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INTERNATIONAL PARTIES, BREACH OF CONTRACT, AND THE RECOVERY OF FUTURE PROFITS

I. INTRODUCTION

A continuing problem faced by corporations doing business abroad is the threat of expropriation of the corporation's assets by the host country in breach of the contract under which the corporation operates. The possibility of expropriation exists because of the characteristics of a multinational corporation and the way in which these characteristics are perceived by the host state. When the host state expropriates, the multinational corporation seeks full compensation including future profits. Generally, however, only partial

1. The “host country” is simply the situs state in which the multinational corporation is functioning. Alternatively, the “home state” is the country of origin for the corporation, presumably the state in which the corporation has been incorporated, and the only state entitled, under international law, to represent the interests of the corporation in an international legal forum. See Barcelona Traction, Light and Power Co. (Belg. v. Spain) 1970 I.C.J. 3, 47 (Judgment of Feb. 5).

2. Such contracts generally cover all aspects of the running of the concession, including distribution of management and control, marketing and production, as well as fiscal revenue systems and employment provisions. “Traditional” concession agreements often lasted for extensive periods of time and, as the terms were rigidly fixed, were unresponsive to changing conditions. For example, in the oil production industry such agreements typically ran from 50-70 years, with some lasting as long as 99. See Walde, Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development, 10 LAW. Am. 265, 279 (1978).

3. The multi-national corporation has a number of foreign subsidies, by which it extends its production and marketing capabilities beyond the boundaries of any one country. Thus, component parts are often produced in different locations. J. SPERO, THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS 132 (3d ed. 1985). Since it is highly centralized, marketing and production decisions are made by the parent entity and reflect its outlook on economic and foreign policy. A. BENNETT, INTERNATIONAL ORGANIZATIONS 451-52 (2d ed. 1980).

4. The sheer size of the enterprise may overwhelm the developing state. Further, fears may be generated that the corporation will eclipse its own industry, cause technological dependence, or interfere with the host state's plans for economic development. Questions are likewise raised by the corporation's repatriation of profits, rather than permitting them to generate further growth in the host state. A. BENNETT, supra note 3, at 451-52 (citing J. BEHRMAN, NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE: TENSIONS AMONG THE NORTH ATLANTIC COUNTRIES 7-8 (1970)).

5. See infra notes 37-59 and accompanying text. Full recovery consists of placing the corporation in the position it would have been in had the expropriation not taken place.
compensation is available.\textsuperscript{7}

Although many commentators have written on the topic of compensation, the leading literature focuses on the decisions of arbitration panels,\textsuperscript{8} which generally recognize future profits.\textsuperscript{9} Thus, corporations seriously considering foreign investment, if aware of the current literature, may expect to recover future profits. This Note concludes, however, that this assumption may be unreasonable.

In reaching the above conclusion, this Note will explore the corporation's available alternatives concerning future profits in a case of expropriation, evaluate these alternatives, and explain why corporations have little cause for optimism. To understand these alterna-

\textsuperscript{6} Future profits are the profits that would have been generated between the date of the expropriation and the conclusion of the concession; "which may be based on projections of past earnings or estimates of future earnings." Smith, The United States Government Perspective on Expropriation and Investment in Developing Countries, 9 Vand. J. Transnat'L L. 517, 519 (1976). While the concept may at first seem somewhat vague and speculative, compensation for lost future profits has long been an issue in international law and may form a sizeable percentage of a corporation's compensation claim. See infra note 53 and accompanying text.

For example, in its claim for compensation the Libyan American Oil Company submitted a claim for lost future profits in excess of 186 million dollars, while its claim for lost facilities only amounted to approximately 13 million dollars. Libyan Am. Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1, 78-79 (1981). In any case, future profits are never considered if the corporation does not have a proven record of profits. Cf. Furnish, Days of Revindication and National Dignity: Petroleum Expropriations in Peru and Bolivia, in 2 The Valuation of Nationalized Property in International Law 55, 59-60 (R. Lillich ed. 1973)(Bolivian Gulf Oil Company did not press for future profits where it had realized no profits in the past).

\textsuperscript{7} The taking state prefers partial rather than full compensation, see infra note 77 and accompanying text, and is able to impose this valuation scheme because most disputes are settled by the domestic devices of the taking state. See infra note 103 and accompanying text.


\textsuperscript{9} See infra notes 137-84 and accompanying text.
tives, consideration will be given to the term expropriation, defining it in its broadest, most useful sense. Thereafter, the various valuation standards for expropriated corporate assets will be examined. Finally, corporate remedies available on expropriation of assets will be analyzed, leading to a conclusion of possible results.

II. Expropriation—What is it?

Expropriation is usually defined as conduct by the host state which deprives an alien of substantially all benefits derived from property interests within the host state. Historically, the act of expropriation has been unanticipated, and has often accompanied political unrest or upheaval.

Increasingly, however, host states resort to less noticed methods of wealth deprivation. A forced or coerced sale is one such method. The sale arises when the host state enters take-over negotiations with the corporation, but so undermines the corporation's bargaining position that no true negotiations occur. The corporation has no desire to sell its assets, but in an atmosphere of tension it is aware that no

10. See infra notes 13-20 and accompanying text.
11. See infra notes 21-36 and accompanying text.
12. See infra notes 104-207 and accompanying text.
13. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 192 (1965)(referring to expropriation as "taking").
14. See, e.g., Gantz, The Marcona Settlement: New Forms Of Negotiation And Compensation For Nationalized Property, 71 Am. J. Int'l L. 474, 476 (1977)(The first act of the revolutionary government of Peru consisted of an expropriation of the assets of the Marcona Mining Company. The Act was accompanied by accusations that Marcona represented the "evil multinational."); Furnish, supra note 6 (Standard Oil encountered a similar situation when its assets were nationalized by Peru, as did Gulf Oil when nationalized by Bolivia); Von Mehren & Kourides, International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases, 75 Am. J. Int'l L. 476, 483-86 (1981)(Four oil expropriations undertaken by Libya in the period 1971-73 were primarily undertaken as reactions to international political happenings. The first against BP was motivated by Great Britain's refusal to react to actions taken by Iran. The expropriations of Texaco Overseas Petroleum Company, California Asiatic Oil Company, and Libyan American Oil Company were all done in reaction to United States posturing in the Middle East.); see also J. Spero, supra note 3, at 293-306 (discussing the changed economic and political conditions which led to OPEC's control of oil concerns previously held by the "seven sisters"- the principle oil corporations).
16. A good example of this was the Chilean negotiated buy-out of the Anaconda Copper Company, where it was clear that Anaconda did not seek the sale. Anaconda was profiting from an agreement negotiated two years prior. Vagts, supra note 15, at 18.
alternative exists. The host state acts as if it were a fair and honest negotiator, possibly one whose basic philosophy requires it to reject an open or bare-faced expropriation, while at the same time working toward an effective expropriation. Whether the host state's action is termed expropriation or coerced sale, the effect is the same: the forfeiture of the benefit of the property held by the corporation.

Another less dramatic, and largely ignored, method of wealth deprivation exists where the host state forces the sale of a significant and often controlling percentage of the corporation. As in the situations described above, the corporation is deprived of the profits generated by this lost percentage.

III. EXPROPRIATION COMPENSATION

A. Compensation Standards

Although radical positions are sometimes advanced, nearly all nations now recognize the obligation for some compensation for ex-

17. See, e.g., Vagts, supra note 15, at 18-19 (discussing the experience of Anaconda Copper Company); Note, From Concession to Participation: Restructuring the Middle East Oil Industry, 48 N.Y.U. L. Rev. 774, 791 (1973) (King Faisal warned that in the absence of a negotiated sale Saudi Arabia would be forced to act unilaterally); N.Y. Times, Dec. 22, 1975, at 47, col. 3 (“The lengthy negotiations were punctuated by threats from Kuwait's Oil Minister, Abdel Mutaleb al-Kazemie, to nationalize the Western oil companies' holdings if necessary.”).

18. See Vagts, supra note 15, at 18-19. In negotiating with oil companies in 1972 for a partial sale, several considerations prevented Saudi Arabia from considering expropriation. First, the state was ideologically opposed to the concept of nationalization. Second, Saudi Arabia had close Western ties which it sought to maintain for both its technical assistance needs, as well as for providing a profitable outlet for investment. Note, supra note 17, at 788-90.

19. The state may be able to avoid possible backlash from international investors by assuming such an underhanded approach to expropriation, and thereby describing the sale as fair. Nevertheless, a forced sale is not without dangers, both internationally, and domestically. The multinational investor may not accept the claims of the taking state; his protests could create vibrations affecting international lending institutions as well as potential investors and buyers of the expropriating state's products. Domestically, such action may drum up fears among the business community of “who's next?” Vagts, supra note 15, at 18-21.

20. See generally Walde, supra note 2, at 288-293 (discussing this practice in both oil and other natural resource extraction agreements); Zakariya, supra note 8, at 550-68 (an analysis of “participation” agreements for petroleum extraction).

A problem beyond the scope of this Note is that posed by “creeping expropriation.” This term is generally applied to indirect action taken by the host state which effectively reduces the value of the corporation's assets. This may include a change in local tax laws, exchange laws, or import control laws. For an exhaustive study, see generally Weston, supra note 15.

21. For a discussion of the few instances in which states have refused payment of any compensation upon expropriation see Francioni, Compensation For Nationalisation Of Foreign Property: The Borderland Between Law And Equity, 24 INT'L & COMP. L.Q. 235, 266-69 (1975).
propriation in breach of contract. Difficulty arises, however, when an attempt is made to formulate a universal standard. In examining the compensation issue, four distinct approaches exist to value corporate assets, two of which deny future profits.

The first approach to valuation is known as the fair market value method. When the corporation’s assets are assessed at fair market value, the corporation is provided with a complete recovery; it is made “whole.” An attempt is made to pay the corporation the price it would have received in an open market transaction, were such a market available.

A second alternative is to value the assets as a going concern. This “profit-based” method is calculated by multiplying either the past annual earnings or estimated future earnings by a capitalization factor. While this will not result in a complete recovery, as would fair market value, the corporation will recover the loss of intangibles such as future profits and good will.

A third approach is to provide the replacement cost of the property forfeited to the expropriating state. Such an award is equivalent to the price which the corporation must pay for new facilities and equipment, but adjusts for depreciation; it does not include future profits.

The final approach is to award the book value. This approach, which provides the acquisition value of the bare physical assets at the time they were purchased, is substantially less than the replacement value, and excludes future profits.


23. See Muller, supra note 22, at 39.
24. Id. at 39-40.
25. Id.
26. Id.

27. The capitalization factor is determined by considering factors such as the number of years the concession would have operated and the risk of loss in the particular industry. W. T. Anderson, Accounting: Basic Financial, Cost and Control Concepts 493-95 (1965).

28. See, Muller, supra note 22, at 40.
29. Id.
30. Id.
31. Smith, supra note 6, at 519.
32. Id.; see also McCosker, Book Values in Nationalization Settlements, in 2 The Valuation of Nationalized Property in International Law 36 (R. Lillich ed. 1973)
A clear dichotomy exists between the positions of the expropriating state and the corporation. The corporation desires future profits and so advocates use of the fair market value or going concern method of valuation, while the taking state prefers book value, the minimum compensation possible. These divergent positions are a reflection of fundamentally different attitudes regarding the relationship between the host state and the corporation. Conceived in the environment of the developed nations, the corporation endorses the position which the developed states have assumed toward compensation.

B. Developed States’ Position

The developed states argue that expropriation must serve a public purpose, and must be accompanied by compensation; such compensation must reflect the full value of the loss sustained by the expropriated corporation. This position, generally referred to as the

Cosker argues that, from an accounting perspective, book value is not intended to be a basis for valuation of expropriated property.

33. See supra notes 24-28 and accompanying text.
34. See infra notes 31-32 and accompanying text.
35. See infra notes 37-77 and accompanying text.
36. Cf. A. Bennett, supra note 3, at 451 (economic and foreign policies of the corporation conform closely to the policies of the home government).
37. Restatement (Second) of Foreign Relations Law of the United States § 185 (1965) ("The taking by a state of property of an alien is wrongful under international law if either (a) it is not for a public purpose ....") Comment b further explains: "[x]propriation must be based on reasons of public necessity or public utility .... "). But see Weston, The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, 75 Am. J. Int’l L. 437, 439-40 & n. 15 (1981) (there is little to support the idea that an expropriation done without a public purpose will, by itself, constitute a violation of international law).
38. Restatement (Second) of Foreign Relations Law of the United States § 188 (1965) ("Under ordinary conditions, including the following, the amount [of compensation] must be equivalent to the full value of the property taken .... ") Comment b, defining full value, provides: "[t]he full value specified in this Section means fair market value if ascertainable."); Smith, supra note 6, at 519-20 ("the going-concern approach attempts to measure earning power (and so encompasses elements such as loss of future profits) ... and in the view of the United States Government generally best approximates market value").

The foundation supporting the Restatement position, however, may no longer be rock solid. In May of 1986 the membership of the American Law Institute approved a revised version of the Restatement. Restatement of the Foreign Relations Law of the United States (Revised) (Tent. Draft No. 7, 1986) (approved May 14, 1986). Initial drafts stated that it was difficult "to state in black or even gray letter what is the international law as regards compensation for expropriated alien properties," id. at xvi (Tent. Draft No. 1, 1981), "[because] the traditional law has been challenged by most of today’s states, but the United States and a few others hold on to the old view [requiring full value]." Id. at xviii. While the final version retained the classic position, it also recognizes some exceptional circumstances in
classical or traditional approach, was described in 1938 by then Secretary of State Hull, in a letter to the Mexican government.\textsuperscript{39} In charging Mexico with a deviation from international law,\textsuperscript{40} Hull stated that international law required prompt, adequate, and effective compensation.\textsuperscript{41}

The view that international law requires compensation for lost future profits is supported by a number of arguments. First, it is asserted that contracts must be enforced, because to do otherwise would undermine the reasonable expectations of the parties.\textsuperscript{42} Further, international investment would be jeopardized if investors cannot be assured that agreements will be enforced.\textsuperscript{43} When breach of contract occurs a full recovery will satisfy the nonbreaching party's expectations, since the party is placed in the same economic position they would have been in at the conclusion of the contract if it had been enforced.\textsuperscript{44}

Future profits are also justified by acknowledging that the concept of full compensation may not be required. Id. at 122-23 (Tent. Draft No. 7, 1986). Compare Schacter, Compensation For Expropriation, 78 Am. J. Int'l L. 121 (1984)(Restatement (Revised) view of compensation accurately reflects current practice) with Robinson, Expropriation in the Restatement (Revised), 78 Am. J. Int'l L. 176 (1984)(Restatement (Revised) view does not reflect international law).

40. Id. at 656.
41. Id. at 657.
42. It has been argued that the concept \textit{pacta sunt servanda} (agreements must be kept), which originally developed as a concept enforcing treaties between states, applies as well to an agreement between a state and an alien. Domke, Foreign Nationalizations: Some Aspects of Contemporary International Law, 55 Am. J. Int'l L. 585, 597 (1961). In 1958 the International Bar Association adopted the following resolution: “International law recognizes that the principle of \textit{pacta sunt servanda} applies to the specific engagements of States towards other States or the Nationals of other States and that in consequence a taking of private property in violation of a specific state contract is contrary to international law.” Seventh Conference Report, Cologne, 485 (1958) reprinted in L. Henkin, R. Pugh, O. Schachter & H. Smith, International Law 763 (1980).
43. See Walde, supra note 2, at 268-69. At the core of this notion is the idea of “sanctity” of contracts. One commentator argues that this doctrine is the foundation supporting international investment, an activity of considerable importance to the developed states. J. Spero, supra note 3, at 174. For instance, in 1982, United States direct investment in developing states amounted to 24% of its overall direct international investment. Id.
44. See Schwebel, International Protection of Contractual Arrangements, 53 Am. Soc'y Int'l L. Proc. 266 (1959). By placing the foreign investor in the position he would have been in had the contract been enforced the reasonable investor will not be deterred from foreign investment in the future. He can be assured that, whether expropriation occurs or not, he will be in the same economic position at the conclusion of the contracting period. Since the system of international investment is dependent upon the expectations of investors, it likewise will not suffer.
Corporation has "acquired rights" in the host state. Corporations engaged in natural resource exploitation in the past have had concessions which ran for lengthy periods of time. At the time of the expropriation, these corporations have already done business in the state for a substantial period. As a result, corporations argue that they have acquired an interest in the land to which the concession applies, as well as the natural resources present in the land. Thus, they maintain that the profits eventually reaped from the land belong to them.

Complementary to the previous argument is the concern expressed by the corporation that the expropriating state not be unjustly enriched at its expense. When the host state expropriates and employs the facilities of the corporation, it acquires an asset which has been developed as a result of the efforts of the concession holder. To permit the state to occupy these facilities without providing something equivalent in value in return would be inequitable.

Finally, some commentators argue that an external standard must exist to prevent host states from discriminating between aliens and non-aliens when providing compensation. International law provides such a minimum standard of treatment, requiring full compensation, including future profits.

45. See Neville, supra note 22, at 63-64; see also Note, supra note 17, at 796 (Middle East oil companies claimed quasi-property rights in the underground reserves, for which they sought compensation).

46. In the petroleum industry, concession agreements have run as long as 99 years, though on average they last 50-70 years. Walde, supra note 2, at 279 & n.39. In response to recent international developments, the duration of concession agreements has generally been shortened. Nevertheless, based on a survey of 157 recent agreements, 21-25 year durations are the most common in non-fuel industries, while 26-30 years is the general rule for petroleum contracts. Id. at 280 n.41.

47. For example, the American Independent Oil Company was operating in Kuwait, at the time of its expropriation in 1977, under an agreement whose original provisions were finalized in 1948. Kuwait v. American Indep. Oil Co., 21 I.L.M. 976, 989-90, 998 (1982).

48. See supra note 45.


50. See Francioni, supra note 22, at 272-73.

51. See Domke, supra note 42; Guha Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?, 55 Am. J. Int'l L. 863, 884-85 (1961); Piper, New Directions in the Protection of American-Owned Property Abroad, 4 Int'l Trade L.J. 315, 317 (1978). "National treatment of aliens cannot fall below the minimum standard of justice prescribed for the treatment of aliens by international law, regardless of the standard treatment received by nationals. Aliens consequently may be entitled to preferential treatment if such preferential treatment is necessary to meet the minimum standard." Id.

52. Restatement (Second) of Foreign Relations Law of the United States § 166 & comment a (1962); see infra notes 53-56 and accompanying text.
Developed states argue that both international courts and arbitral bodies, the instruments of international law, have consistently stated that compensation for a breach of contract under which the corporation operates must make the nonbreaching party whole, and must necessarily include future profits. For example, in the Factory at Chorzow, compensation was awarded for the taking of the factory in breach of an international treaty. The Permanent Court of International Justice declared that a taking state must pay compensation sufficient to place the expropriated entity in the position it would have been in had the agreement been enforced. Based on policy statements, legal philosophy, and judicial decision, the developed states' position is firm: future profits must be paid by the taking state when it expropriates in violation of a contract.

C. Developing States' Position

The developing states have established a position in opposition to that of the developed states. They argue that the classical view was formulated at a time when those states involved in international politics and investment were of a homogeneous background, thus

55. Id.
56. Id. The taking state must make a "payment of a sum corresponding to the value which a restitution in kind would bear [plus an] award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it . . ." Id. at 47.
57. See supra notes 37-41 and accompanying text.
58. See supra notes 42-52 and accompanying text.
59. See supra notes 53-56 and accompanying text.
60. See Anand, Attitude of the Asian-African States Toward Certain Problems of International Law, 15 Int'l & Comp. L.Q. 55, 62-63 (1966); Abi-Saab, The Newly Independent States and the Rules of International Law: An Outline, 8 How. L.J. 95, 98 (1962). All of the states responsible for the initial development of international law were from a Western, property based background. Heavily engaged in international trade, they established themselves in the developing states to satisfy both their material needs and to gain markets for products. The
resulting in a system designed to foster practices advocated by these states, such as colonialism, which are no longer acceptable.61

Traditional attitudes on international law serve to bolster this position. The developing states argue that legal concepts formulated by Western nations can no longer be used to protect contracts wrested from a weak colony whose only option was to agree.62 Rather, they suggest that law is open to evolution, and that a system of law conducive to the goals of the developed states is no longer appropriate to a world in which the developing states predominate.63

The developing states argue that the focus of the emerging international system, and the supporting international legal concepts, should be on maintaining state territorial sovereignty, which is a precious commodity to much of the developing world.64 In particular, this requires that the state have the ability to dispose of its territory and natural resources as it sees fit, free from outside influence.65 This position has been codified by the developing states in the Calvo Doctrine, which is based on the general notion of exclusive jurisdiction of sovereign states over their own territory.66 Thus, an alien corporation whose assets are expropriated may be provided with the same compensation a national corporation would receive67 and challenges to either the expropriation or the valuation can only be entertained by system of law they established was designed to further these objectives.

61. See Anand, supra note 60, at 61; Guha Roy, supra note 51, at 866; but see Lillich, The Current Status of the Law of State Responsibility for Injuries to Aliens, 25 AM. SOC. INT’L L. PROC. 244, 246 (1979)(criticizing the work of Guha Roy as being superficially reasoned); see generally Abi-Saab, supra note 60, at 107-08 (many newly independent states had to submit to unequal treaties used to exploit economic privileges).

62. See Anand, supra note 60, at 61-63 (describing the developing states’ demand for change from the “Western business civilization” which created a “ruler’s law” for dealing with the non-western world); Jessup, Non-Universal International Law, 12 COLUM. J. TRANSNAT’L L. 415, 419 (1973)(noting the complaints of prior exploitation made by countries which formerly enjoyed little political or military power). The predominance of the developing states is nowhere more apparent than in the power they now exercise in the United Nations. See infra notes 83-91 and accompanying text. For the arguments supporting the “sanctity” of contracts see supra notes 42-44 and accompanying text.

63. Arechaga, supra note 49, at 184. This attitude has been chiefly expressed in United Nations General Assembly Resolutions. See infra notes 87-91 and accompanying text.

64. Archaga, supra note 49, at 179-80.

65. See id.


67. This follows from the Calvo Doctrine requirement of equal treatment of aliens and nationals. See Dolzer, supra note 22 at 560 n.28; Garcia-Amador, supra note 66, at 2-3.
those structures established to handle the grievances of nationals. To permit other forms of recourse for the corporation, such as an appeal to its home government for intervention, would infringe the state's sovereignty, imply incompetence in the state's dispute machinery, and serve to widen the gulf between national and alien. Such a result is unacceptable to countries attempting to restore national dignity, maintain territorial integrity, and devise and implement economic and social reform.

The developing states recognize that economic development is essential both as a means of achieving internal stability, and of protecting themselves from outside encroachment. They are encumbered, however, by a deficiency in the means for development and disposable capital. Expropriation is one means of acquiring material and machinery to further industrial growth. Compensation, however, must be paid. As a result of limited capital, the choice of the developing states is clear when they consider internal growth and stability versus outside investors; they offer compensation limited to an amount at or near the book value of the assets taken.

68. See Dolzer, supra note 22, at 560 n.28.
69. See infra notes 185-92 and accompanying text for a discussion of the process required of a United States' national seeking to have the Government assume his claim.
70. Guha Roy, supra note 51, at 889.
71. Id.
72. Id.
73. See Garcia-Amador, supra note 66, at 10-15; Abi-Saab, supra note 60, at 103-05, 113-14. One means of achieving what has come to be known as the New International Economic Order (NIEO), has been through adoption of United Nations General Assembly Resolutions. The NIEO places an emphasis on economic reform, but also seeks elimination of practices such as colonialism, racial discrimination, and intervention of foreign states in the affairs of another state. Garcia-Amador, supra note 66, at 10-15. For a discussion of one of the cornerstones of the NIEO, the Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974), see infra notes 89-96 and accompanying text.
75. See Garcia-Amador, supra note 66, 17-20; J. Spanier, supra note 74, at 371.
76. See supra note 22 and accompanying text.
77. See Garcia-Amador, supra note 66, at 48-50; Piper, supra note 51, at 324 ("partial rather than full compensation is an appropriate compromise between an absolute and likely unrealistic [standard], especially in instances of social and economic reform programs"). Increasingly, partial compensation results in book value. Walde, supra note 2, at 292 n.60. See also N. Girvan, Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint, in 3 The Valuation of Nationalized Property in International Law 149, 167 (R. Lillich ed. 1975)(Third World governments are more likely to favor book value method of valuation).
rily excluding future profits.

D. Controversy at the United Nations

The developing and developed states' positions have come into direct confrontation in the forum provided by the United Nations. Originally a creature of the developed states, early U.N. resolutions reflected the traditional stance. U.N. General Assembly Resolution 1803 required that expropriation be accompanied by "appropriate compensation, in accordance with the rules in force in the State . . . and in accordance with international law." While seeming to place decisions of valuation for expropriation within the autonomous control of the host state, some control over this process could still be exercised by an outside entity, such as the corporation's home state. By adding the phrase "and in accordance with international law," the developed states injected a standard, international law, which they interpreted as requiring full compensation, including future profits.

The position and influence of the developed states declined throughout the 1960's, however, coinciding with the rise of Third World powers. As the composition of the General Assembly changed, arguments were raised during the early 1970's that Resolution 1803 no longer reflected the consensus of the international community, and was without legal effect. Moving to exploit their now powerful position in the United Nations General Assembly, the developing states passed resolutions designed to benefit themselves, rather than the developed states, thereby setting in place the framework for a more progressive world economic order.

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78. In 1945, the founding year of the United Nations, only 12 of the 51 members were from Asia or Africa. J. Spanier, supra note 74, at 41.
80. Id.
81. Id.
82. See supra notes 38-41 and accompanying text. See also Schwebel, The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources, 49 A.B.A. J. 463 (1963) (U.N. General Assembly Resolution 1803 reflects the existing law).
83. By 1965, the membership of the United Nations had increased to 122 members, of which a sizable majority, 87, were developing. J. Spero, supra note 3, at 184.
84. Piper, supra note 51, at 326.
Reflecting the developing states’ concern for territorial sovereignty,86 U.N. Resolution 317187 proclaimed, “[t]he principle of nationalization . . . implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State . . . .”88 The Charter of Economic Rights and Duties of States89 was similarly worded: “where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing state.”90 Thus, the developing states seemingly legitimized a system of compensation which required that any challenges to expropriation or compensation be confined to the domestic grievance devices of the expropriating state, thereby assuring that the amount of compensation available would be minimal.91

The developed states responded by arguing that these resolutions were not authoritative statements of international law.92 Since the major economic powers had not endorsed this new economic order,93 the doctrine was wishful thinking and not representative of

[The right of all countries, and in particular of the developing countries, to secure and increase their share in the administration of enterprises which are fully or partly operated by foreign capital and to have a greater share in the advantages and profits derived therefrom on an equitable basis, with due regard to the development needs and objectives of the peoples concerned and to mutually acceptable contractual practices, and calls upon the countries from which such capital originates to refrain from any action which would hinder the exercise of that right . . . .

G.A. Res. 2158, 23 U.N. GAOR Supp. (No. 16) at 148, U.N. Doc. A/6518 (1966). This movement, however, was not confined to revision of the existing economic order. The NIEO was tailored to meet the needs of the developing states by adopting sweeping economic as well as social changes. Demands included an end to aggressive war, national self-determination, peaceful coexistence, respect for human rights, and an end to racial discrimination. See Piper, supra note 51, at 326; Garcia-Amador, supra note 66, at 10-20; see also infra notes 89-91 and accompanying text for a discussion of the Charter of Economic Rights and Duties of States.

86. See supra notes 64-70 and accompanying text.
88. Id.
90. Id. See generally Garcia-Amador, supra note 66 (discussing the philosophical underpinnings of the Charter); Weston, supra note 37 (discussing the effect the Charter has had on the development of international law).
91. See infra notes 64-77 and accompanying text.
92. See, e.g., Arechaga, supra note 49, at 185-88. See also Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389, 484-85 (1977), where the arbitrator found that these U.N. General Assembly Resolutions did not reflect current international law.
93. For example, Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom, and the United States voted against the Charter of Economic Rights and Duties of States. In addition, Austria, Canada, France, Ireland, Israel, Italy, Japan, the
present practice. Others criticized the U.N. Resolutions as being mere recommendations and in no sense legally binding. It is difficult, however, to dismiss a position which has been endorsed by an overwhelming majority of the member states.

The conclusions to be drawn from this brisk U.N. exchange between developing and developed states are inconclusive. Subsequent court action seems to endorse the traditional view: international law governs and requires future profits. But, there is room for controversy, with both courts and commentators vigorously debating the meaning and effect of the U.N. controversy.

IV. REMEDIES

The corporation historically has had a series of options after expropriation, including direct negotiations with the host state’s government, action within the host’s legal system, international arbitration, or appeals to the corporation’s home government to

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94. “The Charter [of Economic Rights and Duties of States] was passed by a large majority, but the United States, Canada, Japan and the members of the European Economic Community all abstained or voted against it. Such opposition properly raises a serious question as to the legal significance of the Charter.” Dubitzky, The General Assembly’s International Economics, 16 Harv. Int’l L.J. 670, 674 (1975)(footnote and italics omitted); see Weston, supra note 37, at 452-55. But see Dolzer, supra note 22, at 563. Dolzer states: [The Charter’s] bearing on the process of changing customary law can only be denied if one assumes that the votes cast in favor of these resolutions have no legal character [, however,] the extensive debates in the General Assembly have made clear that legal—and not only political—views were discussed in this context . . .

Id. See also Garcia-Amador, supra note 66, at 57-58 (while debate rages over what international law requires for compensation for nationalization, it is certain that the law is changing).


96. The NIEO, as described in the Charter of Economic Rights and Duties of States, was adopted by a vote of 120 in favor, 6 against, and 10 abstentions. 1974 U.N.Y.B. 403, U.N. Sales No. E.76.I.1.

97. See, e.g., Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389, 487 (1977)(while the Charter of Economic Rights and Duties of States was firmly rejected as not being indicative of international law, the arbitration board nevertheless noted, “it is impossible to deny that the United Nations’ activities have had a significant influence on the content of contemporary international law”).

98. See, e.g., Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389 (1977); Arechaga, supra note 49; Dolzer, supra note 22; Garcia-Amador, supra note 66; Haight, supra note 95; Weston, supra note 37.

99. See infra notes 104-16 and accompanying text.

100. See infra notes 117-36 and accompanying text.

101. See infra notes 137-84 and accompanying text.
assume the claim. Moving through the spectrum of available actions, the corporation shifts from options which are dominated by the developing states' attitudes, to mechanisms more receptive to its own views. Most questions, however, are settled through negotiation with the taking state, or actions in its courts; comparatively few disputes ever reach arbitration, or other international devices.

A. Domestic Actions

1. Negotiation. — In direct negotiations, there is little to shield the corporation from suffering the full force of the taking state's attitude toward compensation. As a result, corporations in such circumstances have not recovered future profits. Furthermore, recovery in this forum is even more unlikely when the corporation's assets are taken through a complete or partial forced sale. The experience of the Arab-American Oil Company (ARAMCO) in its negotiations with the Government of Saudi Arabia suggests the nonviability of direct negotiations with the host government. In 1972, Saudi Arabia, motivated by domestic concerns

102. See infra notes 185-92 and accompanying text.

103. Between 1973 and 1985, there have only been six major international arbitral decisions (excluding the ongoing settlements of the Iran-United States Claims Tribunal) considering the international law aspects of expropriation. See Kuwait v. American Indep. Oil Co., 21 I.L.M. 976 (1982); Benvenuti et Bonfant v. People's Republic of The Congo, 21 I.L.M. 740 (1980); AGIP Co. v. Popular Republic of The Congo, 21 I.L.M. 726 (1979); Libyan Am. Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1 (1977); Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389 (1977); BP Exploration Co. v. Libyan Arab Republic, 53 I.L.R. 297 (1973). It is difficult to estimate the number of complete takeovers, forced sales, or partial buy outs which have been settled by the state's negotiation, or legal machinery. Nevertheless, Vagts documents three actual cases of forced sale since 1970, occurring in Chile, Brazil, and Venezuela. Vagts, supra note 15, at 18-19. Additional documented cases of forced sales have occurred in Kuwait, Zakariya, supra note 8, at 569-72, and Saudi Arabia, Note, supra note 17, at 787-91. Further, Walde cites a survey of some 170 takeovers of U.S. subsidiaries and concludes that renegotiation (done within the domestic machinery of the host state), is increasingly resorted to, as opposed to a clear expropriation. Walde, supra note 2, at 274 n. 30.

104. See, e.g., Gantz, supra note 14 (discussing the experience of the Marcona Mining Company); Kenncott Copper Corp., Expropriation of El Teniente, the World's Largest Underground Copper Mine (1971), reprinted in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 86 (R. Lillich ed. 1975)[hereinafter Kenncott][with the exception of the preface, this article constitutes a Memorandum of August 16, 1971, prepared for the Kenncott Copper Corp. by the law firm of Covington and Burling in response to the expropriation of Kenncott's assets]; Furnish, supra note 6 (describing the experiences of the Bolivian Gulf Oil Co. in Bolivia, and International Petroleum Co. in Peru); see also, Goldman & Paxman, Real Property Valuations in Argentina, Chile, and Mexico, in 2 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 129 (R. Lillich ed. 1973)(discussing the general practices of other Latin American countries).

105. See supra notes 15-20 and accompanying text.

106. See Note, supra note 17, at 787-90.

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as well as regional political realities, began taking over a percentage of ARAMCO's assets.\textsuperscript{107} Negotiations began in January of 1972 between Saudi Arabia and ARAMCO concerning the possible takeover and lasted for more than nine months. In July, talks broke down because of the compensation issue. The Saudi Arabian position was firm: if a negotiated settlement could not be reached, it would be forced to act unilaterally.\textsuperscript{108} A final agreement, reached in October, concluded that Saudi Arabia would pay updated book value for the assets acquired,\textsuperscript{109} a figure considerably below one that encompasses future profits.\textsuperscript{110}

A similar situation was faced by the Anaconda Copper Company in its dealings with Chile in 1969. As in the ARAMCO case, the Chilean Government's action was motivated by pressing political concerns.\textsuperscript{111} Negotiations between Anaconda and Chile were tense. Anaconda realized, however, that expropriation was a likely outcome if an agreement could not be reached.\textsuperscript{112} While the final terms of the agreement are not clear, and subsequent events led to complete nationalization, the agreement apparently did not consider compensation for future profits.\textsuperscript{113}

\textsuperscript{107} Id. Saudi Arabia, as the leader of the Middle East oil producing countries, had a need to maintain a leadership role in the face of challenges to its position by Libya, Algeria, and Iraq. Since these states had already undertaken expropriation of oil industries in their respective countries, Saudi Arabia had to act quickly in its own takeover procedure. \textit{Id.}

\textsuperscript{108} \textit{Id.} at 791. Saudi Arabia applied additional pressure to ARAMCO by assuring the home governments of the ARAMCO consortium that retaliation against the oil company would not involve cutting off oil to the West, and thereby undercut potential pleas by ARAMCO for intervention. \textit{Id.}

\textsuperscript{109} \textit{Id.} at 795.

\textsuperscript{110} \textit{Id.} at 795-96.

\textsuperscript{111} The oil companies proposed a fair market value figure, which would have taken into account the inflated value of plant and facilities as well as the oil reserves underground. On the basis of one trade review's estimate of the present value of reserves discovered by Aramco, this latter factor alone would have added $1 billion to the $125 million figure Saudi Arabia had originally proposed . . . . \textit{Id.} at 796.

\textsuperscript{112} \textsuperscript{113} Income from copper sales accounted for nearly 51% of Chile's foreign exchange income. As a result of growing nationalism, gaining control of the assets generated by the copper concessions had become, by the 1960's, a key political concern. Fleming, \textit{The Nationalization of Chile's Large Copper Companies in Contemporary Interstate Relations}, 18 \textit{Vill. L. Rev.} 593, 594-95 (1973). Anaconda, alternatively, was operating under a concession agreement concluded two years previously; it had no desire to sell. Vagts, supra note 15, at 18.

\textsuperscript{112} Vagts, supra note 15, at 18; Wall St. J., June 27, 1969, at 3, col. 1.

\textsuperscript{113} Vagts, supra note 15, at 19. The 1970 elections in Chile resulted in a government firmly committed to nationalization. Among the first acts of the president was passage of a constitutional amendment nationalizing the copper industry. Fleming, \textit{supra} note 111, at 596-600.
Recent developments suggest that a negotiated sellout or a partial sellout is the preferred method of acquiring a corporation's assets. As a result of this trend, the corporation's prospects appear dismal: it must choose between negotiated compensation, under circumstances in which the host state can dictate its demands, or accept the possibility of no recovery. Moreover, the corporation's limited ability to negotiate may be further constrained by its desire to maintain a cordial relationship with the state. Although the expropriating state has taken all of the corporation's assets within the country, the state may be willing to continue to deal with either the corporation or its subsidiaries through consultation, service contracts, or distribution of products.

2. Legal Remedies. — The expropriating state's legal system will not provide the corporation with a different result. In much of the developing world, the practice of expropriation has a lengthy history, touching both the property of aliens and nationals. Often, the state has domestic machinery in place for the regular exercise of the expropriation power. Such machinery decides what property should be expropriated and determines the appropriate compensation. Administered through local government organizations, disputes concerning expropriation can be brought to a particular part of the expropriating state's legal system, often set up specifically to deal

114. Walde, supra note 2, at 273-74 & n.30. Indicative of this trend are regulations imposed in Jamaica (1976-77) Algeria (1971), Iran (1973-74), Venezuela (1975), and Indonesia (1975). Id. at 273. See also Zakariya, supra note 8, at 569-72 (similar regulations imposed in Kuwait in 1975).

115. See infra notes 197-200 and accompanying text.

116. See id.

117. White, Expropriation of the Libyan Oil Concessions-Two Conflicting International Arbitrations, 30 INT'L & COMP. L.Q. 1, 2 n.5 (1981). “There is a growing body of authority to support the view that concession agreements have as one of their special characteristics, the lack of enforceability under the municipal law of the host state. They are so far as that law is concerned subject to unilateral change by legislative action.” Id.

118. See Goldman & Paxman, supra note 104, at 129 n.3, where the authors state: Major instances of expropriation of land and industrial facilities have occurred as follows: Argentina: oil concessions (1963); Bolivia: oil (1970); Brazil: oil refineries, land and public utilities (1959-60); Chile: copper mines and land (1964, 1969, 1971); Columbia: land (1962); Cuba: total expropriation (1959-61); Mexico: land and public utilities (1960); Peru: land, oil and public utilities (1968-70).

Id. For some states, the constitutional authority for expropriation extends back much further. See, e.g., Argentina Const. art. 17 (1853), cited in Goldman & Paxman, supra note 104, at 137 n.38; Mexico Const. art. 27 (1919), cited in Goldman & Paxman, supra note 104, at 137 n.40.

119. Goldman & Paxman, supra note 104, at 136-45. Argentina, Chile, and Mexico all have administrative bodies for determining expropriation.
with such questions.\textsuperscript{120} When dealing with expropriation of an alien's assets, however, the viability of such options is questionable.

While nationals are subject to administrative expropriation decisions made by local government organizations,\textsuperscript{121} decisions to expropriate the property of an alien corporation are made on a national level, through the passage of special legislation by the central governing authority.\textsuperscript{122} The legislation describes the assets to be taken and states either the value to be paid or the formula for calculating the value.\textsuperscript{123} The state justifies discriminatory treatment of aliens by noting that when assets are valued by local organizations distortions arise from the interplay of appraisers, judges and public officials. Alternatively, distortion is avoided by a single legislative act describing the properties expropriated and the compensation due.\textsuperscript{124} The extraordinary nature of the legislation, however, causes any remedies afforded the alien by the state's legal system to be meaningless.

While the corporation is afforded access to the state's legal machinery to question expropriation,\textsuperscript{125} this will not increase the compensation it receives. Courts are creatures of the same system of government which, through legislation, has voiced its opinion that future profits should not be granted.\textsuperscript{126} Thus, unless the legislature has breached a provision of the state's constitution, recourse to the courts

\begin{thebibliography}{9}
\bibitem{120} Argentina, Chile, and Mexico all provide a legal system in which expropriation can be challenged. \textit{Id.} Similarly, the courts are available for expropriation challenges in Peru and Bolivia. See Furnish, \textit{supra} note 6, at 58, 67-72.
\bibitem{121} \textit{See supra} notes 118-19 and accompanying text.
\bibitem{123} \textit{See supra} note 122.
\bibitem{124} Goldman & Paxman, \textit{supra} note 104, at 157-58.
\bibitem{125} \textit{See id.} at 137-40, 165. In Mexico, recourse can be had only to challenge calculation of compensation. \textit{Id.} at 140-41. In Argentina and Chile, special courts exist whose only purpose is to resolve expropriation disputes. \textit{Id.} at 142-45. Similar machinery exists in Peru and Bolivia. See Furnish, \textit{supra} note 6, at 58, 64. Denial of court access in cases of expropriation would violate a central tenet of the developing nations: equality of treatment for nationals and aliens. \textit{See supra} notes 67-73 and accompanying text.
\bibitem{126} \textit{See, e.g.}, Constitutional Amendment Concerning Natural Resources and their Nationalization, \textit{reprinted in} 10 \textit{I.L.M.} 1067, 1067-68 (1971)(Chile). In nationalizing the copper industry, Chile's constitutional amendment stated that compensation was to be based on the book value as of December 31, 1970, thus taking into account "the original cost of such assets, less amortization, depreciation, write-offs (castigos), and devaluation through obsolescence." \textit{Id.} at 1067.
\end{thebibliography}
is futile.\textsuperscript{127}

For example, in 1967, the Chilean Government agreed to buy fifty-one percent of the Kennecott Copper Corporation.\textsuperscript{128} In 1971, in an attempt to gain the remaining forty-nine percent, the legislature adopted a constitutional amendment which allowed nationalization of the remaining part of the business.\textsuperscript{129} The amendment\textsuperscript{130} authorized payment of book value for the expropriated assets.\textsuperscript{131} From this amount, however, deductions were made for alleged excess profits made by Kennecott over the duration of its concession.\textsuperscript{132} Kennecott disputed the accounting process: "No recognition is given to the fact that these assets have substantial additional value as part of a going concern. Thus, nothing in the legislation recognizes the past, current and future income potential of the mining companies."\textsuperscript{133} Subsequent resort to Chile's Special Copper Tribunal proved ineffective. The tribunal concluded that the constitutional amendment expropriating Kennecott's assets provided the Comptroller-General with the power to determine compensation.\textsuperscript{134} Further, the decision of the President to deduct excess profits was a political determination of a nonjusticiable nature, and therefore, beyond the tribunal's reviewing power.\textsuperscript{135} Thus, resort to the expropriating state's courts will not result in recovery of future profits because the court is bound by a constitution and legislation which only permits book value.\textsuperscript{136}

\textsuperscript{127} Peruvian courts, at least, are prepared to invalidate governmental action if it conflicts with a constitutional provision. For example, the Conchan Chevron Oil Company successfully challenged decrees which discriminated against it in favor of a government-owned oil company by arguing that the government's action violated provisions of the Peruvian Constitution. Furnish, supra note 6, at 69. Challenges to expropriation, however, may be dismissed by the courts as political decisions, and beyond their authority to investigate. See infra note 135 and accompanying text.

\textsuperscript{128} Kennecott, supra note 104, at 106.

\textsuperscript{129} The act of the legislature is reprinted in 10 I.L.M. 1067 (1971).


\textsuperscript{131} Kennecott, supra note 104, at 112-14.

\textsuperscript{132} Lillich, International Law and the Chilean Nationalizations: The Valuation of the Copper Companies, in 3 The Valuation of Nationalized Property in International Law 120, 124-25 (R. Lillich ed. 1975).

\textsuperscript{133} Kennecott, supra note 104, at 112.

\textsuperscript{134} The decision of the Special Copper Tribunal is reprinted in 11 I.L.M. 1013 (1972).

\textsuperscript{135} Id. at 1036-40.

\textsuperscript{136} See Furnish, supra note 6, at 62-85; Goldman & Paxman, supra note 104 at 138. [In Argentina, Chile and Mexico,] the scope of judicial review in most expropriation cases is severely limited by legislative acts. Courts normally lack jurisdiction to review the legality of the taking so long as the public interest motive is shown, on the
B. Arbitration

1. Corporation as Party. — The corporation has a better chance of recovering future profits if it can argue its claim before an impartial tribunal.\footnote{137} In the past, concession agreements have frequently provided that disputes arising under the agreement are to be settled by an independent, international arbitration panel.\footnote{138} The clauses are frequently detailed, and provide for both the choice of arbitrators as well as the choice of law to be applied.\footnote{139} If invoked, the corporation removes two of the potential hurdles to recovery: the panel is not dominated by members who espouse the developing states’ attitude\footnote{140} and the applicable law is international law\footnote{141} rather than the domestic law of the expropriating state. Thus, the corporation moves from a system of law denying future profits to one in which the point is at least in controversy.\footnote{142}

The expropriating state will argue, in opposition to such a process, that the power to bring a state before an arbitration panel is

\footnote{137} See infra notes 157-72 and accompanying text.

\footnote{138} The concession agreement between the Libyan American Oil Co. and Libya contains a typical arbitration clause which states in part:

If at any time during or after the currency of this contract any difference or dispute shall arise between the Government and the Company . . . and if the parties should fail to settle such difference or dispute by agreement, the same shall, failing any agreement to settle it in any other way, be referred to two Arbitrators, one of whom shall be appointed by each party, and an Umpire who shall be appointed by the Arbitrators immediately after their appointment . . . .


\footnote{139} See e.g., Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389, 402-05 (1977); Libyan Am. Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1, 33, 38-39 (1977); BP Exploration Co. v. Libyan Arab Republic, 53 I.L.R. 297, 302-05 (1973). While such clauses may provide for a blend of domestic and international law, in actuality, it is international law which sets the standard. See infra note 156.

\footnote{140} See supra notes 60-77 and accompanying text.

\footnote{141} See supra note 139.

\footnote{142} While both the developed and developing nations admit the relevance of international law, they dispute its meaning. See supra notes 53-56, 62-73 and accompanying text.
reserves to states as sovereign entities. Providing a corporation with this ability serves to elevate the status and power of the corporation at the expense of the state, and thereby compromises the state's sovereignty. Counter-arguments suggest that international law does not recognize a distinction, based on sovereignty, between parties to a contract. Thus, contracts which include arbitration clauses are binding on both parties. Nevertheless, this does not assure that states will easily acquiesce to arbitration. For example, between 1970 and 1974, Libya nationalized the assets of Texas Overseas Petroleum, California Asiatic Oil, British Petroleum, and the Libyan American Oil Company. The four oil corporations attempted to invoke the arbitration clauses of their respective concession agreements. Libya, in its only action in the cases, argued that nationalization was an act of sovereignty. By ending the concession agreements, Libya had also terminated the corporations' status as a concession holder. Thus, the corporations had no standing to invoke a provision of the now defunct agreements. While the arbitrators in the Libyan cases rejected this argument, it has raised ques-


144. Id. at 42.

145. The traditional doctrine was that only states are proper subjects of international law. This position has begun to erode. See White, supra note 117, at 5. The ascending doctrine holds that both individuals and states become proper subjects of international law when they voluntarily contract. See generally Garcia-Amador, The Changing Law of International Claims 378-87 (1984) (for a discussion of this evolving area of international law). Thus, breach of contract by either party entitles the other to seek compensation.

146. See Garcia-Amador, supra note 145, at 378-87.

147. British Petroleum was expropriated on December 7, 1971. Texaco Overseas Petroleum Co., California Asiatic Oil Co. and the Libyan American Oil Co. were expropriated on February 11, 1974. Von Mehren & Kourides, supra note 14, at 476.


149. Von Mehren & Kourides, supra note 14, at 488-89.

tions as to the enforceability of an award rendered in such circumstances.

Perhaps the most important question dealt with by an international arbitration panel is the choice of law. Expropriating states argue that the appropriate law is that of the taking state, which would result in an award less than full value, and frequently approaching book value. Recent practice rejects this approach.

Determining the applicable law is not always facilitated by a concession agreement detailing the choice of law. In the Libyan cases, the choice of law provisions required that disputes be settled in accordance with those principles of Libyan law which were common to international law. In the absence of common principles, the decision was to be based on “general principles of law, including such of those principles as may have been applied by international tribunals.” While discussions of what is to emerge from the blend of state and international law are sometimes muddled, international law ultimately sets the minimum standard for recovery.

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151. See supra notes 62-73 and accompanying text.
152. See infra notes 157-72 and accompanying text.
153. Section 28(7) of the concession agreements, which were identical, provided:

This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.


155. Analysis of the appropriate method of interpreting choice of law provisions are not facilitated by decisions, such as that of the tribunal in Kuwait v. American Independent Oil Co., 21 I.L.M. 976, 990-1001 (1982), where the panel cites no authority for its conclusions but simply states: “the Tribunal, in carrying out the function entrusted to it, has not experienced any difficulty as to the determination of the applicable law.” Id. at 999. Such a result would be unacceptable in a domestic case in the United States, yet is tolerated in international arbitration.

156. In theory such provisions should result in the arbitrator applying those principles of law common to both the host state, and international law, or failing this then “general principles of law.” The reality is that arbiters and arbitration panels begin with international law, then discard those aspects which conflict with the host state’s law. General principles of law, an elusive concept, is then added into this formula. While general principles of law have been interpreted as meaning those aspects of law common to civilized states, such as procedural due process, they have also been construed as encompassing certain aspects of international law. If
Increasingly, it has been held that international law requires future profits for an expropriation in breach of contract.\textsuperscript{157} International arbitration decisions consistently hold that book value does not reflect the standard for compensation required by international law.\textsuperscript{158} While acknowledging the changes caused by the development of many previously underdeveloped nations, and in particular the recent shift in the position of the United Nations,\textsuperscript{159} arbitration panels maintain that the traditional posture on expropriation remains tenable.

In \textit{Sapphire International Petroleums Ltd. v. National Iranian Oil Co.},\textsuperscript{160} Iran terminated an oil concession in breach of contract. The arbitrator ruled that the proper measure of damages included the present value of reasonably ascertainable expected earnings.\textsuperscript{161} Similarly, in \textit{Texaco Overseas Petroleum Co. v. Libyan Arab Republic},\textsuperscript{162} the sole arbitrator held Libya responsible for making full compensation for the petroleum agreements cut short by Libya. While not ruling out the possibility of \textit{restitution in integrum}, the decision stated that full reparation is the standard for determining this happens, the net result may be to allow reentry of those elements previously cast out. See Waldock, \textit{General Course On Public International Law}, 2 \textit{Recueil des Cours} 1, 58-64 (1962), \textit{reprinted} in L. Henkin, R. Pugh, O. Schacter & H. Smit, \textit{supra} note 42, at 78-80 (noting that courts have tended to blend general principles and customary international law). See also White, \textit{Expropriation of the Libyan Oil Concessions-Two Conflicting International Arbitrations}, 30 \textit{Int'l & Comp. L.Q.} 1, 8-9 (1981)("The real difficulty is that 'the general principles of law' need careful definition. Without such definition, there is a risk that a principle of international law rejected because of its inconsistency with a principle of [the host State's] law might be reinstated as a general principle of law."). The effect is to judge an arbitrated dispute by using international law as the standard. See, \textit{e.g.}, Kuwait v. American Indep. Oil Co., 21 I.L.M. 976 (1982); Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389 (1977); BP Exploration Co. v. Libyan Arab Republic, 53 I.L.R. 297 (1973); Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136, 170-76 (1963).

\textsuperscript{157} See Gann, \textit{supra} note 8, at 649-50.
\textsuperscript{160} 35 I.L.R. 136 (1963)(National Oil Company was a wholly owned government corporation).
\textsuperscript{161} \textit{id.} at 189.
\textsuperscript{162} 53 I.L.R. 389 (1977).
Moreover, in *Kuwait v. American Independent Oil Co.*, the court provided an award designed to satisfy the legitimate expectations of the concessionaire for future profits.

Questions have arisen as to the value of these decisions. While seeming to validate the continuing necessity for full compensation, they are somewhat limited in their scope because each decision is of an ad hoc nature, and choice of law and other contractual provisions vary from case to case. As a result, the decisions' precedential value in establishing the current status of future profits may be diluted.

Many of the difficulties presented by an ad hoc arbitration panel are avoided by the Iran-United States Claims Tribunal. Established as part of the agreement for the release of the U.S. hostages from Iran in 1981, the Tribunal is in a particularly good position to state the present status of international law regarding compensation for two reasons: first, the Tribunal has extremely broad jurisdiction; it is equipped to handle any investment disputes concerning citizens or corporations of the U.S. and Iran arising out of activities in Iran prior to 1981. Second, the Tribunal has an international composition, and thus a decision is the product of a consensus of differing views on international law. In *American International Group, Inc. v. Islamic Republic of Iran*, the Tribunal stated that the assets of the corporation should be valued as "a going concern, taking
into account not only the net book value of its assets but also such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management. The book value method is used mainly for liquidation purposes.\(^{172}\)

Nevertheless, recovery of future profits is not assured. In *Libyan American Oil Co. v. Libyan Arab Republic*,\(^{173}\) the arbitrator refused to award future profits. After a survey of recent opinions and the state of the literature,\(^{174}\) he concluded that ""[i]n such a confused state of international law . . . it appears clearly that there is no conclusive evidence [concerning] whether or not all or part of the loss of profits (lucrus cessans) should be included in that computation . . . .""\(^{175}\)

In terms of sheer numbers, most recent cases have decided that future profits are available,\(^{176}\) although problems still exist. First, the law is not definitively settled.\(^{177}\) Second, while arbitrators may interpret international law as requiring future profits,\(^{178}\) this does not mean the corporation will actually recover.

Total noncompliance with arbitration awards is relatively rare, with only a few instances arising out of the many hundreds rendered.\(^{179}\) Motivations for acknowledging even an adverse award include foreign investment needs,\(^{180}\) political concerns,\(^{181}\) and possibly

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174. *Id.* at 72-73.

175. *Id.* at 76.


177. See *supra* notes 173-75 and accompanying text.

178. See *supra* notes 157-72 and accompanying text.


180. The state may encounter difficulties in obtaining credit or loans from international or private investors. Under the laws of the United States, failure of the taking state to provide adequate compensation requires the United States to suspend assistance automatically. Simi-
A genuine respect for the law. Awareness that one of the parties may not comply, however, can enter into the decision making process, and may provide an incentive for tempering an award. Furthermore, questions concerning compliance may drive the corporation to further post-award negotiation, which may result in less than full recovery.

2. Corporation's Home Government as a Party. — A final option to be considered is resort to the corporation's home government. In the United States this requires the corporation to petition the State Department to assume its claim against the foreign government. If the petition is successful, the United States will make a claim that the host state's action has directly damaged the interests of the United States. While this generally results in direct negoti-
ations with the host government, other legal avenues, such as the International Court of Justice, are available.

Resorting to its home government for assistance does not eliminate all difficulties for the corporation. The injured corporation has no way to force the government to assume the claim; the government's decision to press the claim is purely discretionary and must inevitably take into account other factors not considered by a corporation's myopic vision. Further, if the claim is assumed by the government, the corporation forfeits all control, not only over the tactics for proceeding, but also over the award itself. Finally, this option is not immediately available upon expropriation. The requirement that local remedies must be exhausted is a "well-established rule of customary international law, [because] it has been considered necessary that the State where the violation occurred should have an

188. See Weston, International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry, in R. Falk & C. Black, The Future of the International Legal Order 36, 115 n.224 (1970). The International Court of Justice, however, has had little involvement in the issue of expropriation; states have not effectively exercised this option. Id.

189. L. Henkin, R. Pugh, O. Schachter & H. Smi, supra note 42, at 702 ("in exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation . . . " (quoting Administrative Decision V (U.S. v. Germany), 7 R. Int'l Arb. Awards 119, 152 (1924))).

190. Frequently the U.S. takes up the claims of a number of investors, and then negotiates damages in the form of a lump sum, which may or may not take into account future profits. It is then up to the appropriate executive agency, generally the U.S. Foreign Claims Settlement Commission, to distribute the award; its decisions are not subject to judicial review. Moreover, the corporation cannot restrain the Department of State from settling the claim for less than it considers adequate. Restatement (Second) of Foreign Relations Law of the United States §§ 213, 214 (1965).
opportunity to redress it by its own means, within the framework of its own domestic legal system." Thus, the State Department will require that the corporation attempt to achieve justice through the domestic machinery of the taking state, unless such efforts appear to be futile, before it will even consider assuming the claim.

Whether sought directly by the corporation or indirectly by the corporation’s home government, arbitration, which often succeeds in obtaining future profits, may nevertheless prove unacceptable to the corporation. First, the risk of noncompliance with an award is very real. Second, the corporation may desire a continued relationship with the state. In the case of complete expropriation of assets the corporation may still attempt to negotiate agreements by which it provides services or consultation to the expropriating state. Particularly in the oil industry, expropriated corporations have subsequently negotiated agreements with the host government to act as buyers and distributors of the state’s output from the newly formed enterprise. The corporation may reach the conclusion that forgone future profits are obviated by a present and continuing relationship. Such arrangements would be less likely if the corporation subjects the expropriating state to a lengthy arbitration or court proceeding.

IV. CONCLUSION

The realities are clear, and perhaps harsh. A corporation doing business in a foreign country has a questionable basis to expect recovery of future profits. While this may be balanced by other consider-

193. See supra notes 137-84 and accompanying text.
194. See supra notes 185-92 and accompanying text.
195. See supra notes 157-72 and accompanying text.
196. See supra notes 179-84 and accompanying text.
197. As part of the final negotiations following expropriation of its assets in Peru, the Marcona Mining Company was able to negotiate a deal by which it maintained an ongoing relationship with the country. See supra note 187. In exchange for its expropriated assets Marcona received cash and also retained its position as the distributor of the iron ore harvested by Peru. Gantz, supra note 14, at 485-87.
198. Id.
199. See Zakariya, supra note 8, at 569-72.
200. Such an option would seem even more unlikely if the state is merely attempting to take over a percentage of the corporation’s assets which amount to less than a complete taking.
erations, corporations do not recover future profits by resorting to the taking state’s remedies. In such a forum, there is nothing to restrain the state from freely exercising its prerogative, and its opinion on compensation. Increasingly this results in assets being valued at or close to book value. Resort to a forum more closely aligned to the corporation’s own perspective is difficult. This is particularly true where the expropriation is concealed as a sale and worse still where the corporation is faced with a partial buy-out. In either of these situations, the corporation is not provided with a clear breach of contract which is inherent in a “traditional” expropriation. Once in arbitration, the corporation faces a system of law which is still much debated. Then, assuming that the corporation triumphs, it must overcome the risks and hazards of enforcement.

Yet it is difficult to bemoan the fate of the multinational corporation whose desire for future profits is generated by a philosophy grounded on property rights, in which economic gain is the primary goal. The developing state is also seeking economic development and growth; its growth, however, comes at the expense of the “sanctity” of contracts. Balancing the interests against each other, economic growth of the country against economic growth of the corporation, the interests of the developing state may outweigh those of the corporation. Development and growth on the part of the developing world should contribute to greater economic efficiency, which, in turn, should generate further development and eventually new areas for corporate enterprise. Thus, deprivation of a corporation’s assets may ultimately benefit not only the taking country, but also those states already developed, and, perhaps paradoxically, the multinational corporation.

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201. See supra notes 104-36 and accompanying text.
202. Id.
203. See supra notes 143-50 and accompanying text.
204. See supra notes 15-20 and accompanying text.
205. See supra notes 137-75 and accompanying text.
206. See supra notes 179-84 and accompanying text.