus, Gabon, Haiti, Indonesia, Iran, Jordan, Khmer Republic, Kuwait, Laos, Liberia, Malawi, Swaziland, and Thailand.⁶⁹ This indicates that at least some members of the Group of 77 were not totally disapproving of new compromise formulas.

e) More on the Group of 77 Position with Regard to
"International Obligations"

In spite of both the history and the explicit, unequivocal wording of subparagraph 2(c), some spokesmen for the NIEO Charter continue to state that it does not place matters of nationalization and compensation entirely outside the reach of international law.

68. For the full text of amendments (Doc. A/C.2/L 1404), see Report of the Second Committee, *supra* note 64, at 6.

69. *Id.* at 10.

Ambassador Castañeda, one of the leading architects of the Charter, insists that:

Il est donc évident que la non inclusion d'une disposition concrète dans l'article 2 concernant l'exécution de bonne foi des obligations internationales ne veut pas dire que du point de vue juridique, le système de la Charte dans son ensemble rejette ce principe. Celui-ci a été catégoriquement énoncé dans le chapitre I(j), et s'applique à toutes les matières régies par la Charte, y compris notamment celles de l'article 2.⁷⁰

What are the provisions of other articles of the Charter which must be interpreted and applied in conjunction with Article 2?⁷¹ Ambassador Castañeda mentions, in particular, the principle of "fulfillment in good faith of international obligations," which is recognized in Chapter I(j) of the Charter.

There are several problems with Ambassador Castañeda's argument. It is unrealistic to suggest that the "international obligations" referred to in Chapter I(j) includes those embodied in customary international law, since the latter were emphatically repudiated during the process of elaboration of the NIEO Charter. More importantly, such a contention overlooks the fact that these obligations were expressly and overwhelmingly rejected when paragraph 3 of the above-mentioned amendments introduced at the Second Committee were put to a separate vote.⁷²

Finally, the argument ignores the restrictive and inflexible attitude assumed by the developing countries when the issue was being negotiated in the UNCTAD Working Group. Ambassador Castañeda himself admitted that "It had been impossible to reach any agreement on that point also." Introducing the reports of the Working Group to the Second Committee of the General Assembly, he detailed the reasons for the impasse:

The third controversial issue in paragraph 2 concerned the principle of fulfillment in good faith by States of international obligations concerning the principle of permanent sovereignty,

70. See Castañeda, *supra* note 65, at 54.

71. Article 33(2) of the NIEO Charter actually says that its provisions "are interrelated and that each provision should be construed in the context of other provisions."

72. See note 69 and corresponding text. A *propos* of the words "international obligations," it should be noted that they do appear in other articles of the Charter (Arts. 4 and 12(7)). In these articles, these words are used in connection with matters entirely unrelated to Article 2.

nationalization, transnational corporations, and so on. The same difficulties arose: the developing countries maintained that the only international obligations were those freely assumed under treaties, while the Group B countries argued that there were additional obligations deriving from general international law or generally accepted practice. It had been impossible to reach any agreement on that point also.⁷³

To reiterate, the letter and the spirit of Article 2, subparagraph 2(c) of the NIEO Charter clearly demonstrate a purpose to "liberate" from any international restrictions or limitations the exercise of the State's right to nationalize foreign-owned property. The legislative history of the Charter, especially the express and overwhelming repudiation of the proposed amendment stipulating the fulfillment of "international obligations" in good faith, leaves no room whatsoever for any doubt as to this intention.⁷⁴

12. *The Question of Compensation: Settlement of Disputes*

A comparison of the procedural aspects of Article 2, subparagraph 2(c) of the NIEO Charter (i.e., the provisions concerning settlement of disputes) with the corresponding provisions of Resolution 1803, suggests another way in which the new instrument departs from the position taken by the General Assembly in 1962.

73. See U.N. Doc., *supra* note 61, at 384.

74. The following passages addressing the question of compensation from the Lima Declaration and Plan of Action on Industrial Development, adopted in 1975 by the Second General Conference of the United Nations Industrial Development Organization (UNIDO), also corroborates our submission:

32. That every State has the inalienable right to exercise freely its sovereignty and permanent control over its natural resources, both terrestrial and marine, and over all economic activity for the exploitation of these resources in the manner appropriate to its circumstances, including nationalization in accordance with its laws as an expression of this right, and that no State shall be subjected to any forms of economic, political or other coercion which impedes the full and free exercise of that inalienable right.

For the full text of the Declaration, see Doc. ID/Conf. 3/31, or U.N. Doc. A/10112 (1975).

The NIEO's new approach to expropriation or nationalization of foreign property, and the compensation therefor, is perhaps more explicit in the Lima Declaration than in any other previous instruments, including the NIEO Charter. In effect, "nationalization in accordance with its laws" is a clear unequivocal expression of the idea that the free exercise of sovereignty and permanent control over its natural resources is an inalienable right of every State, not subjected in any respect to any other legal order.

As will be recalled, paragraph 4 of Resolution 1803 stated:

In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

These provisions explicitly contemplate the settlement of compensation disputes by international methods of settlement when national jurisdiction has been exhausted and the parties concerned (presumably including both private individuals and corporations) have agreed to arbitration or international adjudication. In contrast with this position, Article 2, subparagraph 2(c) of the NIEO Charter makes no express mention of these methods of settlement; it refers only to "other peaceful means," thus avoiding an explicit reference to international means, such as arbitration and international adjudication. Neither subparagraph 2(c) of the Charter nor Resolution 1803 goes further than to contemplate settlement outside national jurisdiction only when there is an agreement by the parties involved. But according to the marked emphasis placed by subparagraph 2(c) on national jurisdiction ("it *shall* be settled under the domestic law"), that subparagraph also seems, by implication, to reject settlement by recourse to arbitration or international adjudication.

The settlement of disputes only under domestic law and by the courts of the nationalizing State is a logical corollary of the position taken with regard to the substantive aspects contained in subparagraph 2(c). If nationalization of foreign property and compensation therefor are matters within the sole, exclusive national jurisdiction, settlement of disputes arising out of such matters should likewise fall within the same jurisdiction. Settlement under international law and by courts or other international means will depend entirely on the will and consent of the nationalizing State.

The legislative history of the procedural provisions of subparagraph 2(c) is as conclusive as it is with regard to its substantive provisions. To illustrate, the following pertinent passage of the speech made in the plenary of the General Assembly by Mr. Emilio Rabasa, then Foreign Minister of Mexico, follows:

. . . But, as the charter says, if any dispute arises it should be settled in accordance with the domestic law of the nationalizing State and by its tribunals; that is, it should be internal legal order which establishes the procedures and means of compensation.

What is not to be tolerated, and what the overwhelming majority of countries have therefore completely rejected, is that instead of or in addition to the national legal system, other bodies or extra-national procedures should be called on to rule on what a State should do in such cases. To accept such a system as binding would be to place States on an equal legal and political footing with foreign corporations, and that would mean that those corporations would receive nothing more or less than the treatment which should be reserved solely for States.⁷⁵

The foregoing statement is an impassioned expression of the new Latin American position regarding the admissibility of international claims. This position was unanimously adopted by the Latin American Group, including several Caribbean countries, in an *Aide Memoire* submitted to the Working Group on multinational enterprises established during the "New Dialogue" that former U.S. Secretary of State Kissinger promoted in early 1973. The Latin American document, which has also been circulated in the United Nations in connection with proposed "codes of conduct" for multinational enterprises, contains a number of guidelines of conduct. The first of these guidelines reads as follows:

A. The TNE's [transnational enterprises] shall be subject to the laws and regulations of the receiving country and in case of litigation, they should be subject to the exclusive jurisdiction of the courts of the country in which they operate.

The position embodied in this text is elaborated in the following passages of the Latin American Group commentary to guideline A:

11. This statement is the reflection of an old Latin American concern that has its origin in the pretension of the TNE's to have a right to a status, or to be beneficiaries of a privileged treatment, in the country where they operate. To validate this pretension would signify the provision of a preferential and discriminatory status in favour of foreign enterprise. It would also presuppose the establishment of different treatment for nationals and foreigners, which would be unacceptable. But in the last analysis, the exemption of transnational enterprises from the internal juridical order would bring, as a consequence, injury to the fundamental basis upon which the sovereignty of the state resides, which implies full competence over the entire area in which the power of the State is exercised . . .

. . . .

75. 29 U.N. GAOR, Prov. Verbatim Records, A/PV 2315 at 74 (1974).

13. A natural consequence of the subjection of foreign enterprises to national legislation is the existence of an exclusive competence on the parts of the courts of the receiving country to hear any case or litigation that arises from the application of this legislation. On occasion, the foreign enterprise presumes to escape the jurisdiction of the receiving States by means of private agreements in which it is stipulated that any controversy that may arise concerning the activities of the enterprise shall be resolved by the courts of the country of origin or of a third state, or *that they will be submitted to international arbitration*. These types of agreements are not acceptable and, in more than one case, are considered nullified of all right by the national laws (emphasis added).

The new Latin American position regarding the admissibility of international claims is clearly defined in the *Aide Memoire*. The rationale of the position lies, essentially, in the Calvo Doctrine, that is, foreign enterprises are not entitled to a "privileged treatment" or a "preferential and discriminatory status;" a different treatment for nationals and foreigners, therefore, is considered unacceptable.⁷⁶

Should the new Latin American position be compared with the position incorporated in subparagraph 2(c) of Article 2 of the NIEO Charter; while the former amounts to an absolute, indiscriminate elimination of international means of settlement in the field of investment disputes, subparagraph 2(c) expressly contemplates settlements by other than the local courts. When it is freely and mutually agreed upon by all of the *States* concerned, settlement of disputes by "other peaceful means" may be sought. What the Charter, however, does not provide for are agreements for the same purpose that may

76. The full text of the *Aide-Memoire*, including both the guidelines and the commentaries thereto, as well as a summary of the United States position, are reproduced in OAS Doc. OEA/Serv. 6, G CP/CG-607/75, rev. 1 corr. (1976). Another expression of the new Latin American position is found in Article 51 of Decision 24 of the Commission of the Cartagena Agreement, establishing the "Common Regime of Treatment of Foreign Capital and or Trade Marks, Patents, Licenses and Royalties," which is in force in the present five members (Bolivia, Colombia, Ecuador, Peru, and Venezuela) of the Andean Group:

Article 51. In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors.

Full text of Decision 24 is reproduced in INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, I INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN 296 (1975); and in 11 I.L.M. 126 (1972).

be mutually and freely concluded by the State and the foreign private individual or corporation parties to the dispute; the silence of the Charter in this respect reflects the position that the Group of 77 had adopted with regard to such agreements.⁷⁷ To this most important point, though, we will turn, in a wider context, in the *Recapitulation*.

IV. POST-WORLD WAR II INTER-STATE PRACTICE: A *de facto* ABANDONMENT OF TRADITIONAL PRINCIPLES?

A look at the last three decades of the inter-State practice of expropriation, nationalization, and transfer of foreign property, and particularly compensation for these actions, raises the question of whether the current Third World demands are altogether incompatible with this practice. Post-World War II inter-State practice shows a marked and progressive departure from many of the principles of traditional international law. But has such practice amounted to a *de facto* abandonment of the basic principles? More specifically, has the principle establishing the international obligation to pay compensation been abandoned?

13. *The Lump Sum Settlement Agreements*

By 1958, a post-war inter-State practice of expropriation, nationalization, and transfer of foreign property, as well as compensation for such acts, had developed to the extent it was described by this author in the Fourth Report to the International Law Commission.⁷⁸ The following paragraphs incorporate the contents of the pertinent passages of that report.

This inter-State practice developed in connection with nationalizations, particularly those carried out immediately after World War II as part of the broad programs of socio-economic reform undertaken by various countries of Eastern and Western Europe. It was in response to these general and impersonal expropriations that the

77. As Ambassador Castañeda told the General Assembly Second Committee, the Group of 77 "... considered that such agreements [i.e., "investment agreements between States and private companies"] were not international agreements, since they were not concluded between States and were therefore governed by the domestic law of the State concerned." See U.N. Doc., *supra* note 61, at 383.

78. The Fourth Report dealt with the international responsibility of States for "measures affecting acquired rights" of aliens. [1959] II Y.B. INT'L L. COMM'N 1-36.

so-called "lump sum" agreements were concluded. Under these agreements, the expropriating State and the State of nationality of the aliens affected by the expropriation agreed on a lump sum compensation scheme as a means of indemnification for the expropriated property. The figure agreed upon was determined irrespectively of the real value of the property.⁷⁹

A number of features should be noted in connection with early post-war European nationalizations. First, in all cases, compensation was paid for the property or undertakings expropriated. In the Central European countries, an exception was made in the case of persons who had collaborated with the enemy or behaved unpatriotically during the war; the non-payment of compensation was a confiscatory measure imposed as a penal sanction. Second, the compensation did not, as a rule, cover the total value of the property or undertakings, and sometimes was less than half the estimated value. Thirdly, in exceptional cases, compensation was payable immediately, payment normally being made in the form of public bonds or sometimes shares of the expropriated undertakings themselves, redeemable at different dates. Finally, practically none of the enactments made distinctions on the basis of the nationality of the persons affected and some even provided for preferential treatment of aliens affected by the nationalization.⁸⁰

The practice embodied in the agreements mentioned has further general characteristics which should be noted before considering the specific aspects of compensation.⁸¹ Unlike agreements concluded in order to regulate the amount, form, and time for payment of compensation to be paid in the future, these agreements were concluded *a posteriori* and embodied the settlement of a dispute or the adjustment of a situation between the two States concerned. Such arrangements envisaged "negotiated" compensation, separate and independent from any which may have been fixed unilaterally under the nationalization measures. The agreements, therefore, as a rule,

79. The practice seems to have been initiated with the Agreement of May 30, 1941, between Sweden and the USSR, the text of which has not been published. See I. FOIGHEL, NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW 97 (1957).

80. With regard to these and other features of the post-war European legislations on the subject, see Doman, *Post-War Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1140 (1948).

81. For an account of the early agreements, some twenty-five in all, see Foighel, *supra* note 79, at 133. For an updated list, see Lillich and Weston, Part II, *infra* note 86, at xiii.

involved "compromise" formulas which vary according to the cases and circumstances. In this respect, the practice followed was markedly similar to that adopted in other agreements concluded in the past for the purpose of fixing a lump sum as full "reparation" for injuries to aliens caused by wrongful acts or omissions imputable to the contracting States, and which settled or discharged the individual claim to which such acts or omissions have given rise.⁸² The agreements under discussion also had the effect of discharging claims. Thus, Article 3 of the Swiss-Yugoslav agreement stipulated that, after the payment of the agreed compensation, the Swiss Government will consider all claims by its nationals as finally settled. Lump sum agreements of this type have various other characteristics not directly relevant to the purposes of this article.⁸³

Although lump sum agreements are also of interest from the point of view of the "promptness" and "effectiveness" of compensation, the chief matter of interest is the lump sum agreed upon as compensation for all the property expropriated from the nationals of the contracting claimant State. The relationship between the lump sum figure and the real value of the property or, as the case may be, the total amount of the claims, is appreciably different in the various agreements. It has, for example, been calculated that the compensation which Poland agreed to pay Great Britain amounted to only one-third of the value of British investments, and the proportion was the same in the case of the compensation agreed upon with Czechoslovakia. On the other hand, it is considered that the compensation paid under the settlement with Yugoslavia covered half the value of the investments, and that paid under the agreement with France relating to British interests in the French gas and electric industry amounted to seventy per cent of the value of the investment.⁸⁴

These examples, which are illustrative of the relationship between the amount of the compensation stipulated in other treaties and the estimated value of the property or the total amount of the claims, show that lump sum agreements, far from envisaging "just"

82. In this connection, see M. WHITEMAN, III DAMAGES IN INTERNATIONAL LAW 2067-68 (1943).

83. See Bindschedler, *La Protection de la Propriété Privée en Droit International Public*, 90 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 278-79 (1956).

84. See Schwarzenberger, *The Protection of British Property Abroad*, 5 CURRENT LEGAL PROB. 307 (1952).

or "adequate" compensation, provided for "partial" negotiated indemnification, the amount of which varied appreciably depending on the circumstances. In the case of lump sum agreements, there is no absolute uniformity with regard to the rule followed in valuing the property and determining the amount of compensation,⁸⁵ which is understandable in view of the diversity of the situations giving rise to this type of international settlement.

As regards the "promptness" of compensation, these agreements did not as a rule provide for the immediate payment of the total amount. The Yugoslav-United States agreement is an exception in this respect, part of the funds transferred to the Federal Reserve Bank by the Yugoslav Government during the German occupation being used for this purpose. The other agreements provided for the payment of the compensation in two or more installments, with or without interest, and often in the form of obligations or shares in the industries or undertakings expropriated. For example, under the Anglo-French agreement referred to in the preceding paragraph, the credit-vouchers were payable in seven annual installments and bore interest at the rate of three per cent.

In the agreements concluded with the countries of Eastern Europe, the installments extended over a considerable period, in some cases up to seventeen years, although under some of the agreements, a substantial proportion of the compensation was payable in the first installment. It is clear that the time limit for the payment of the agreed compensation necessarily depended 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 had in practice been in a sufficiently strong economic and financial position to be able to pay the agreed compensation immediately and in full.

Similar considerations apply with regard to the "effectiveness" of the compensation. Although a wide variety of payments were contemplated in the agreements, payment was generally effected through the use of frozen assets of the expropriating State in the other State, or through the delivery of specified raw materials or other goods. An example of such payment in kind is furnished by the agreement between Poland and France, which provided for the delivery of specified quantities of coal over a number of years.

85. See Foighel, *supra* note 79, at 117-19.

Examples of the first form of payment are offered by the Yugoslav-United States agreement mentioned earlier and the agreement between Switzerland and Rumania, under which twenty-five percent of the agreed compensation was to be paid from Rumanian funds frozen in Swiss banks. In the Swiss-Hungarian agreement, on the other hand, it was stipulated that part of the compensation would be paid in the legal currency of the expropriating State.

The foregoing and other aspects and features of the practice of settling international claims by "lump sum" agreements (also called "en block" or "global" settlements) have been examined more recently and thoroughly, especially by Professors R. B. Lillich and B. H. Weston, in a number of studies.⁸⁶ Theirs and other publications show to what extent this inter-State practice has expanded and is prevailing today.⁸⁷

14. *Rationalization of Current Inter-State Practice*

Long before the current views and arguments in favor of a more liberal approach to expropriation, nationalization, and particularly compensation, were advanced in the NIEO's deliberations, the fundamentals of this approach had already received wide acceptance and support. For a long time, there were learned publicists who strongly favored a revision of the traditional principles. The late Judge H. Lauterpacht was one of the first to maintain that the obligation to pay full compensation might in practice have the consequence of making a projected reform impossible.⁸⁸ Other publicists,

86. See R. LILlich & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1975). Part I (Vol. I) contains the Commentary, and Part II (Vol. II) contains the Agreements.

87. As has been discussed, approximately eighty-five lump sum agreements have been concluded in the last twenty-five years. See Lillich, *infra* note 89, at 525. "[A]t least ninety-five percent of international claims practice is today channeled through lump-sum agreement-making." See Lillich and Weston, *supra* note 86, at 43. One of the most recent and notorious is the United States-Peruvian agreement of 1974. For a detailed account of this settlement, see Gantz, *The United States-Peruvian Claims Agreement of February 19, 1974*, 10 INT'L LAW. 389 (1976).

88. *Reglés Générales du Droit de la Paix*, 62 ACADEMIE DE DROIT INTERNATIONAL, RECEIL DES COURS 346 (1937). The argument of "financial impossibility" to pay full compensation was originally invoked by Rumania in connection with its 1920's measures of nationalization, and in the late 1930's by Mexico, also in connection with its agrarian reform. See Kunz, *The Mexican Expropriations*, I N.Y.U. CONTEMP. LAW PAMPHLETS SERIES 5, 11, 27 (1940). See also CH. DE VISCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 194-95 (1957); Bindschedler, *supra* note 83, at 250.

also from developed countries, were more explicit on this point and suggested that the nationalizing State's capacity to pay is one of the most important factors to take into account when establishing the amount, time, and form of compensation.⁸⁹

In determining the amount of compensation to be paid, it is necessary to take into account equitable, practical, technical, and political considerations, as well as juridical concerns. The argument of impossibility to pay is of great importance here if one desires to remain consistent with the idea which legitimates the institution of expropriation in general—namely, that private interests, national or foreign, must yield to the interest of the community. It could be unjust to deprive those less wealthy developing countries of the power to directly exploit their natural resources and public services, industries, or other undertakings established in their territory, just because of their inability to pay compensation. "Capacity to pay" is also important from the point of view of the time and form of compensation. This capacity must be taken into account in both connections because the nationalizing State will, if not pressed to make the payment in a given, rigid form and time, in many cases, undoubtedly be able to pay compensation more adequate to the value of the property. Indeed, in no case should these considerations be interpreted as

89. See generally de Lapradelle, *Les effets internationaux des nationalisations*, I ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 69 (1948); Chargueraud-Hartman, *Les interets etrangers et la nationalization*, I ETUDES INTERNATIONALES 348 (1948); VITTA, LA RESPONSABILITÀ INTERNAZIONALE DELLO STATO PER ATTI LEGISLATIVI 143 (1953); Guggenheim, *Les principes de droit international public*, 80 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 128 (1952). After the decade of the 1950's, the foregoing lists of publications has increased considerably. See generally G. WHITE, THE NATIONALIZATION OF FOREIGN PROPERTY (1961); C. FOUILLOUX, LA NATIONALIZATION ET LE DROIT INTERNATIONAL PUBLIC (1962); I. FOIGHEL, NATIONALIZATION AND COMPENSATION (1964). In light of this impressive response of the academic community to the well-established practice of lump sum agreements, it is certainly difficult to understand the restrictive, somewhat "conservative" *dicta* of the International Court of Justice in the *Barcelona Traction* case (1970). In the opinion of the Court, "such arrangements are *sui generis* and provide no guide in the present case," characterizing them as *lex specialist*. See *Barcelona Traction*, *supra* note 21, at 41. This position has been rightly considered as "unfortunately in the extreme," since it embodies a "singularly restrictive attitude towards one potentially significant source of customary international law." Lillich, *Two Perspectives in the Barcelona Traction Case—The Rigidity of Barcelona*, 65 AM. J. INT'L L. 256 (1971). Irrespective of the question concerning shareholders' claims, there seems to be little doubt as to the Court's unfortunate underestimation of the practice of lump sum agreements as a source of international law at the present stage of its development.

authorizing the State to fix a compensation which, by reason of its amount, the time, or form of its payment, transforms the expropriation into a confiscatory measure or a mere despoliation of private property.⁹⁰

It is evident that if such measures are to be avoided, it is vital that expropriation, nationalization, and the transfer of foreign property are not considered as matters falling within the so-called "reserve domain" of the State. Further, compensation must be an obligation imposed on the latter by international law. The amount as well as the time and the form of the payment may depend upon negotiations and agreements between the States concerned, or between the nationalizing State and the private individuals or corporations affected by the measures, and even, in the absence of such agreements, on the unilateral decision of the nationalizing State, provided that compensation meets the minimum conditions that postwar inter-State practice has established.

It is precisely in this regard that a great fundamental difference exists between the principles developed by the lump sum agreements and the position taken by the Third World and incorporated in the NIEO Charter. While the principles that authorize a reasonable and partial compensation consistent with the financial capacity of the nationalizing State assume the existence and the acceptance by States of an international obligation to pay compensation, the system postulated by the Charter leaves everything that concerns compensation, beginning with the question whether or not it must be paid at all, to the sole and unrestricted will of the nationalizing State.

V. RECAPITULATION

For the purpose of this recapitulation, let us begin by attempting, once more, to define the true nature and scope of the right to nationalize foreign-owned property in light of the new approach, i.e., under the proposed New International Economic Order and its most prominent legal instrument, the UN Charter of Economic Rights and Duties of States. We will then turn to some related issues and aspects of NIEO's new approach to the law governing nationalization and compensation.

The right "to nationalize, expropriate or transfer of foreign property," as conceived and formulated in the NIEO's Charter, becomes,

90. See Fourth Report, *supra* note 78, at 24.

in nature and scope, a corollary right of the classic concept of absolute State sovereignty. The principle, reaffirmed by the UN General Assembly Declaration on the Establishment of a NIEO, that “[n]o State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right,” is an unquestionable principle.

What is questionable, however, is the claim that the right to nationalize foreign property is not subject to conditions and limitations established by international law. Nevertheless, in the legislative history of sub-paragraph 2(c) of Article 2, the presence of such a claim is apparent beyond any doubt, as it is also apparent in the letter of the Charter. In particular, the flat and overwhelming refusal on the part of the Third World countries to incorporate in the Charter, in connection with the exercise of the right to nationalization, the elementary principle that States shall fulfill their international obligation in good faith, is further and conclusive evidence. Consequently, the determination of compensation, if any, for the nationalization of foreign-owned property, as well as the settlement of disputes to which the question of compensation may give rise, fall within the exclusive, internationally-unrestricted, domestic jurisdiction of the State.

In spite of its general and moderate terms, the position taken by the General Assembly in its 1962 Resolution 1803 (XVII), adopted with substantial support from both developing and developed countries, was repudiated. Under the new approach to the law governing nationalization, the nationalizing State will only have to take into account “its relevant laws and regulations and all circumstances that the State considers pertinent” in determining the amount of compensation, its time and form of payment, and even the question of whether or not any compensation at all will be paid. Regarding the settlement of disputes, under the same new approach, the exclusiveness of the domestic jurisdiction of the State is also strongly postulated. It is true that under Resolution 1803, international means of settlement (in particular, arbitration and international adjudication) were only contemplated in accordance with the principle of the “free choice of means;” but it is also true that under the NIEO’s Charter, international means are not even contemplated. More eloquent than this formal omission is the fact that the resort to such means was strongly repudiated in the legislative history of the pertinent provision.

Thus, the conception of the right to nationalize (both national and foreign) private property that eventually was adopted in the

UN General Assembly was, essentially, the Soviet conception—a conception that had been steadily gaining support since it was first launched during the 1962 discussions of Resolution 1803 (VIII).⁹¹ It is apparent, therefore, that the Third World's new approach to the law governing nationalization projects the image of a kind of emotional renaissance of the classic concept of absolute State sovereignty—a concept that was thought to be gone forever, if not in the Soviet countries, in the rest of the world, including the developing countries. As we have seen, it is the concept brought to serve as one of the main bases of the proposed NIEO and the fundamental postulate of the emerging law of development. As it has rightly been put, sovereignty today is considered, under the ideology of development, “as the very basis of and the previous condition to development.”⁹²

91. Illustrations of the Soviet conception are found under subsection III, 11 above. Obviously, the official Soviet conception is fully and unreservedly shared in Soviet academic circles. The following citation will serve as an illustration:

International law does not consider the nature of property rights nor does it regulate property relations within a state. Under international law states are sovereign, therefore only municipal and not international law can regulate all matters connected with the acquisition, transfer and loss of ownership rights, including the loss of ownership under the terms of a nationalization law. This cannot become a subject for discussion by another state. The laws of the state carrying out the nationalization, and not international law, determine the conditions under which property is taken from private persons and in particular to whom the law extends, whether or not compensation shall be paid, etc., etc. This postulate applies equally to the property of aliens.

Vilkow, *Nationalization and International Law*, SOVIET Y.B. INT'L L. 78 (1960). (The quotation is from the English summary of the article). For an analogous statement, see Sapoztimikow, *Neocolonialism Doctrines of International Protection of Foreign Concessions*, *id.* at 98 (1966-1967).

92. Virally, *La Charte des Droits et Devoirs Economiques des Etats*, *Notes des Lecture*, XX ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 57, 67 (1974). In the following citation, the nature and scope of sovereignty, as required for the achievement of NIEO's goals, are defined:

Far from being outdated, the principle of sovereignty and its economic dimension is therefore in ascendance and there are clear indications that it will be increasingly used—although primarily by the less advanced States—as a weapon to gain greater control over natural wealth and resources, to justify nationalization and other measures affecting foreign enterprises, to override contractual arrangements perceived as being contrary to development needs, to claim removal of restrictions regarding the acquisition of technology, to regulate the repatriation of profits, etc.

Geiser, *supra* note 33, at 97.

Does traditional international law, particularly as developed by the post-war inter-State practice in the field of nationalization and compensation, really justify the developing countries taking such an attitude when acting collectively? The importance of the role played by the history of nationalizations, some chapters of which reveal excessive and unwarranted demands on the part of developed countries and of their transnational corporations, should be neither overlooked nor underestimated from the juridical standpoint. However, it seems that there is another factor which is playing a role of no less importance. This second factor lies in the presence of a certain degree of misunderstanding of the true meaning of the principles of traditional international law governing nationalization and compensation.⁹³

An erroneous image of traditional international law and its post-war developments might have contributed to the misunderstanding of the principles of this law, particularly whenever this image is projected in the writings of learned authorities on the subject. As an illustration, below is one of the introductory paragraphs to a relatively recent article by former Judge Eduardo Jiménez de Aréchaga in connection with the consequences of the exercise of the State's right to nationalize foreign-owned property under "traditional" international law:

*Traditional international law considered any interference by a State with foreign-owned property a violation of acquired rights which were internationally protected, and thus an unlawful act. Today, measures of nationalization or expropriation constitute the exercise of a sovereign right of the State and are consequently entirely lawful. This fundamental change of approach significantly affects the application of the rules of State responsibility, particularly in regard to the existence and scope of the duty to compensate aliens whose property has been nationalized or appropriated (emphasis added).*⁹⁴

Was "any interference" with the property of aliens really ever considered, *per se*, a "violation of acquired rights which were internationally

93. On the basis of the unique experience he acquired during the long process of the elaboration of the NIEO's Charter, Ambassador Castañeda admitted that "En bonne partie, la confusion était due à la préparation juridique insuffisante d'un certain nombre de participants, qui par ailleurs tendaient à soligner seulement l'aspect politique du document." See Castañeda, *supra* note 65, at 55.

94. Cf. Jiménez de Aréchaga, *State Responsibility for the Nationalization of Foreign-owned Property*, 11 N.Y.U. J. INT'L L. AND POL. 179, 180 (1978).

protected, and thus an unlawful act"? A look at inter-State practice and international case law, or at any other authoritative sources of traditional international law, indicates that the answer to the question is positively *no*. In fact, a mere "interference" with the property or acquired rights of aliens was seldom, if ever, seriously considered an unlawful or arbitrary act—except in the case of a treaty provision expressly prohibiting it, or in cases where a further act or omission could be imputed to the State, such as the failure to pay an appropriate compensation or any other act or omission involving a breach of an international obligation. Hence, it will be erroneous to assert that under traditional international law, the mere exercise of the State's power to affect acquired rights of aliens, including measures of expropriation and nationalization, involves an unlawful or an arbitrary act.

The projection of the foregoing image of traditional international law makes one wonder as to the true motivation or objective behind that projection. Is it to provide a juristic rationale and a stronger justification to the Third World's approach to the law governing nationalization and compensation? If such is the case, authorities that are projecting the wrong image may or may not be accomplishing their purpose. If this is not the case and their aim is to redefine international law, their notion of the "traditional" principles concerning the right to nationalize foreign-owned property and the circumstances in which the nationalizing State incurs international responsibility is certainly without foundation.

In addition to this type of erroneous image of the principles of traditional international law governing nationalization and State responsibility for measures affecting the property of aliens, a kind of mistaken approach seems to have been taken to particular aspects of the law and practice concerning foreign private investments and their nationalization. One of the best examples is seen in the attitude that the Group of 77 adopted in the Charter negotiations with regard to the validity of investment agreements concluded between States and foreign corporations. In the following passage of Ambassador Castañeda's repeatedly mentioned statement to the Second Committee of the XXIX General Assembly, this attitude is described as follows:

. . . . Regarding investment agreements between States and private companies and the obligation to fulfil them in good faith, the Group B [developed] countries considered that, if a State accepted foreign capital under certain conditions and concluded an

agreement with the investing company, that agreement should be fulfilled in good faith. The countries of the Group of 77 did not deny the general duty of all States to fulfil their obligations, but considered that such agreements were not international agreements, since they were not concluded between States and were therefore governed by the domestic law of the State concerned. They did not have international status, because private companies were not subjects of international law. The developing countries refused to accept the formula in alternative 4 [submitted by the Group B countries] because they felt that it would be tantamount to conferring international law status on such companies and making the legal bond between the company and the State a bond of international law. Disagreement on that issue was radical.⁹⁵

That the contracts or agreements concluded between States and aliens (whether individuals or corporations) are "governed by the domestic law of the State concerned" is also unquestionable in light of traditional international law; actually, in accordance with one of the most well-established principles of this law, such contracts or agreements not only were always governed by domestic law, but mere non-compliance by the contracting State seldom, if ever, gave rise to international responsibility. Why, then, should there be an issue concerning the validity of contractual relations between States and investing foreign companies based on the assumption, *inter alia*, that accepting the obligation to fulfill the investment agreement in good faith "would be tantamount to conferring international status on such companies and making the legal bond between the company and the State a bond of international law?"

Indeed, that is precisely the juridical situation of a considerable number of the sometimes-called "international economic development agreements" concluded before and after World War II by a number of developing countries and foreign transnational corporations. Insofar as the governing law is concerned, in contrast with the aforementioned general principle, the characteristic of these agreements is the stipulation subjecting them, or parts thereof, to international law or to any system of legal principles other than the domestic law of the contracting State. Hence, this type of an agreement creates a truly international legal relationship, in the sense that it confers an "international status" on the corporation and makes international law or the other non-municipal legal system the governing law. Most of these agreements further stipulate that disputes concerning the

95. See U.N. Doc., *supra* note 61, at 383.

interpretation and application of their provisions will be submitted to arbitration or to some other international means of settlement.⁹⁶

Evidently, the purpose of the type of agreements we are referring to is to exclude the contractual relationship, or some of its particulars, from the application of the municipal law of the contracting State, as well as to remove the settlement of disputes arising between the parties from the national jurisdiction. Admittedly, agreements of such nature and scope have become unpopular in some circles of the Third World because of their alleged incompatibility with the new approach to foreign private investments. The question then arises whether such agreements are really incompatible with the principle of national sovereignty which has been reaffirmed for the purpose of assuring NIEO's goals.

Quite surprisingly, it is the new approach which seems to create the incompatibility. At the very moment the Third World is reaffirming and even reinforcing national sovereignty, the developing countries are faced with a self-limitation of their sovereign right to willingly and freely enter into the agreements with foreign individuals or corporations they deem necessary or convenient to achieve their developmental goals. From the juridical point of view, there seems to be nothing wrong with the character of the parties if a "bond of international law" results from an agreement to which the State has entered pursuant to the free exercise of its own sovereignty. Is it that agreements establishing the same "bond of international law" with developed and sometimes very powerful countries are really more compatible with the new conception of national sovereignty?

This other Third World position certainly appears to be both politically and legally unrealistic. Fortunately, it was never formally incorporated in the Charter of Economic Rights and Duties of States. Accordingly, developing countries are not prevented by any provision of this instrument from continuing a practice that, still in the view of many of them, has proven to be necessary or convenient for the achievement of their developmental goals, and which they feel has no detrimental effect on their sovereignty, either juridically or politically.⁹⁷ As will be recalled, the Latin American and some of

96. For clauses of this type, *see* García-Amador, Fifth Report to the International Law Commission, II INT'L COMM'N 41, 51-55 (1960).

97. This observation seems to find support, *inter alia*, in the fact that the 1965 World Bank Convention for the Settlement of Investment Disputes Between States and Nationals of other States, where settlement of such disputes

the English speaking Caribbean countries, instead, expressly repudiated this practice in a document containing "guidelines of conduct" for transnational corporations, and five of them (the Andean Group) did so in a legally binding subregional instrument.⁹⁸ The obstacles, and at times the impossibility, of strict observance of the prohibition stipulated therein have shown, in a practical way, how unrealistic it is for developing countries to commit themselves to such a limitation to their own freedom of action with regard to foreign private investments.

In conclusion, let us attempt to define the genuine meaning and significance of the Third World approach to the law of nationalization of foreign-owned property and compensation therefor. Is it, as a brilliant, young student from a newly independent developing country put it, a revival of "the long standing debate between proponents of the Calvo Doctrine and of the minimum standard principle?"⁹⁹ That is not exactly what appears to be taking place, however, in the United Nations in connection with the proposed establishment of a New International Economic Order. The Charter of Economic Rights and Duties of States has gone much further and in another direction; it certainly has initiated a new and different debate. This new debate centers around whether the nationalization of foreign-owned property and the compensation therefor, including the settlement of disputes concerning these questions, are no longer to be governed by principles of international law, but instead have become matters falling within the sole and exclusive jurisdiction of the nationalizing State.

Regardless of the outcome of this debate—the roots of which seem to be found in the practice of the so-called "lump sum settlement" agreements—in terms of new doctrines and principles, it is certain that the law of international claims is changing; its basic traditional concepts and principles concerning the international responsibility of States for injuries caused to aliens, especially those

between States and private investors is provided, has been ratified, as of November 20, 1979, by fifty-five developing countries. See the list of both developing and developed ratifying countries (eighty-five in total) in INTERNATIONAL CENTER SETTLEMENT OF INVESTMENT DISPUTES, Doc. ICSID/3/Rev. 3, at 1-3.

98. See the document and the subregional instrument (Decision 24 of the Commission of the Cartagena Agreement) in subsection III, 12 *supra*. The countries of the region have unanimously refused to even sign the World Bank Convention, consistent with the new Latin American position.

99. P. MAYNARD, A DISSERTATION ON THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES (A LEGAL ANALYSIS) 59-60 (1976) (unpublished).

concepts and principles governing nationalization and compensation, are undergoing a renewed series of challenges. We must hope that, as this debate continues, it takes a direction in the best legitimate interests of both the developing and developed countries.