MIGA and Foreign Investment

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IV. Eligible Risks

An examination of the risks eligible for MIGA's cover should begin with Article 2(b) of the Convention, which states simply that the Agency will issue guarantees against non-commercial risks. Though subject to some qualifications, which will be described below, the principle is thus that any non-commercial risk may qualify for MIGA's guarantee. While this is the principle, Article 11 of the Convention, following the same approach described earlier in defining eligible investment, first specifies four types of non-commercial risks as initially eligible for cover, and then establishes the power of MIGA's Board of Directors to add any other non-commercial risk by a decision taken by special majority. The four risks named in the Article are the currency transfer risk; the risk of expropriation and similar measures; the breach of contract risk; and the risk of war and civil disturbance.

Again like the forms of eligible investments, the Convention defines these four risks in broad terms, leaving the details to be worked out in the Agency's regulations and in individual contracts of guarantee. The resulting flexibility will be of great importance to MIGA. It should enhance the scope for MIGA to tailor the definitions of covered risks in contracts of guarantee to the features of the individual project involved. As noted above, MIGA's guarantees will moreover be available for a broader range of forms of investments than can be covered by most national agencies, creating in turn more varied rights and interests to which the definitions of MIGA's coverage will have to be adjusted.

B. The Risk of Expropriation and Similar Measures

1. Scope of Coverage

In its simplest form, an expropriation is an outright taking of property by a state through an act, such as a nationalization decree, transferring title to the property from the owner to the state. However, it has been observed that a state may also take a variety of measures which "interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner." In the consultations undertaken during the drafting of the MIGA Convention, it became clear that investors were much more concerned about the risk of such indirect or de facto expropriations than about outright or direct takings. This concern was supported by studies showing that since the 1970s oblique forms of expropriation had become more common than direct takings of property. The provision of guarantee protection against a myriad of potential host government measures that could sharply frustrate an investor's expectations and invalidate the assumptions on which he based his investment decision therefore seemed essential to MIGA's ability to encourage investment.

The design of expropriation coverage as protection against a broad range of host governmental measures had at the same time to be reconciled with the need for a clear definition of the limits of such coverage. These limits should address difficult questions such as when a taking might properly be imputed to a government, what point should governmental interferences with property rights pass before they can be considered tantamount to a seizure of the property involved, etc. The delicate balancing of the considerations involved should become apparent as we examine the types of measures and interests included under MIGA's expropriation coverage and the effects such measures must have to substantiate a claim.

The Regulations tell us that the "coverage may encompass, but is not limited to, measures of expropriation, nationalization, confiscation, sequestration, seizure, attachment and freezing of assets." Under Article 11(a)(ii) of the Convention, a covered measure may include any legislative action. The Regulations however explain that such an action may by itself be covered only if the expropriatory legislation is self-executing in the sense that it requires no further
legislation or regulation for its implementation. Thus in the case of legislation merely authorizing an expropriatory decree, only the enactment of the decree could give rise to a claim. Such a decree may be an administrative one, and Article 11(a)(ii) of the Convention provides that covered measures may include any administrative action. Administrative omissions may also be covered. However, the Regulations limit the coverage of such omissions to cases where they constitute a breach of a legal obligation to act on the part of the administrative authority. Such an obligation may arise under the investment contract, the host country’s domestic law or under international law. Thus, the refusal to grant certain licenses or facilities as agreed with the investor could be a covered event if such refusal is proven to be the direct cause of the loss. A denial of adequate police - protection might in extreme circumstances qualify as an expropriatory omission where the denial amounts to a breach of established international standards of treatment of aliens, regardless of whether the investment is also covered against the civil disturbance risk. Paragraph 1.33 of the Regulations provides that in the case of an administrative omission, a covered measure will be deemed to have arisen 90 days after the date by which the administrative authority had an obligation to act or such other period as may be specified in the contract of guarantee.

Under Article 11(a)(ii) of the Convention, the action or omission must in all cases be “attributable to the host government.” This limitation is less restrictive than it might appear to be at first glance. According to the Regulations, a measure may be attributed to the host government not only where the government itself takes or omits to take an action, but also where it approves, authorizes, ratifies or directs the action or omission. Moreover, the term “host government” is defined by the Convention as including “any public authority” of the host country. Expropriation coverage will thus be available for measures taken by, for example, provincial and municipal authorities in addition to measures of the central government. The Regulations, further add that the term “host government” may, if the contract of guarantee so provides, encompass a de facto government over the territory in which the investment is located, thus permitting MIGA to maintain effective expropriation coverage in times of civil strife.

2. Exclusions from the Expropriation Risk

(i) Legislative Omissions and Judicial Decisions

MIGA’s financial viability will in part depend on its ability to recoup payments from host countries in the event of claims. This will in turn depend on the extent to which the Agency as subrogee would have rights against the host country which are congruent with the Agency's contingent liability to the investor under the contract of guarantee. In view of its status as an international development Institution, MIGA will at the same time have to avoid conflicts between its financial self-interest and members’ legitimate exercise of governmental powers in their territories. These considerations help to explain certain exceptions to the otherwise broad definition of expropriatory measures eligible for cover. Thus not only legislative omissions, but also measures taken by judicial bodies are excluded from expropriation coverage. Clearly, MIGA would find itself in an untenable position if it were to pay claims on the basis of what local laws should have provided for, or accept claims regarding allegedly deficient decisions of courts and then seek recourse from host governments on such flimsy bases. On the other hand, the exclusion only applies to decisions of truly judicial bodies, i.e. independent courts or tribunals. The purpose of this qualification is to allow guarantee protection to extend to measures of entities which are judicial only in name as well as of judicial bodies when they are required in fact to perform administrative functions unrelated to their judicial duties.

(ii) Bona Fide Regulatory Measures

Article 11(a)(ii) of the Convention moreover excludes from expropriation coverage "non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories." Examples of such regulatory measures given in the Regulations include “the bona fide imposition of general taxes, tariffs and price controls and other economic regulations as well as environmental and labor legislation and measures for the maintenance of public safety.” It should be emphasized, however, that the regulatory measures exclusion only applies to governmental measures which meet all of the requirements mentioned in Article 11 (a)(ii) of the Convention, i.e., to measures which (a) do not discriminate against the investor and apply generally, (b) are taken by governments in the normal exercise of their regulatory powers, and (c) are truly taken for the purpose of regulating economic activities. It is on the basis of the latter requirement in particular that the Regulations introduce the notion of good faith in determining
whether a measure falls within the exclusion. A regulatory measure will not, therefore, be excluded from cover if, for example, far from pursuing a public purpose, it is in fact “designed to have a confiscatory effect such as causing the investor to abandon his investment or to sell it at a distressed price.” In some cases, such bad faith may be difficult to establish. The motives of a measure might in exceptional cases be inferred, however, from its impact, particularly where the result of the measure appears to be grossly disproportionate or obviously unreasonable in relation to the ostensible regulatory objective.

There may, finally, be cases where the host government imposes a series of measures, the cumulative result of which may be equivalent to an expropriation. The Regulations permit MIGA to extend coverage to such cases of “creeping” expropriation even if each individual measure taken alone would appear to fall within the exclusion for regulatory measures. Instead, the various measures may be judged in their entirety against the above-mentioned standards (non-discrimination, normality and regulatory purpose). If, considered as a whole, the series of measures falls outside the exclusion, it may qualify for cover. In extreme cases, an investor might even be protected against such a normal regulatory power like taxation if a series of increases in taxes add up to a destruction of the investment’s financial viability, even though each individual increase could not obviously be characterized as expropriatory in nature.

### 3. Covered Interests

The interests that qualify for cover against expropriation and similar measures are broadly defined in Article 11(a)(ii) of the Convention to include not only the investor’s “ownership or control” of his investment, but also any “substantial benefit” accruing to him from the investment. A wide range of economic interests, as well as title to property and ancillary rights of control, may thus be protected under MIGA’s expropriation coverage. The following example may illustrate the importance of this approach. If a guarantee holder has a wholly owned subsidiary in the host country which is covered against the expropriation risk and the host government confiscates only revenue-producing assets of the subsidiary, the confiscation would represent an interference with the subsidiary’s ownership rights, but not those of the guarantee holder. Nevertheless, the guarantee holder could be entitled to compensation from MIGA if the revenues from the assets constitute “a substantial benefit” from the covered investment of which he was deprived.

The Regulations make it clear that expropriation coverage may be provided against measures which prevent the guarantee holder from exercising his rights of ownership or control over his investment as well as measures which interfere with the rights themselves. In the case of equity interests, covered rights may take the form of rights to dividends and profits, the right freely to dispose of the equity interest, as well as rights of control. Coverage may further be so broad as to encompass the equity investor’s interests in the operations or profitability of the project enterprise. Non-equity direct investments present a somewhat different set of interests since they establish contractual as opposed to ownership rights such as those enjoyed by shareholders in corporations. The non-equity investor’s rights may take the form of claims against the project enterprise for agreed payments, and the rights to enforce such claims and transfer them to third parties. Apart from undertaking to make payments to the investor, the project enterprise may agree to give him rights of participation in the management of the enterprise. In addition, a project enterprise will commonly have a wide range of other contractual undertakings towards the investor, such as the duty not to disclose trade secrets under franchising arrangements. All of the above rights of non-equity investors qualify for MIGA’s expropriation coverage. Compensation may thus be available for measures which affect the investor’s rights directly, such as seizures of funds received an account of such rights. It may also be available in respect of indirect expropriation measures such as host governmental actions that make it impossible for the enterprise to carry out its obligations towards the non-equity direct investor.

### 4. Effect of Covered Measures

Under Article 11 (a)(ii) of the Convention a covered measure must, to be regarded as expropriatory, “have the effect of depriving the guarantee holder of his ownership or control of, or a substantial benefit from, his investment.” In applying this rule, MIGA will have to make certain choices as to the extent of the deprivation that should take place before a claim may be made. To keep their exposure within manageable limits, major national investment guarantee agencies and private political risk insurers generally restrict expropriation coverage to the complete loss of the guaranteed investment.
During the consultations between the World Bank staff and business representatives, this "all or nothing" approach was seen as a major flaw of existing guarantee programs. In elaborating on the Convention, the Regulations therefore refrain from a sweeping application of this principle. Rather, they give MIGA a large measure of discretion to provide coverage in cases of both partial and total loss of the investment.

At the same time, the Regulations identify situations which would normally warrant restriction of expropriation coverage to cases of total loss. These are cases where it is difficult to quantify the investor's loss without reference to his rights and benefits in their entirety. They include cases where the host government's measures prevent the guarantee holder from exercising covered rights or substantially diminish the operations or profitability of the investment project. The limitation of coverage to cases of total loss in this type of situation minimizes the scope for disputes over the amount of compensation and reduces the chance of overcompensation by MIGA.

Where it is likely that a loss can be related to a readily quantifiable portion of the investor's rights and benefits, coverage may be provided for cases of partial as well as total loss. Such coverage may, for example, be made available for cases of deprivations of covered rights, funds and other tangible assets.

Where expropriation coverage is confined to cases of total loss, the investor may often find it difficult to demonstrate that a specific host government action or omission has led to the total loss of the investment. The investor's task in this respect will, however, be facilitated by tests set out in the Regulations, which may be incorporated in contracts of guarantee. Thus, a total loss may be deemed to have occurred if the host government measure has prevented the guarantee holder from exercising a fundamental covered right for a specified long period. Similarly, the investment may be considered as totally lost if, as a result of the measure, the investment project has ceased operations for a specified long period. The Regulations suggest as a guideline in both cases that the relevant period would be 365 consecutive days, but leave it to individual contracts of guarantee to specify any other period that might be more appropriate in the circumstances.

As an alternative to requiring the lapse of such periods, Paragraph 1.40 of the Regulations provides that a total loss of the investment may be deemed to have taken place if after the occurrence of the expropriatory event the Agency agrees that the guarantee holder assign to it all his rights, claims or other interests related to the covered portion of his investment. A similar test is used by some national agencies on the assumption that the investor's interest in an ongoing investment will normally exceed his interest in compensation so that he may be, prepared to give up the investment only if it has in substance been destroyed by the host government measure. However, these agencies require the investor to assign to them all of his rights related to the guaranteed investment. By contrast, MIGA's Regulations require only assignment of the interests relating to the covered portion of the investment. If MIGA accepted the assignment in all cases, an investor might assign the fraction of his interest guaranteed by MIGA to the Agency but remain with the investment. In addition, the investor's willingness to assign his interests in the investment need not be an indication of the seriousness of the host government measure; it may simply be an indication of the commercial failure of the investment. MIGA should therefore be careful not to agree to such assignments except in the case where the investor is actually withdrawing from an investment which was clearly profitable before the host government measure. Even then, MIGA should first make a careful assessment of the impact of such an assignment on its relationship with the host country and of the uses open to it of compensation funds not related to the portion covered by MIGA's guarantee.

C. Breach of Contract

1. Justification of Coverage

Both equity and non-equity investors frequently attempt to secure their rights and gain advantages through concession, tax, marketing or other agreements with the host country. They may, for example, try to guard against changes in the host country's laws subsequent to the investment through so-called stabilization clauses in the agreements. To a varying extent, some national investment guarantee agencies extend expropriation coverage against breaches by the host government of such agreements in limited situations. The Regulations also state that expropriatory measures "may take the form of breach of contract" so that MIGA's contracts of guarantee may extend expropriation coverage to some cases of breach of contract. However, MIGA's situation differs from that of national guarantee programs in that MIGA is
authorized to provide coverage against breaches of contracts by the host government as a separate coverage in addition to its expropriation coverage. Such a coverage will not be subject to any of the various limitations that apply to MIGA's expropriation coverage. This innovative breach of contract coverage will seek to enhance the reliability of contractual arrangements between host countries and investors. It will strengthen the investor's confidence that his investment agreement will be protected when his bargaining power declines as the investment matures. In the hydrocarbon and mining sectors in particular, the host government may initially be dependent on the investor for the exploration of indigenous resources. Once a find is made and development begins, the investor's returns may increasingly seem to be exorbitant as the risks originally undertaken will have all but disappeared. The relationship between the investor and the host country may thus appear as an "obsolescing bargain," the investor obtaining highly advantageous conditions in the initial negotiations and the host country later pressing for changes in the agreement. Such changes might be unilaterally introduced by the host government without necessarily violating its domestic law or international law. The initial imbalance and subsequent instability of investment contracts are indeed interrelated. While investors may be discouraged from making new investments without receiving long-term assurances from host governments, they should be aware that obtaining excessive protection and advantage through contractual clauses is a fragile remedy. By inspiring investors' confidence in the stability of their agreements with host countries, MIGA may not only help to remove a deterrent to investors but also make a balanced initial deal more acceptable to them.

MIGA's coverage will be available for losses arising from repudiations or breaches by host governments of contracts with guarantee holders in certain defined cases. Such contracts may include Joint venture agreements, concession or development agreements relating to the exploitation of natural resources, agreements governing taxes or royalties, sales or purchase agreements relating to inputs or products of the investment project, as well as most of the various forms of non-equity direct investment. To qualify for cover, however, it is essential that the contract be between the host government (including any public authority of the host country, such as a local governmental authority) on the one hand, and the guarantee holder on the other hand.

2. Restrictions on Coverage

To avoid entangling MIGA in the substance of contractual disputes, breach of contract coverage is confined to three different situations, which are set out in Article 11 (a)(iii) of the Convention. They all represent situations which the Regulations correctly group under the term "denial of justice."

The first, and perhaps the most obvious, situation is where the guarantee holder does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach. If the availability of such a forum were established on a purely formal basis, the attractiveness of MIGA's breach of contract coverage would be diminished, since it may rarely be the case that there is no forum at all before which an aggrieved investor can bring his claim. However, access to a forum which either lacks independence of judgment, or does not accord parties any fair hearing, or is clearly powerless to impose a final decision on them may have the same effect as the absence of a forum. Under the Regulations, the investor will therefore only be considered as having access to a forum if it is independent from the executive branch of government, acts judicially and is authorized to make a final and binding decision. The Regulations add that the investor may similarly be deemed to be without a remedy even if in theory he has access to a forum possessing the foregoing qualities but in fact is denied access because, for example, the host government has established unreasonable procedural impediments.

The second type of denial of justice provided for in Article 11 (a)(iii) of the Convention is where the judicial or arbitral forum fails to render a decision on the claim of repudiation or breach within a "reasonable period of time." Since the reasonableness of such a period will to a great extent depend on such factors as the complexity of the contractual arrangements involved and the swiftness of the machinery of justice in individual host countries, Article 11 (a)(iii) of the Convention leaves the precise period to "be prescribed in the contracts of guarantee pursuant to the Agency's regulations." In this respect, the Regulations rightly refrain from specifying a specific period and require that the "reasonable period" to be specified in the contracts of guarantee "shall be not less than two years from the initiation of a proceeding by the guarantee holder and the final decision of the forum." Although the two-year period was considered too short by some participants in the meetings of the Preparatory Committee, it was agreed upon with the understanding...
that it represents the minimum and should not be taken to imply that longer periods would be considered unreasonable. In all cases, it is obvious that a guarantee holder would be precluded from claiming compensation if the decision is not rendered within the period set out in the contract of guarantee because of a delay brought about or agreed upon by the guarantee holder himself. This might be the case where the guarantee holder has, for example, failed to take a procedural step within the time limits set by the forum or where he has asked for or, given the choice, has consented to the forum’s postponement of a procedural step.

The third and final type of denial of justice mentioned in Article 11(a)(iii) of the Convention is the case where the guarantee holder is unable to enforce a decision rendered by the forum in his favor on the claim of repudiation or breach. The Regulations envisage that contracts of guarantee will specify the measures which a guarantee holder should take to secure the enforcement of such a decision before he can have a claim against MIGA, as well as the periods within which such measures should be taken.110 If such measures have not resulted in enforcement within 90 days from the date of their initiation or such other period as may be specified in the contract of guarantee, the decision may be deemed unenforceable.111 However, where in MIGA's judgment the enforcement measures would appear to be futile, it may decide to pay compensation without insisting that the guarantee holder take the measures.112

A breach of contract claim may be founded upon any of the above three types of denial of justice. Their coverage is meant to guarantee the investor's effective pursuit and enforcement of contractual rights.

PART THREE: POLICY AND INSTITUTIONAL ISSUES

Chapter Six: MIGA AND THE STANDARDS APPLICABLE TO FOREIGN INVESTMENTS

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IV. "CONSISTENCY WITH INTERNATIONAL LAW" AS THE TEST OF ADEQUACY OF THE LAW AND PRACTICE OF THE HOST COUNTRY IN THE ABSENCE OF AN APPLICABLE BILATERAL INVESTMENT TREATY

Despite recent assertions to the contrary,24 the precise content of customary international law regulating the treatment by states of foreign investment in their territories has been and remains to date one of the most controversial aspects of international law. The argument that, absent a treaty obligation, the issue falls in its entirety within the exclusive domestic jurisdiction of each state, is neither new nor confined to theoretical writings.25

The Supreme Court of the United States once noticed that "there are few if any issues in international law today on which opinion seems to be so divided as the limitations of a state's power to expropriate the property of aliens."26 Unfortunately, the International Court of Justice has not had an occasion to give its authoritative view on the limitations imposed by customary international law in this area. For more than ten years, the U.N. Commission on Transnational Corporations, which is not a judicial body, has tried but failed to reach agreement on this matter. The current situation is best summarized in a recent issue of the Encyclopedia of Public International Law, as follows: "[t]he opinions expressed by industrialized States and developing States with respect to the rules of international law are widely divergent, and the conduct of States in actual practice coincides with none of these expressed views."27 It is important therefore to try to ascertain here the status of customary international law on this issue and to offer some suggestions on how MIGA may best be able to deal with it.

In order for MIGA to satisfy itself that the law and practice of a host country is consistent with customary international law, it must have a clear notion of the requirements of such customary law in the field of treatment of foreign investment by their host countries. Much as an international tribunal cannot, under the principle prohibiting a finding of non liquet, abstain from rendering justice due to alleged gaps in the law,28 MIGA, for obvious operational reasons, cannot avoid making a judgment on this matter due to the present controversy surrounding it. It must recognize, however, the great sensitivity of this subject which in view of its direct bearing on political and economic interests of states has become a central issue in the "North-South
dialogue" and a bone of contention among states and publicists alike. MIGA should in particular avoid taking the partisan positions of the writers who have addressed this issue from the vantage point of the interests of their respective states. Rather, it should try to identify applicable rules of international law through an objective search in the sources of this law, while recognizing the difficulty of such search under the present stage of development of the law.\textsuperscript{39} Inevitably, the "law" identified by MIGA for this purpose may not be universally accepted as such by all its members. It is likely, however, to have a strong impact on the behavior of its member countries and more generally on future decisions of international tribunals. Such "law" should, therefore, be identified with the greatest degree of caution and impartiality. In particular, in the specific process of identifying international law requirements for the purposes of Paragraph 3.16 of its Regulations, MIGA should not be influenced by its self-serving views on what this law should be or by its interest in securing maximum protection for the investment to be guaranteed.

In an attempt to assist in the objective search for applicable rules of international law in this area, the rest of this Chapter will focus on the most relevant issue, i.e., the extent to which customary international law requires a state to compensate for alien property taken by it.

A. The Traditional View

There is little disagreement that under customary international law a state is bound to respect the property of aliens but that such respect does not deprive the state of its general regulatory powers or hinder it from introducing social reforms which may entail interference with private property.\textsuperscript{30} The result is that the taking of a lawfully acquired and operated property of an alien by his host state is likely to be deemed unlawful under international law in certain circumstances: when it is obviously arbitrary (i.e., when it occurs in an unjustifiable discriminatory context); when it is clearly not for a public purpose; or when it constitutes a breach by a state, for governmental rather than commercial reasons, of a specific obligation undertaken in relation to the property in question.\textsuperscript{31} Western sources (government spokesmen, and some writers and individual arbitrators) also argue that whether the taking of property is lawful or not, customary international law requires that it must be accompanied by full compensation reflecting

the equivalent value of the property taken and must be paid, without delay, in convertible currencies. As early as 1796, United States Secretary of State Adams wrote that "[t]here is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to the protection of its sovereign by all efforts in his Power."\textsuperscript{32} In 1938, United States Secretary of State Hull stated his government's position more specifically in a famous letter to his Mexican counterpart where he contended that the expropriation of property of American citizens in Mexico ought to entail "adequate, effective and prompt compensation."\textsuperscript{33} This position, later to be known as the Hull formula or rule, came to represent the view of traditionalist writers symbolizing as it does liberal concepts of individual rights and personal property. Although it is still held to date in official statements of Western governments.\textsuperscript{34} It was by no means the only view expressed even in early writings\textsuperscript{35} and it has been diametrically opposed by the practice of socialist and developing states and in the doctrines advanced by their writers.\textsuperscript{36} The "full compensation" required under customary international law covers in the traditional view as expressed in current literature the genuine economic value of the nationalized property at the time and place was taken, which, in the case of a going concern, includes compensation for future net income discounted to its present value. This view was guardedly reflected in the 1965 Restatement of the Foreign Relations Law of the United States which required payment of "prompt, adequate and effective" compensation but qualified it by "what is reasonable in the circumstances" and recognized exceptions to it in some situations.\textsuperscript{37} Recent revised drafts of this Restatement have abandoned the Hull language, however, for the "just compensation" formula, but still define the latter "in the absence of exceptional circumstances" to be "an amount equivalent to the value of the property taken, paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and...in a form economically usable by the foreign national."\textsuperscript{38} Some Western writers are definite, however, in their conclusion that the Hull rule is "not sustained by the prevailing doctrinal opinion within the international community" and that "recent practice, prevailing legal opinion and the development of national property orders all speak against [this rule],"\textsuperscript{39} which at any rate "was not firmly established" in international

custom.\textsuperscript{40} Such a view should not be seen merely as a modern deviation from an established doctrine.\textsuperscript{41} No less a traditional source than Oppenheim's treatise on International Law notes the diversity of attitudes and views on this matter
and concludes that "[t]he only rule which is unanimously recognized by theory and practice is that out of an international
delinquency arises a right for the wronged State to request from the delinquent State the performance of such acts as are
necessary for reparation of the money due" and that such acts would differ according to the merits of each case. In
particular, Oppenheim finds that the taxing of the property of aliens in the context of far-reaching social reforms (such as
the ones which prompted the Hull letter requires a solution where the granting of partial compensation for the taken
property would probably be consistent with legal principle.

B. U.N. Resolutions

In 1962 the U.N. General Assembly adopted Resolution 1803 on "Permanent Sovereignty over Natural Resources" which
stipulated that:

"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 rules in force in the
State taking such measures in the exercise of its sovereignty and in accordance with international law."

This resolution was adopted by a nearly unanimous vote, including that of the United States, and clearly reflected the
consensus of the world community at the time of its adoption. However, following the rise of economic power of oil
exporting developing countries and the resulting aspiration of Third World countries for a "new world economic order," a
series of resolutions were subsequently issued by the U.N. General Assembly which departed from this consensus.
These included the 1973 Resolution on Permanent Sovereignty over Natural Resources, the Declaration on the
Establishment of a New Economic Order and, more notably, the Charter of Economic Rights

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and Duties of States. The latter resolution, adopted by a majority of 120 states over the objection of 6 industrialized
countries (and with the abstention of 10 others) stated in particular that every state has the right 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 ..."

While the legal value of this latter resolution is strongly questioned by most western writers and has more recently been
discarded by the Iran-United States claims Tribunal, the successive declarations mentioned above certainly indicate that
a majority of the members of the world community do not consider as binding customary law the Hull rule or anything
close to the traditional view explained above. True, a majority of states cannot impose a new customary rule by simply
stating it in a U.N. declaration against the objection of the states most likely to be affected by it. Yet, the relevant U.N.
declarations stand as a strong evidence that the Hull rule does not exist in present day customary international law as a
binding rigid formula applicable to all cases of expropriation. At a minimum, the position taken by a large majority of states
during the debate over these declarations and the conclusions codified in their provisions suggest that, whether or not
such rule existed in the past, its binding character is by now seriously in question. However, this should not exclude the
possibility that in certain situations full compensation with the three characteristics described in the Hull letter could be the
most appropriate compensation to be imposed by a Court of law under the circumstances of a particular case.

C. A Treaty-Based Customary Law?

Proponents of the traditional view have relied on the texts of more than 200 bilateral investment treaties to argue that, in
spite of differences in detail, these treaties reflect a general customary rule which limits the

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right of host countries to expropriate the property of aliens and requires them to pay full compensation when they do so.
On their part, opponents of the traditional view also rely on the fact that more than 150 bilateral "lump sum" agreements
and compensation settlement agreements were concluded between states where the home countries of investors
accepted a settlement of the claims of their nationals for less than full value. While the principle that a repetitive pattern of
conduct expressed in international agreements may harden with time into a customary international rule is certainly valid.\textsuperscript{55} This is obviously confined to the case where it could be determined that the states involved in the later treaties were acting under the conviction that their behavior was required by law (\textit{opinio juris}). It is clear, however, as the award in the AMINOIL case noticed, that "both kinds of agreements [mentioned above] involve bargaining in a context to which \textit{opinio juris} seems a stranger."\textsuperscript{56} Neither type of agreement could therefore be correctly considered as declaratory of a preexisting customary law.\textsuperscript{57}

It is significant to note, however, that most bilateral investment treaties include in varying degrees of detail reference not only to the principle of compensation for taken property but often also to the modalities of the compensation formula.\textsuperscript{58} Of the 211 such treaties known to the ICSID Secretariat, 47 treaties, mainly involving the United States or the United Kingdom, include the Hull rule's requirements; 62 others, mainly involving Germany, have similar requirements; 59 treaties, mainly involving Switzerland or Scandinavian countries include some but not all the requirements of the Hull rule; 35 treaties, mainly involving France, require "just compensation" while 5 treaties speak of "full compensation" and 3 are silent on the issue. This demonstrates the importance of this issue in the promotion of foreign investment which is presumably the primary reason for the conclusion of these treaties by developing countries. It also proves that at least for the countries which wished to encourage a greater flow of private foreign investment into their territories, acceptance of a standard identical or close to the traditional rule has been rather common in the overall context of the mutual benefits expected from these treaties. While lump sum settlements may be of a lesser significance in the evolution of general international practice,\textsuperscript{59} they also prove that the investors' states have often been willing to accept compensation below the level required by the traditional rule. In doing so, they may be presumed to have considered the agreed settlements as a reasonable or just solution and not merely as practical or convenient under the circumstances of each case.\textsuperscript{60}

D. International Case Law

Until the recent wave of awards by the Iran-U.S. Claims Tribunal, there was a marked absence of clear pronouncements by international judicial and arbitral tribunals on the precise requirements of customary international law in the case of expropriation of alien property. In spite of the importance of the issue, "no case testing the persistence of the [Hull] rule has made it past the jurisdictional barriers of the International Court of Justice since 1945."\textsuperscript{61} Its predecessor, the Permanent Court of International Justice, had the chance to address the issue in a celebrated \textit{obiter dictum} only on one occasion.\textsuperscript{62} The Court found that \textit{unlawful} expropriation results in a duty on the expropriating state to effect restitution in kind or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear together with the award, if need be, of damages for loss sustained "which would not be covered by restitution in kind or payment in place of it."\textsuperscript{63} In contrast, the Court suggested that a \textit{lawful} expropriation requires "payment of fair compensation."\textsuperscript{64} Such payment should cover "the just price of what was expropriated" and "the value of the undertaking at the moment of dispossession, plus interest to the day of payment."\textsuperscript{65} While this language recalls the "just compensation" formula adopted in the recent drafts of the Restatement of the U.S. Foreign Relations Law and may imply a "full compensation" requirement, it fails to endorse the three requirements of the Hull rule (prompt, adequate and effective compensation). The latter rule does not seem to have been endorsed either in any of the several international arbitral awards which have addressed the issue.\textsuperscript{66} Most of these awards recognized instead the need to pay "just," "fair," "appropriate" or "equitable" compensation whose detailed parameters varied according to the case.\textsuperscript{67} Although they were generally close to the "fair market" or "full compensation" formula, no general rule along the lines of the Hull formula could be deduced from these awards. As Schachter has rightly concluded:

"What the cases show is that when a dispute over compensation for a particular taking reaches a court or arbitral tribunal, the property owner is quite likely to get fair market value and a satisfactory award even though the magic words of the Hull formula are not invoked. But in some cases, he may not receive that amount if, for example, his legitimate expectations did not warrant it or if his operations were contrary to accepted good practices and diminished the value of the property."\textsuperscript{68}
The above reading of the case law in this field is not universally accepted, however. The Iran-United States claims Tribunal in particular has clearly stated on several occasions that under customary international law “full compensation” should be awarded. Needless to say, the Tribunals unqualified contention that this conclusion is overwhelmingly supported by the “opinions of international tribunals and of legal writers” hardly reflects the complexities and differences prevalent in previous awards of other tribunals and more so in legal literature in general.

E. Comparative Domestic Law Practice

The norms of domestic legal systems which govern the practice of states in the matter of taking of property of aliens is also relevant to an understanding of customary international law in this area. Such norms may be ascertained through constitutional and legislative requirements and the pronouncement of domestic courts.

According to Dolzer, "at the domestic level, the Hull rule is today a "maximum standard" which is not fully observed [even] in the major capital-exporting countries." In fact, in many such countries, the constitutions typically include a broad principle (e.g., just compensation) instead of imposing the requirement of adequate, effective and prompt compensation. Given the lesser and varied requirements of the legal systems of several developing countries, let alone socialist countries, it is correct to state that no homogeneity exists in domestic legal systems which would warrant the conclusion that the traditional view is universally codified in their provisions relating to the taking by the state of private property, be it owned by nationals or aliens. It should be noted in this context that some “U.S. legislation strongly assumes that international law requires compensation which is prompt, adequate and effective.” Domestic Courts in the United States have shown awareness, however, that the issue is far from being settled and

that "[i]t may well be the consensus of nations that full compensation need not be paid in all circumstances." In its application of the Fifth Amendment constitutional requirement of “just compensation” in a domestic context, the U.S. Supreme Court was also careful "not to reduce the concept of just compensation to a formula" and stated that "the Amendment does not contain any definite standards of fairness by which the measure of 'just compensation' is to be determined." Nationalization of property of nationals, accompanied with partial compensation or deferred payment was actually found by the courts of several industrial countries to be constitutionally valid under certain circumstances. The European Court of Human Rights also found, in cases not involving aliens, that "legitimate objectives of 'public interest,' such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value." Also, a compensation which is "reasonably related to the value of the property taken," and not necessarily "full compensation," was deemed acceptable (under Article 1 of the European First Protocol on Human Rights).

F. Recent Attempts at "Codification"

As mentioned earlier, the U.N. Commission on Transnational Corporations has been trying since 1976 to reach agreement on what international law requirements in the area of "nationalization and compensation" are or should be. No such agreement has been reached or seems to be in sight, however. Different formulae reflecting the positions of different groups within the “Working Group on the Code of Conduct” were drafted in 1983. Given the wide differences between these formulae, none of them should be read as representing a codification of a generally accepted international law rule. Rather, each represents an articulation of a different position held by certain members of that Working Group and the different groups of states they represent. The four formulae presented are as follows.

(1) "In the exercise of its right to nationalize or expropriate totally or partially the assets of transnational corporations operating in its territory, the State adopting those measures-should pay adequate compensation taking into account its own laws and regulations and all the circumstances which the State may deem relevant. When the question of compensation gives rise to controversy or should there be a dispute as to whether a nationalization or expropriation has taken place, it shall be settled under the domestic law of the nationalizing or expropriating State and by its tribunals."

(2) "In the exercise of their sovereignty, States have the right to nationalize or expropriate foreign-owned property in their territory. Any such taking of property whether direct or indirect, consistent with international law, must be non-discriminatory, for a public purpose, in accordance with due process of law, and not be in violation of specific
undertakings to the contrary by contract or other agreement; and be accompanied by the payment of prompt, 
adverse and effective compensation. Such compensation should correspond to the full value of the property 
interests taken, on the basis of their fair market value, including going concern value, or where appropriate other 
internationally accepted methods of valuation, determined apart from any effects on value caused by the 
expropriatory measure or measures, or the expectation of them. Such compensation payments should be freely 
convertible and transferable, and should not be subject to any restrictive measures applicable to transfers of 
payments, income or capital."

(3) "In the exercise of its sovereignty, a State has the right to nationalize or expropriate totally or partially the assets of 
transnational corporations in its territory, and appropriate compensation should be paid by the State adopting such 
measures, in accordance with its own laws and regulations and all the circumstances which the State deems 
relevant. Relevant international obligations freely undertaken by the States concerned apply."

(4) "A State has the right to nationalize or expropriate the assets of transnational corporations in its territory against 
compensation, in accordance with its own laws and regulations and its international obligations."

More recently, the “Bureau” of the Commission which is a steering committee composed of leaders of various groups, 
suggested the following formula as a possible basis of agreement:

"It is acknowledged that States have the right to nationalize or expropriate the assets of transnational 
corporations operating in

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their territory, and that compensation is to be paid by the State concerned in accordance with the applicable 
legal rules."

This formula, which avoids rather than provides a definition of the compensation criteria, was subject to various criticisms 
in the comments of Bureau members. The “Expert Advisors” of the Working Group have also recently made an attempt 
which, although considered by them "an adequate intermediate concept between the contending views," falls short of 
providing a satisfactory guideline. The formula reads as follows:

"It is acknowledged that States have the right to nationalize or expropriate the assets of transnational 
corporations operating in their territory and that appropriate compensation is to be paid by the State 
concerned."

G. MIGA’s Proposed Approach

Although the above analysis is too brief to do justice to the complex subject of compensation for expropriated property 
under international law (not to mention the broader area of international law rules applicable to the treatment of foreign 
investment), it amply demonstrates two facts. There are considerable differences among states and publicists on what the 
customary international rule this field is or should be. And the variety of principles, interests and situations involved is 
such that the Hull rule cannot readily represent an undisputed expression of the present status of international law in all 
cases. As William Rogers points out in his foreword to a three volume work which explains in depth the different 
viewpoints on this subject:

"In fact, easy resort to generalities such as 'prompt, adequate and effective' or 'national patrimony' are far more 
likely to obscure thought, comfort the parties with notions of ideological certainty and moral perfection, and 
inspire them to dig their trenches deeper. The actual issues in real life are too complex, the cases to be decided, 
and the precedents of decision, too disparate and unique for easy, simple principles."

MIGA will, therefore, be ill-advised to start its operations with an attempt to establish a rigid definition of the international 
law criteria,

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against which the adequacy of legal protection under the law and practice of host countries should be measured. In 
addition to the immense difficulty of formulating such criteria in an objective manner, the exercise is likely to be so divisive
in MIGA's councils as to obstruct rather than facilitate its operations. MIGA is best advised to avoid in its formative years imposing a codification of customary law in this controversial matter. Instead, it should confine itself to the less ambitious task of elaborating flexible guidelines to be used only for the operational purposes of Paragraph 3.16 of its Regulations. Through the policy dialogue fit is meant to encourage among its members pursuant to Article 23 of its Convention, MIGA should eventually be able to build a new consensus among them based on their mutual interest. Through this process, it may gradually be able to develop more precise standards which its members would readily accept as representing customary international law.

The initial guidelines to be established by MIGA should obviously recognize that the subject does not fall exclusively within the domestic jurisdiction of each state. In my view, they should judge the adequacy of protection afforded by domestic law and practice against the following criteria which broadly, though not universally, reflect accepted relevant parameters under customary international law:

1. Does domestic law and practice allow the host country to take the property of aliens in an arbitrary manner which discriminates against them for no justifiable reasons?
2. Is it permissible under the law or practice of the host country to take the property of aliens, directly or indirectly, for the private interest of a ruling individual or party or is the taking allowed only for a public purpose?
3. When the taking occurs, can it be done without the payment of compensation in each case or is such compensation required by the law of the country concerned?
4. Is the compensation payable in the case of taking of property under domestic law and practice generally based on the value of the property taken and approximates such value including both its tangible and intangible components? Or is it determined arbitrarily and without paying due regard to the value of the property taken and other relevant factors?
5. Does the affected alien have in each case resort under domestic law and practice or under an enforceable agreement to an inde-

V. CONCLUSION

The provisions of the MIGA Convention do not include a list of the substantive and procedural standards which should apply to the investments of nationals of parties in the territories of other parties. However, the Convention attaches great importance to the availability of standards which are both fair and stable and to the adequacy of the legal protection accorded to foreign investors.

Recognizing that such standards provide an appropriate framework for achieving a greater flow of foreign investment to developing countries, which is the raison d'être of MIGA, the Convention requires the Agency to satisfy itself that such standards prevail before it launches its guarantee operations in a given country. It also calls on the Agency to assist its members in establishing better investment conditions which are more conducive to attracting the foreign investments they wish to have. For this purpose, and to protect its own interests, MIGA is to promote agreement among its members on applicable standards and to enter into agreements with its members on the treatment that the Agency or the investors insured by it will receive in the host country.

With a view to achieving the wide membership needed for the success of the Agency, the MIGA Convention avoids the creation of obligations on members which may conflict with their constitutional or legislative requirements and maintains a careful balance between the respective rights of the host country, the investors and the Agency itself. MIGA's Regulations
assume that the legal protection accorded to foreign investments will be adequate for the Agency's purposes when there exists an applicable agreement between the investor's state and the host country. In view of the great and increasing number of such agreements, the issue of legal protection is not likely to raise many problems in practice. In case no bilateral investment treaty exists between the state of the applicant investor and his potential host country, MIGA is directed by its Regulations to ascertain that domestic law and practice is consistent with international law. Given the controversy surrounding the state of customary international law in this field, MIGA is best advised in its formative years to apply broad guidelines which are likely to be generally acceptable to its members rather than to impose a partisan codification of a maximal *lex ferenda*. Should the law and practice of the host country be deemed to provide inadequate protection, according to the broad guidelines adopted by MIGA, it is enjoined from issuing guarantees for investment in that country until the deficiency is corrected either unilaterally by the country or through a bilateral agreement between it and the investor's country. Alternatively, MIGA may enter into a satisfactory agreement or arrangement with the host country on the standards applicable to the investments to be covered.\(^8\)

The objective of MIGA, as clearly stated in Article 2 of the Convention, is the encouragement of investment flows among its members and in particular towards its developing members. All the provisions of the Convention were written with this objective in mind and, according to the same Article, "the Agency shall be guided in all its decisions" by this objective. The "standards requirement" should not be viewed as an encroachment on the rights of host countries. Rather, it should be seen as a useful instrument in the stimulation of increased flow of foreign investment and in the general improvement of the investment conditions in host countries.

\(^7\) See the discussion on expropriation of the property of aliens under international law in Chapter Six.


\(^8\) See, e.g., Korbin, "Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from 1960-79," 28 Int'l Studies Q., 329 (1984); Minor, Developing Countries and Multinational Corporations: Why Has the Expropriation Option Fallen from Favour? (1986); Dolzer, supra note 79, at 41.

\(^9\) Regulations, para. 1.29.

\(^10\) Id. at para. 1.32.

\(^11\) MIGA Convention, art. 11(a)(ii).

\(^12\) Regulations, para. 1.32.

\(^13\) In view of the controversy concerning international law criteria on the standards of treatment of aliens, MIGA should proceed cautiously in defining what omissions would constitute violations of an obligation to act under customary international law. See further details in Chapter Six.

\(^14\) Regulations, para. 1.34.

\(^15\) Id., at para. 1.35.

\(^16\) For a discussion of recoupment by the MIGA, see Chapter Four, pp. 182-83.

\(^17\) Cf. MIGA Convention, art. 11(a)(ii).

\(^18\) Regulations, para. 1.32.

\(^19\) Id. at para. 1.36. Cf. Commentary, para. 14.

\(^20\) Regulations, para. 1.36.

\(^21\) Id. at para. 1.37.

\(^22\) Id. at para. 1.30.

\(^23\) Id. at para. 1.31.

\(^24\) Id. at paras. 130 and 131.

\(^25\) Id. at para. 1.31.

\(^26\) The national agencies of Canada and the U.S. limit expropriation coverage to cases of total loss of the guaranteed investment except for the expropriation of funds constituting proceeds from the guaranteed investment. The German program provides coverage in cases of both partial and total loss, but requires that the expropriatory measures make it permanently impossible to operate the project without loss, while the leading private political risk underwriter of Lloyd's of London requires, with some exceptions, that the expropriatory act cause the "permanent and total cessation of the activities" of the investment project.

\(^27\) Regulations, para. 1.30.

\(^28\) Id.

\(^29\) Id. at para. 1.40.

\(^30\) For example, the U.S. agency normally does not cover such breaches per se, but extends coverage to breaches which constitute a violation of the host country's domestic law or international law and which substantially deprive the investor of the benefits from his investment.

\(^31\) Regulations, para. 1.30.
See American Law Institute, Restatement of Foreign Relations Law sec. 712, reporters' note 7 (Tentative Draft No. 3) (1982); Vernon, Sovereignty at Bay 47 (1971); and Korbin, supra note 80, at 340-41. For a review of the "obsolescing bargain" hypothesis, see Bergston, Horst and Moran, American Multinationals and American Interests (1978).

Domestic legal systems normally entitle the State to introduce changes in administrative contracts on the basis of public interest provided that just compensation is paid for resulting damages. See, e.g., Turpin, Government Contracts (1972). Such changes, if introduced in a contract with a foreign investor, would not amount to a violation of international law unless they contravene a treaty obligation or are otherwise unaccompanied by just compensation and are so flagrant in terms of arbitrariness and discrimination, that they constitute a violation of the rights of aliens secured under customary international law. See commentary on Article 2 of the first draft OECD Convention on the Protection of Foreign Property, OECD Doc. 15637, December 1962; Shawcross, "The Problems of Foreign Investments in International Law," 102 Recueil des Cours 339, 351-59 (1961).

See MIGA Convention, art. 11(a)(iii).

Regulations, para. 1.44(i). However, a Court of law whose decisions are subject to appeal before a higher Court is obviously an appropriate forum.

Id. at para. 1.44(ii).

Id. at para. 1.43.

Id. at para. 1.45.

Id. at para. 1.44(iii).

Id. at para. 1.45.

See Iran-United States Claims Tribunal, Interlocutory Award in Case Concerning SEDCO, Inc. and National Iranian Oil Company and Iran, Award No. ITL 59-129-3, March 27, 1986, reprinted in 25 ILM 629 (1986). The Tribunal concluded that "the overwhelming practice and the prevailing legal opinion" before World War II supported the view that customary international law required compensation (for expropriated alien property), equivalent to the full value of the property taken and that this "traditional legal standpoint" has been challenged "only since those days." Id. at 632.

The "Calvo doctrine" advocated that the Intervention of the states of foreign nationals in disputes resulting from the taking of property by their host states was a violation of the territorial jurisdiction of the latter states. See Calvo, Manuel de Droit International Public et Privé 134-37 (1844). This position has been traditionally maintained by Latin American countries and is generally reflected in the U.N. Charter of Economic Rights and Duties of States referred to at infra pp. 237-38. The position that nationalization of foreign property is a matter of domestic jurisdiction was taken by the Soviet Union after the socialist nationalizations and in more recent U.N. debates. See, e.g., Soviet Association of International Law, "Memorandum on the Question of Nationalization of Foreign Owned Property," in International Law Association: Report of the Fiftieth Conference annex B, at 148-52 (1962). See also the contention by the Soviet Union that each state has an "inalienable right to unobstructed...expropriation," in U.N. Doc. A/PV, 1193, at 1131 (1962).


See Oppenheim, 1 International Law 352 (Lauterpacht ed. 1955).

The vast literature on this subject is well summarized in the 43 Annuaire de l'Institut de Droit International 42-125 (1950) (Session de Bath) and in the Comment and Reporters' Notes of American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised) 119-44 (Tentative Draft No. 7, April 10, 1986.) See also Friedman, Expropriation in International Law (1953).

Cited in Moore, 4 Digest of International Law 5 (1906).

See Secretary Hull's letter of July 21, 1938, reprinted in Hackworth, 3 Digest of International Law 655-65 (1942). In his answer the Minister of Foreign Relations of Mexico took the position that international law required only that foreign nationals be treated no less favorably than were nationals, at least in the case of expropriations of general and impersonal character. Id. at 657-61.


For the doctrine and practice of Socialist countries, see generally Katzarov, The Theory of Nationalization 349 (1964); Seidl-Hohenveldern, "Communist Theories on Confiscation and Expropriation: Critical Comments," 7 Am. J. Comp. L. 541


38 Id. at sec. 712 (Revised) (Tentative Draft No. 7, April 10, 1986). The "Comment" on this section of the 1986 draft Restatement permits deviation from the standard during war or similar exigency (id. at 123) and states that a taking might not be successfully challenged if it provided just compensation even if it did not meet the requirements of equal treatment and public purpose. Id. at 124.

39 Dolzer, supra note 29, at 565, 570. Dolzer believes that "[n]either the Calvo doctrine nor the Hull rule represents existing customary law. Neither is tenable in principle, nor do they help explain prevailing practice. The practice lies somewhere between these rules." Id. at 572-73.

40 Id at 564 n. 47a. See also Schachter, "Compensation for Expropriation," 78 AJIL 121 (1984). And see Friedmann, "National Courts and the International Legal Order," 34 Geo. Wash. U. Rev. 443, 454 (1966) where he states that "[i]t is nothing short of absurd to pretend that the protestation of the rule of full, prompt and adequate compensation... in all circumstances is representative of contemporary international law."

41 The Hull rule is seen in abundant Western legal literature as lacking adequate support in state practice and cases. See e.g., Schachter, supra note 40, at 121-30 (1984); Dolzer, supra note 29, at 565; Wengler, 2 Völkerrecht 1008 n. 3 (1964), de Visscher, Theory and Reality in International Law 203 (Corbett trans. 3rd ed. 1968); Rousseau, 5 Droit International Public 250 (1983), Bindschedler, "La Protection de la Propriété Privée en Droit International Public," 90 Recueil des Cours 173 (1956); Foighel, Nationalization - A Study in the Protection of Alien Property in International Law 115-26 (1957, reprinted 1982); Rubin, Private Foreign Investment: Legal and Economic Realities 11-23 (1956); Friedman, supra, note 31, etc.

42 Oppenheimer, supra note 30, at 353.

43 Id. at 352.


48 Id. at art. 2(2)(c).


50 See, e.g., the award in the SEDCO case, supra note 24, at 633-34.

51 Accord, Dolzer, supra note 29, at 562-65. But See Texas Overseas Petroleum Company v. Libyan Arab Republic (1977), 17 ILM 27-30 (1978); the separate opinion of Judge Brower in the SEDCO case, supra note 24, at 643-45 and Clagett, "The Expropriation Issue Before the Iran - United States claims Tribunal: Is 'Just Compensation' Required by International Law or Not?" 16 Law and Pol'y in Int'l. L. & Econ. 521, 525 (1976). The "Comment" on this section of the 1986 draft Restatement permits deviation from the standard during war or similar exigency (id. at 123) and states that a taking might not be successfully challenged if it provided just compensation even if it did not meet the requirements of equal treatment and public purpose. Id. at 124.

52 This view was adopted by the U.S. Court of Appeals for the Second Circuit in Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F2d 875, 892 (2d Cir. 1981). After declaring that the Standard of "appropriate compensation" would "come closest to reflecting what international law required," the Court added that an "appropriate compensation requirement would not exclude the possibility that in some cases full compensation would be appropriate."

53 See texts of these treaties referred to in supra note 5.

54 Several sources estimate that these settlement agreements provided compensation in amounts varying between 80% and 20% of market value. See, e.g., Lillich, supra note 36, at 115-16. For settlements between foreign investors and host countries see a review of 154 such agreements in Sunshine, "Terms of Compensation in Developing Countries' Nationalization Settlements, A Study for the U.N. Centre on Transnational Corporations," February 9, 1981 (unpublished).


57 Accord, SEDCO award, supra note 24, at 633; Dolzer, supra note 29, at 566-68.

58 See an analysis of relevant provisions in Dolzer, Handbook on Bilateral Investment Treaties (ICSID publication, forthcoming).

59 See The Barcelona Traction Case (Belg. v. Spain), 1970 LC.J. Rep. 3, 40 (Judgment of February 5) where the International Court of Justice described these agreements as "sui generis and provide no guide" as to general international practice. But See, Dolzer, supra note 27, at 218 where he argues that "it is more realistic to assume that the (lump sum and financial ad hoc) arrangements reached in practice reflect the parameters of an existing consensus."


61 Vagts, "Foreign Investment Risk Reconsidered: the View from the 1980s," 2 ICSID Rev. - FILJ 1 (1987). On the more general issue of the status of international law on the rights and duties of states regarding foreign investment, the I.C.J. itself, in the Barcelona Traction Case, supra note 59, at 47, noted that "it may at first sight appear surprising that...no generally accepted rules in the matter have crystallized on the international plane."

62 Case Concerning the Factory at Chorzow (Ger. v. Pol.) (Merits), 1928 P.C.I.J. (ser. A) No. 17, at 3 (Judgment of September 13).

63 Id. at 47.

64 Id. at 46.

65 Id. at 47.

66 "If we look for 'traditional' law in the earlier cases, such as these collected by Ralston in his classic work [Ralston, The Law and Procedure of International Tribunals (rev. ed. 1926, supp. 1936)], we cannot find a single decision expressing the 'prompt, adequate and effective' compensation formula." Schachter, "Compensation for Expropriation," 78 AJIL 121, 123 (1984). See also Mendelson, "What Price Expropriation?" 79 id at 414, 416 (1985), who, while agreeing that "none of the cases adopt the actual words of the Hull formula," emphasizes that several decisions before and after the Chorzow case require the payment of full compensation.


69 See, e.g., Mendelson, supra note 66; Schwarzenberger, Foreign Investments and International Law 4-5 (1969);

70 See in particular, American International Group, Inc. and American Life Insurance Co. v. Islamic Republic of Iran and Central Insurance of Iran, 23 ILM 1 (1984) and the SEDCO award referred to in supra note 24 (awards not signed by the Iranian arbitrator).

71 See INA Corporation v. Government of the Islamic Republic of Iran, Iran-U.S. Claims Tribunal Award No. 184-161-1, Separate Opinion of Judge Lagergren, August 14, 1985, at 7. ("I am also inclined to the view that 'appropriate', 'equitable', 'fair' and 'just' are virtually interchangeable notions so far as standards of compensation are concerned. Nor is there any single method of valuation to be used in all situations of compensation. Instead, there is a wide choice of well-established methods of valuation applicable and appropriate under different circumstances. Even the notions 'full' and 'adequate' compensation contain, inevitably and with the best of intentions, a margin of uncertainty and discretion.")

72 Dolzer, supra note 29, at 569.

73 Id. at 568 n. 58, citing Article 11 of the Constitution of Belgium, the Preamble of the Constitution of France and the Fifth Amendment of the U.S. Constitution which all call for "just compensation" as well as Article 14 of the Constitution of the Federal Republic of Germany which requires Parliament to find a "just balance of interests" of the owners and the public. See also Article 42 of the Italian Constitution; Article 33 of the Spanish Constitution; Chapter 2, Section 18, of the Swedish Constitution; etc.
For a comparative study see, e.g., Expropriation in the Americas (Lowenfeld ed. 1971).

See, e.g., 22 U.S.C. sec. 2370(e)(1); id. at secs. 283r, 2850, 2909-8, 19 U.S.C. sec. 2462(b)(4).


United States v. Cors, 337 U.S. 332 (1948). See also United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950); United States v. Virginia Electric & Power Co., 365 U.S. 624, 633 (1961). In the last case, the U.S. Supreme Court explicitly stated that the fair market value was "not an absolute standard."

See examples in Whiteman, 8 Digest of International Law 1152-55 (1967) (Supreme Court of Japan); Journal Officiel de la République Française, January 17, 1982, at 299 (French Conseil d'Etat).


See Case of Lithgrow and Others, id., No. 102.


CTC, Current Studies ser. A, supra note 81, at 54.

Id.

1 The Valuation of Nationalized Property in International Law at viii (Lillich ed. 1972).

Although the intangible valuables of a certain going concern include commercial prospects, they do not necessarily include "the financial capitalization of the revenues which might be generated by such a concern after the transfer of property from the expropriation (lucrum cessans)." See the award in the Amoco case, supra note 67. Compare the Concurring Opinion of Judge Brower in the same case.

An element of flexibility may be introduced by authorizing MIGA before such agreement or arrangement is reached to cover the investment at hand only against the war and transfer risks (assuming that such risks are assessed on their own merit to be eligible for MIGA's cover) as these particular risks do not seem to be affected by the standards issue. Such a pragmatic approach may help MIGA in establishing a working relationship with the country concerned which improves the chances of negotiating reforms in the country's investment conditions thus serving the overall objective of MIGA and enhancing the prospects of its activities in such a country.

Referring Principles:

XI.1 - Compensation for expropriation