Expropriation or Nationalization of Alien Property and the Standards of Compensation Required by International Law

Moha. Waheduzzaman*

Introduction

Expropriation or nationalization of property owned by a foreign national is an especially important phenomenon in international law. Expropriation generally denotes "the taking of property by a state from the ownership of private individuals. This may be a single asset, as in a rubber plantation or building development, or it may be an entire industry. Nationalization is best regarded as a species of expropriation, referring to the second situation."[1] However, nationalization in most cases is likely to be part of a political and social reform of the entire socio-economic system of the state. A state's respect for the private rights of aliens has never been an absolute obligation. Like most other obligations, it is subject to the legitimate higher interests of the state. Indeed, a state's recognized status under international law as a sovereign entity always validated its authority to nationalize or expropriate the property owned by a foreign national. International law, therefore, at no time imposed an absolute bar on expropriation of alien property but at every time there was considerable disagreement among the states as to the rules of expropriation due to the political differences between capitalist and socialist states coupled with the economic differences between developed and developing states. In the matters of payment of compensation, the moot questions that have principally divided the developed and developing world and have also vexed the international courts and tribunals are: What is the standard by which to measure compensation? Whether there is any and what, indeed if any, is the rule of customary international law to measure compensation? And last but not the least, what does 'adequate compensation' mean and whether and how far 'adequate compensation' is now a condition of and measure for lawful expropriation of alien property. This paper is principally an attempt to state what may be the current compensation requirements under international law on expropriation of alien property after throwing light on the ongoing theoretical debate between the developed and developing world as well as appreciating how the different courts and tribunals have responded to or approached the issue.

At the outset, however, two things should be made clear. *First,* there are in fact two related problems that exist in the context of the requirement to pay compensation on expropriation of alien property. The first problem

---

* Lecturer, Department of Law, University of Dhaka.

1 M. Dixon, *Text Book on International Law* (London: Oxford University Press, 2005) 248.

deals with the total amount of obligation of the expropriating state, i.e. whether international law requires full or partial compensation. The second problem involves valuation, i.e. if compensation, whether full or partial, is to be paid, tribunals must of necessity apply a method to achieve that standard. So, this aspect of the problem deals with the various accounting methods employed to estimate the value of the property taken. As it is already apparent, this article will only concern itself with the first of these two related problems.

Second, a distinction is commonly made between lawful and unlawful expropriations of alien property. Drawing of such distinctions is useful since it entails important practical consequences. To the present author, however, such distinctions are also useful in determining or identifying more precisely what is or what is not the issue of the present article.

Expropriation is obviously unlawful when the state takes the property violating its treaty obligations with regard to the property interests of aliens. This is based on the universally upheld principle of *pacta sunt servanda* which dictates that a state is bound, in good faith, to carry out its treaty obligations. Very often, however, an alien and his property are not protected by a treaty. In those cases, the alien and his property rights are protected by the settled rules of customary international law. According to the classical customary requirements[2], definitions of expropriation include legal criteria that (1) there must be a public purpose for the taking, (2) the taking be non-discriminatory against aliens, and (3) the state provide just compensation. Violation of any of these requirements will render the expropriation unlawful and in consequence *reparation* will follow to remedy the wrong. In practice it has been expropriations without satisfactory compensation which have caused international problems. A state claiming that the expropriation was unlawful (as opposed to arguing about the amount of compensation offered) may be entitled to different remedies, including an enhanced monetary sum.[3] For example, in cases of illegality the tribunal could order restitution of the entire property to the injured party (very unlikely) or its full monetary equivalent and this may include an element for future lost profits.[4] In practice, therefore, a state that offers compensation, however derisory, may be in a better position than a state that offers no compensation or whose expropriation is unlawful on other grounds.[5]

'Reparation', therefore, is the consequence of an unlawful state conduct whereas 'compensation', in the instant case, is one of the requirements of lawful expropriation of alien property. Former is about the consequence of

---

2 For a scholarly discussion on the classical customary international law to protect alien property see, Francis J Nicholson "The Protection of Foreign Property under Customary International Law," (1965) 6 *Boston College Law Review* 391-415.

3 Dixon, above note 1,253.

4 Ibid.

5 Ibid.

violation of an international obligation while the latter, properly understood, is a 'rights' issue from both sides of the dispute. At the one hand, *expropriation* is a *right* inherent in the sovereignty of the *expropriating state*; on the other hand, the *alien* also has the *right* to receive *compensation* on such expropriation since payment of compensation is one of the conditions of lawful expropriation. Scope of this article is not the former that deals with the 'consequence of violation of an international obligation', i.e. state responsibility but the latter that deals with the 'highly contentious issue of compensation' on expropriation of alien property, i.e. state obligation. To be more specific, this article concerns with the international obligation to pay compensation itself and not with the consequence of violation of this obligation or the other obligations in the context of the requirements of a lawful expropriation based either on the customary or the treaty rule of international law.

The Standard by Which to Measure Compensation

There still remains disagreement, lesser or greater, between the developed and developing states as to the standard by which to measure compensation. Here the argument centres not about the amount of compensation that must actually be paid on nationalization or expropriation of alien property but on the procedural question of which system of law, international or national, sets the standard for compensation.

According to the view of the developed world, the standard of compensation required by international law is the 'international minimum standard', the main thrust of which is to judge the justness of compensation by reference to international criteria rather than the provisions of municipal law of the nationalizing state. This view of the developed world has gained at least partial, if not full, recognition from the United Nations General Assembly Resolution on the Permanent Sovereignty over Natural Resources adopted in 1962. Paragraph 4 of the Resolution declares:

> 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* (emphasis supplied) in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. 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.[6]

---

6 GA Res. 1803 (XVII), 17 UN GAOR Supp. No. 17, p. 15, UN Doc. A/5217 of 14 December 1962. This resolution was approved by the General Assembly by a vote of 87 in favour, 2 opposed and 12 abstentions.

Thus, Resolution 1803 requires the state to pay compensation in the event of an expropriation. Although the measure of such compensation is to be made "in accordance with the rules in force in the State" performing the expropriation, the General Assembly clearly did not intend the state to have exclusive control over the amount of compensation awarded. This intent is evidenced by the phrase "and in accordance with international law" and the sentence "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."

Developing states, on the other hand, stick to the 'national treatment' standard to judge the propriety of compensation. According to this standard, the compensation given if matches up to that guaranteed to nationals under municipal law, it is *ipso facto* just and proper. This view is supported by the General Assembly Resolutions of 1974[7]. Article 2.2(c) of the 1974 Charter affirms the right of each state to:

> nationalize, expropriate or transfer ownership of foreign property in which case *appropriate compensation* (emphasis supplied) 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.[8]

The radical nature of the Charter is obvious when its provisions are compared with those of Resolution 1803. The Charter merely provides that compensation should be paid and is quite explicit in declaring that the expropriating state, unless agreed to otherwise, has exclusive authority to decide how much compensation shall be tendered. Thus, under the Charter, the definition of compensation is the sole responsibility of the expropriating state taking into account its "relevant laws and circumstances." In other words, compensation would be determined at least in part by domestic law, not by customary international law.

Now, which of the abovementioned views or standards or resolutions giving support to those particular views declares the rules of international law by which courts and tribunals can judge compensation? We must remember that declaratory statements contained in the UN General Assembly Resolutions are not laws themselves. They are laws only when they are evidentiary or reflective of an already existing custom or when

---

7 Res. 3201 (S-VI) on Declaration on the Establishment of a New International Economic Order (NIEO), S-6 UN GAOR Supp. No. 1, p.4, UN Doc. A/9030 of 1 May 1974; Res. 3281(XXIX) on Charter of Economic Rights and Duties of States, 29 UN GAOR, Supp. No. 31, p. 50, UN Doc. A/9631 of 12 December 1974. Resolution 3281 was approved by the overwhelming vote of 120 to 6, with 10 abstentions.

8 Ibid. Resolution 3281.

they are transformed, in the course of time, into norms of customary international law through recurrent state practice coupled with the necessary *opinio juris*. Therefore, neither 1803 Resolution nor 1974 Charter is *ipso facto* law unless reflects an already existing custom or is transformed subsequently into norms of customary international law.

The legal effect of UN General Assembly resolutions has been the subject of much discussion. And it is generally agreed that the legal effect varies with the intent, nature and content of the resolution and also with the nature of the support received. In view of the revolutionary nature of the 1974 Charter as compared to traditional concepts of international expropriation law as well as Resolution 1803, the question becomes whether the Charter has modified traditional international law. Several scholars[9] who have considered the question generally agree that it does not lay down established rules which have already become part of international law. This author quotes with approval the view of one such scholar:

> If this provision of the Charter is law-creating and it is understood in the sense described above, it would have totally changed what was understood to be the law up to that time, at least by the present author and by many others. Compensation would no longer be a matter governed by international law. However, a look at the governing resolution and the preamble of the Charter is revealing. The resolution refers to the consideration that the General Assembly "stressed the fact that the Charter shall constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality, and independence of the interests of developed and developing countries". The Charter itself in its preamble speaks of the *promotion* of the establishment of the new international economic order, *contribution* towards the creation of certain conditions and the need to establish and maintain a just and equitable economic and social order. While declarations or resolutions of the UN General Assembly could contribute to the creation of new law, create new law or be declaratory of existing law in the appropriate circumstances, the provisions cited above, *inter alia*, clearly indicate that prescriptions such as are contained in Article 2.2(c) of the Charter do not reflect the existing law but are rather intended to reflect a goal to be achieved in the realisation of a new international economic order. The Charter itself has a strong programmatic character and does not purport to be a declaration of pre-existing principles. In any case Article 2.2(c) does not appear to *establish* a changed view of the law on the part of the 120 States voting in favour of it. There is evidence in the *travaux preparatoires* and in the General Assembly debates that they regarded the Article as reflecting an aspiration or an objective. There is also evidence that the provision is regarded by many States as an emerging principle which is in the process of being

---

9 Neville "The Present Status of Compensation by Foreign States for the Taking of Alien Owned Property," (1980) *13 VAND. J. TRANSNAT'L L.* 63-66; Weston. "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth (1981) 23(75) *AM. J. INT'L L* 437, 441; Brower and Tepe "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?" (1975) *9 INT'L LAW* 295.

> established but has not yet been established. Thus, at the most, it is no more than "soft" law so-called.
>
> In any event, even if the Article signified a changed *opinio juris* and consistent practice (this latter is certainly not established), the question arises what effect do the votes against and the abstentions have, as reflections of assertions of the right to contract out or protest against new developments. This is, indeed, a difficult issue. Its resolution in favour of change may require more consistent, unqualified and unswerving practice in the face of continued objection, even if one were to concede that eventually the persistent objector cannot impede change. All in all, it would not appear that at the present time Article 2.2(c) reflects a changed principle of international law relating to compensation.[10]

In *Texaco Overseas Petroleum Co. V Libya*[11], an arbitration arising out of Libyan oil nationalizations, the arbitrator, Professor Dupuy, thoroughly considered the questions as to the legal status of 1803 Resolution and 1974 Charter or rather the effect of these resolutions on the customary compensation requirement under international law. Dupuy distinguished between resolutions which essentially codify an existing area of agreement and those which attempt to create a new principle. He stated that the former do not create a custom but confirm one, while the latter are only binding to the extent that they have been accepted. The arbitrator acknowledged that the UN General Assembly resolutions may have a certain legal value but added that this legal value must be determined on the basis of circumstances under which they were adopted and by analysis of the principles which they state. He therefore proceeded to consider these two factors and concluded, after consideration, that the 1974 Charter had not become law because the provisions of the Charter, *first,* were deemed contrary to many traditional principles of international law, *second,* failed to receive support of a significant sector of the international community, and *third,* were primarily political, rather than legal, declaration. Furthermore, in view of the universal acceptance of Resolution 1803, he concluded that it represents the current compensation requirement. To come to this conclusion, Dupuy particularly relied upon the voting patterns of the two resolutions. According to his analysis, the principles stated in Resolution 1803 were assented to by a great many States representing not only all geographical areas but also all economic systems.[12] On the other hand, even though the Charter was also adopted by a very large majority, Dupuy emphasized that all the industrialized countries with market economies had abstained or voted against it.[13]

---

10 C.F. Amerasinghe, "Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice" (1992) 41 *International and Comparative Law Quarterly* 22-65, 34-35.

11 53 (1977) ILR 389; For details on the case see e.g. Lee A. O'Connor, "The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State" (1983) 6 *Loy. L. A. Int'l & Comp. L. Rev.* 355, 362-366.

12 Ibid 487.

13 Ibid 489.

Thus, it can definitely be concluded with some credibility that the 1974 Charter does not, in itself, reflect the rule of customary international law. *Amoco International Finance Corpn. V Iran*[14]and *Kuwait V American Independent Oil Co.*[15] are but two other leading examples where again the 1803 Resolution was accepted by the arbitrators as reflecting the customary compensation requirement under international law. In the *Amoco* Case the tribunal found that despite the UN General Assembly resolution in 1974, the prompt payment of just compensation is an obligation which is accepted as a general rule of customary international law. The tribunal stated that this rule reflected the practice of states, was relied in numerous expropriation conventions and that US-Iran Treaty of Amity was just another example of such a practice.

The principles set forth in the 1974 Charter may create even more uncertainty as different host nations may have different or even conflicting expropriation laws. Furthermore, one must not forget that expropriation or nationalization of property owned by a foreign national is only one particular example of the rules relating to the treatment of aliens. Dixon rightly observes: "it is treated separately only because it is one of the most contentious areas of state responsibility wherein there is considerable disagreement between developed and developing states."[16] There is an international minimum standard to treat aliens in the absence of treaty provisions. And it is domain of international law to determine the standard of treatment and not municipal law. Any violation of this obligation gives rise to state responsibility.[17] If the same dynamic is applied when a state nationalizes or expropriates the property owned by a foreign national, then, only 'international minimum standard' and not 'national treatment' can be the standard by which courts and tribunals will measure compensation. The proposition is very simple, when a state nationalizes the property of its own national the standard can be (and really is) municipal law but when it nationalizes the property of a foreign national 'international minimum standard' cannot be replaced by 'national treatment' standard. And this is so even after we have fullest respect and confidence upon a state's economic sovereignty over its natural resources. Moreover, if we take 'national treatment' as the standard to measure compensation the problem will far more be complicated instead of being softened and mitigated as the number of litigations will be increased when the foreign national's state will offer 'diplomatic protection'[18] on the ground of non-payment of just and proper compensation.

---

14 (1987) 15 Iran-U.S.C.T.R. 189.

15 21 (1982) ILM 976 [commonly known as *Aminoil* Case]

16 Above note 1, 248.

17 For state responsibility in the absence of treaty provisions see Garcia and Garza V USA: *Mexico V USA* (1926).

18 For diplomatic protection see, for example, *Mavrommatis Palestine Concessions* Case (*Greece V UK)* [1924] PCIJ

The Measure of Compensation

It is a settled rule of customary international law that compensation has to be paid on expropriation or nationalization of alien property. And we have just seen that 'international minimum standard' and not 'national treatment' is (or should be) the criterion to judge the propriety of compensation. But there again the view of developed and developing states fundamentally differs as to the amount of compensation set by 'international minimum standard'. The dispute is vital since it has practical consequences.

The long standing view of developed states, Harris writes, was expressed in a note from the United States Secretary of State Hull to the Mexican Govt. in 1940 on the expropriation by Mexico of foreign oil interests: "the right to expropriate property is coupled with and conditioned on the obligation to make *'adequate, effective and prompt'* (emphasis supplied) compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement."[19] Therefore, according to the Hull formula adequacy of compensation is one of the component parts of lawful expropriation. But when is compensation said to be adequate? According to one general, accepted and traditional meaning compensation is adequate when it reflects the full value of the property taken irrespective of all the circumstances. This view was restated in the *Anglo-Iranian Oil Company Case.*[20] However, what would be construed by full value of the property will vary from case to case. To take one simple example, if the company is a 'going concern' it may even include 'future lost profits' *(lucrum cessans)* along with the value of the undertaking at the date of expropriation.[21] On the contrary, if a company's prospects were poor, it cannot and will not include 'future lost profits' as value of the property taken.[22]

Not surprisingly developing states have objected to this Hull formula of adequate compensation. Developing states urge for taking into consideration all the relevant circumstances including the economic viability of the nationalizing state, the importance of the expropriated property, the benefits which the foreign nationals have already acquired through commercial activities in the state etc. And compensation if assessed by reference to all these relevant factors it may fall short of the full market value of the property and will not include an amount for 'future lost profits'.

Supposing that the Hull formula at one time stated a customary rule of compensation of general application, it not longer does so due to this wholesale objection by developing states. The problem is that the view of developing states could not also replace the Hull formula of adequate

---

19 D.J. Harris, *Cases and Materials on International Law* (London, 1998) 568.

20 (1952) ICJ Rep 93.

21 *Amoco International Finance Corpn. v Iran* (1987) 15 Iran- U.S.C.T.R. 189.

22 See e.g. *Sola Tiles Case* (1987) 14 Iran- U.S.C.T.R. 223.

compensation because the 1974 Charter, favouring the view of developing states, had found little favour in international arbitral awards. Instead actual awards always tend to steer a middle course accepting the disagreement between developed and developing world over legal principles as, *inter alia*, a reflection of political and ideological differences. Harris, therefore, rightly comments: "neither 1974 Charter has found favour nor has the Western 'prompt, effective and adequate' compensation standard been readily adopted by International Tribunals. Instead tribunals have recently been attracted by the 'appropriate compensation' rule upon which states generally were able to agree in Resolution 1803. It was used, for example, in the *Aminoil* case, in the *Amoco* case and other *Iran-United States Claims Tribunal* cases."[23]

Importantly, however, the term 'appropriate compensation' has not only been incorporated in 1803 Resolution but also in the 1974 Charter.[24] The main difference between them is that under 1803 Resolution whether the compensation actually paid is appropriate is to be judged by reference to the national law of the expropriating state as well as international law. Whereas under 1974 Charter, it is to be judged solely by reference to national law. The problem, however, is to know what does 'appropriate compensation' mean. Some cases or arbitral awards are, by way of illustration, cited below to ascertain its meaning.

In the *Aminoil Arbitration*[25] a tribunal of three arbitrators adopted the standard of 'appropriate' compensation laid down in the 1803 Resolution and observed, in its *dicta*, that the determination of the amount of an award of 'appropriate' compensation could be better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion. Though the indemnity in fact awarded on the facts of the case could be regarded as amounting to 'full' compensation, the *dicta* certainly support for a flexible and equitable approach to the question of the standard of compensation. In the *Libyan American Oil Co. Arbitration*[26] the sole arbitrator, Mahmassani, held that the classical doctrine that required the payment of 'prompt, effective and adequate' compensation is no more imperative and that only 'convenient and equitable' compensation is required in cases of nationalization. The decision of the case, together with the reasoning of the arbitrator based on a concept of equity, confirmed that certain cases of nationalization may warrant less than full compensation. In the course of the judgment the arbitrator also observed that adequate compensation as including loss of future profits, such as was awarded in some old arbitral decisions,[27] was no more acceptable as an imperative general rule. It now retains only the

---

23 Above note 19, 570.

24 See paragraph 4 of the 1803 Resolution and Article 2.2(c) of the 1974 Charter.

25 See, for details, Amerasinghe, above note 10, 39-40.

26 (1977), (1982) 62 ILR 140. For details on the case see Amerasinghe, Ibid 41-42

27 *Delagoa Bay Railway Case* (*G.B. V Portugal*) (1900) Moore, 2 Arbitrations, p. 1865; Shufeldt Claim (*USA V Guatemala*) (1930) 2 U.N.R.I.A.A. 1079.

value of a technical rule for the assessment of compensation, a useful guide in reaching settlement agreement and stands only as a maximum rarely attained in practice.

In the *Amoco Finance Case*[28] the tribunal thought that a lawful expropriation demanded 'just' compensation which in the context of the governing treaty meant the value of the expropriated asset as a 'going concern'. *Banco Nacional de Cuba V. Chase Manhattan Bank*[29] is a municipal court case where the US Federal Court of Appeals showed a manifest preference for the term 'appropriate' instead of 'full' or 'adequate' and also admitted the possibility that in certain cases of expropriation less than full compensation may be payable according to international law.

Interpretation of the term 'appropriate compensation' by the *Iran-United States Claims Tribunal* has varied according to the views of particular Chairman of the Chamber of Tribunal concerned. "For the most part 'appropriate compensation' has been understood by the Tribunal in a way that approximates more closely to the views of western states than to those of developing states."[30] In the *Sola Tiles Case,*[31] for example, Bocksteigel, Chairman of Chamber One, interpreted the term 'appropriate compensation' as equivalent to 'adequate compensation' of the Hull formula. It was, however, held that 'appropriate compensation' was to be determined in light of the particular circumstances of the case so that if, a company's prospects were poor, no compensation should be awarded for its 'going concern' value. Again in the *American International Group Case*[32] the tribunal used the term 'appropriate' to describe the compensation payable but rejected the view that less than full compensation could be appropriate compensation and meet the requirements of customary international law. In the *INA Corporation Case*[33] Lagergren, an earlier chairman of chamber one, adopted a very flexible approach when he said that 'appropriate compensation', in the context of large-scale nationalizations, will mean the 'fair market value' standard to be discounted in taking account of 'all circumstances.' However, such discounting may, of course, never be such as to bring the compensation below a point which would lead to 'unjust enrichment' of the expropriating state. It might also be added that the discounting often will be greater in a situation where the investor has enjoyed the profits of his capital outlay over a long period of time, but less or none, in the case of recent investor, such as INA. Lagergren, however, doubted whether the standard of 'appropriate compensation' with the above meaning has replaced the Hull formula for other lawful expropriations too.

---

28 Above note 14.

29 658 F.2d 875 (2d Cir.1981). See, for details, Amerasinghe, above note 10, 46-47.

30 Harris, above note 19, 570.

31 Above note 22.

32 (1983) 4 Iran-US C.T.R. 96.

33 (1985) 8 Iran-U.S.C.T.R. 373. For detail on the case see Harris, D. J. *Cases and Materials*. Above note 19, 571.

Noticeably, the opinion of the judges and the arbitrators in the above mentioned decisions and arbitral awards differs not in accepting or recognizing 'appropriate compensation' as a standard to measure compensation but only as to the meaning of the term 'appropriate compensation.' From the above mentioned analysis and assessment of cases we can reach certain definitive conclusions. They are:

i) As the Hull formula presently does not reflect customary international law, 'adequate compensation' cannot be said to be a condition of and measure for lawful expropriation or nationalization of alien property unless 'appropriate compensation' is given a meaning equivalent to 'adequate compensation.'

ii) Nationalization or expropriation of alien property on the payment of 'appropriate compensation' is, however, generally accepted to reflect customary international law and it seems to require consideration of all the relevant circumstances of the case. International decisions and arbitral awards cited above bear testimony to this fact. And the value of judicial decisions are stated in Article 38 (1) (d) of the Statute of International Court of Justice (ICJ) as 'subsidiary means' for the determination of law and in Article 59 of the same statute as declaratory of existing law.

iii) What is 'appropriate compensation' will, however, differ from case to case. Sometimes it may be equivalent to the Hull formula of 'adequate compensation.' Again it may fall short of it if the attending circumstances of the case so demand. Thus the requirement to pay 'appropriate compensation' is so flexible that it encompasses both the 'equitable' (fair value)[34] and the 'Hull formula' (full value][35] approaches. This is most emphatically witnessed by the disagreement among the tribunal in *Shahin Shane Ebrahim V Iran*[36] where the majority favoured the former and the minority the latter.

Significance of Adequate Compensation Still Remains!

From what has been said and the stand that has been taken in this paper one might jump to the conclusion that 'adequate compensation' as a measure of compensation on nationalization or expropriation of alien property has lost all its importance. But that is not necessarily the case. The customary law requirement of 'appropriate compensation' is not any

---

34 M. Rafiqul Islam "Permanent Sovereignty over Natural Resources: Its Changing Landscape and Continuing Relevance in a Globalised World" in Dr. M. Rahman (ed), *Human Rights and Sovereignty over Natural Resources* (ELCOP: Dhaka,2010) 1-21, 9.

35 Ibid.

36 (1995) Iran-US Claims Tribunal.

peremptory rule (i.e. *jus cogens*) of international law. So the states can derogate from it at any time by incorporating the Hull Doctrine of compensation in their bilateral treaties. In such eases ascertainment of the meaning of the term 'adequate compensation' becomes important. The most obvious examples of this are the bilateral investment agreements. "Of course, these bilateral agreements, binding on the parties, do not necessarily reflect general customary law, but at least they suggest that the imposition of conditions of lawful expropriation in bilateral treaties is not prohibited by international law, even if they are not mandatory"[37]. Even after admitting this theoretical possibility we can argue with much credibility that the more 'appropriate compensation' will gather its strength as a rule of customary international law, it is less likely that the states will adopt Hull doctrine of 'adequate compensation' instead of 'appropriate compensation' as a measure of compensation.

Conclusion

Traditional customary international law has for long required that the taking of alien property must be non-discriminatory, for a public purpose and fairly compensated for. These general rules are frequently involved in testing the legality of an expropriation. And where its requirements are not complied with, the taking of alien property is judged to be confiscatory. However, the rule that requires payment of compensation on expropriation of foreign-owned property is the one about which one finds the most serious controversy. The more exact rendition of this rule is that the taking of alien property must be accompanied by *prompt, effective and adequate* payment of compensation. This particular understanding of the nature of payment of compensation along with the other general rules involved in expropriation have long received, in the United States and other developed and common market nations which promote free enterprise, strong affirmation as the basic rules of customary international law with respect to state responsibility for economic injuries to aliens.

In a relatively recent time, however, the traditional norm of customary international law has been subject to considerable attack, particularly from the developing nations. As obvious, the bulk of the controversy has centred on the classical standard's compensation requirement. Importantly, the controversy does not in general focus on *whether* compensation should be paid, but instead centres on *how much* compensation should be paid. Changes that took place in the political climate of the world with the spread of communism and the shedding of colonial domination or decolonization has had a substantial impact upon the protection afforded to foreign investment by traditional international law. Since the 1920s after the nationalizations associated with the Bolshevik revolution in the Soviet Union, authorities and the governments of various communist countries have consistently maintained that international law has no minimum standard, leaving the question of

---

[37] Dixon, above note 1, 250.

compensation to the domestic jurisdiction of states. The difficulty in this matter, however, grew more and more with the emergence of the former colonial areas into the status of full-fledged independent states. With the emergence of new nations with strongly nationalistic sentiments, the old alignment of colonial power and colony ceased to exist. These newly independent nations wished to take their places among the nations of the world. A strong sense of nationalism and a desire to retain control over natural resources and the means of production caused these newly emerged less developed countries to resort to expropriation of foreign – owned capital. As a result, there immediately arose a clash between the property rights of the expropriated owners and the rights to sovereignty of the expropriating nation.

Thus, the attack on the traditional rules of international law emanates principally from the under-developed nations. Since international law obtains its legitimacy from consensus, developing states argue that because they were excluded from the creation of the traditional standard of compensation and because this standard has subsequently been rejected by a large segment of the international community, the traditional standard of compensation is invalid today or no longer represents the consensual norm of international law. Jurists from developing countries have expressed a variety of views in support of their nations. Some espouse the view that, whatever the rule of international law in the past, the modern law is predicated only on the premise that compensation is always a matter entirely within the domestic jurisdiction of the host state. Some sought to outright reject the traditional rules developed to protect foreign investment arguing that these rules were evolved to further the aims of colonialism and, today, do not qualify as international law. Others believe, as most Latin American countries did even in the nineteenth century, that all that international law requires is that the host state accords to aliens the same treatment which it gives to its own nationals, and no better. The capital-exporting states, on the other hand, interposing on behalf of their nationals whose property has been expropriated have always insisted on the 'minimum standard' principle, which obliges a state to grant a minimum of protection to aliens regardless of the treatment given to its own nationals.

In this backdrop, a realistic appraisal of the problem indicates that international law as it is currently conceived to be- that is, that body of rules based on the concurrent wills of the several sovereign states- cannot supply a *sure and certain* generally approved rule to regulate the situations created by expropriation of alien property by a host state. It is difficult to state in black or even gray letter what is the international law now as regards compensation for expropriated alien properties. What can be stated with some semblance of agreement is that *some* form of compensation is due to an expropriated company. The plethora of international laws including treaties, regional agreements, tribunal awards and decisions, and the host country's own laws lead to no real agreement on the standard of compensation due to an expropriated company.

Acknowledging the opposing positions of the developed and developing nations as well as the difficulties to lay down what the *law is* in this highly contentious matter, the present author has consciously attempted, in this paper, to state what *may* or rather *ought to* be the standards of compensation under the current customary international law. After conceding, for reasons observed in the body, the 'international minimum standard' as yardstick, the author has tried to find out what should be the measure of compensation under the 'minimum standard' principle on the expropriation of an alien property. The following paragraph sums up the view and position of the author as to what *may* or *ought to* be the current customary compensation requirement on expropriation of foreign-owned property.

The question of 'adequate compensation' is essentially connected with the measure of compensation on expropriation or nationalization of alien property. The Hull formula of compensation is throughout objected by the developing states and also less relied upon by the judges and arbitrators of the international courts and tribunals since the adoption of 1803 Resolution in 1962 and can no longer be accepted as reflecting the customary rule of compensation of general application. Therefore, 'adequate compensation' being one of the component parts of the Hull formula can be regarded neither as a condition for valid expropriation nor as the basis for measure of compensation. On the contrary, the present position is that 'appropriate compensation' is to be paid on expropriation or nationalization of alien property. And it must be accepted that 'appropriate compensation' will vary according to the circumstances attended in each particular case including, *inter alia*, whether the expropriation was entirely of an individual nature or part of a general legislative reform measure seeking to establish a better economic and social order. As a matter of fact it may amount to 'adequate compensation' in the sense and meaning in which it is used in the Hull Formula of Compensation. In that case it would be incorrect to state that the tribunal has applied the Hull formula of adequate compensation or regarded it as the basis for measure of compensation, rather the case is one where the tribunal thought 'adequate compensation' as appropriate taking into account all the relevant facts and circumstances of the case. Conversely, no objection can be taken when 'appropriate compensation' falls short of the full value of the property taken or disallows 'future lost profits' if warranted or admitted by the peculiar facts and circumstances of the case.